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ACHIEVING TRANSITIONAL JUSTICE: CHALLENGES TO RECONCILIATION, STATE-BUILDING AND DEMOCRATISATION

EDITORS' NOTE

The Centre for Legal Governance at Macquarie Law School provides a platform for research into legal governance and regulatory problems facing governments, businesses and communities, and contributes to the development of ethically informed legal and social policy. As such, its conferences have become the forum where new fields of scholarship are discussed and developed. The *Macquarie Law Journal* proudly uses these forums to harvest the most recent papers produced in these fields, thereby keeping us abreast of relevant and innovative knowledge.

In October 2013, the Centre for Legal Governance, in association with the Australian Academy of Law, hosted its Third Annual Conference on 'Tomorrow's Law' in Sydney, on the theme *Reparations and Reconciliation for Victims of Historical Injustice*. The aim was to bring together worldwide experts on transitional justice to review, expand and enrich this fairly new research field that sits between human rights and law.

The papers delivered at this conference explored: the legal challenges to the transition from conflict and state repression to reconciliation, the post-conflict establishment of viable rule of law and democratic legal orders, the institutional and human rights reforms needed for achieving transition and justice for past abuses and grievances, and the impact of history, national identity and memory on the viability of these processes. The conference was very well attended and received, and it succeeded in bringing together national and international like-minded practitioners and researchers so that they could network and share ideas on the different facets of transitional justice in its interface between human rights and history. Several of the conference speakers are featured in this edition, together with other contributors who are active in transitional justice research from all corners of the globe. We have ordered the articles so that researchers and students new to this important field may begin with the relationship between transitional justice and history, proceed to a variety of case studies that illustrate the complexity of the subject and its interdisciplinarity, and close with a contribution that argues for new legal frameworks for its future development.

Transitional justice is a fairly new field indeed and as such it has gone through different developmental stages from its original form. Emerging after World War II from the universal judicial attempt to bring to justice the perpetrators of the Holocaust, it started as a legal attempt to review and penalise injustices committed in the past. In more recent years, after the many episodes of human rights abuses committed in Latin America, Eastern Europe and Africa, the

term's definition has widened to encompass a more inclusive mission of bringing back or instituting the rule of law in these regions. Bell et al, in their review of the term, define it much more accurately for our times, recognising that '[m]eaningful societal change (of which accountability is likely to be a key part) requires the overhaul of political, legal and social institutions'.¹ They note also that the United Nations Secretary-General has added another twist to this definition by recognising 'an organic relationship between "transitional justice" and the rule of law'.² Hence, when embarking on research on transitional justice we need to acknowledge that there are many definitions and layers to this process. While it should by now be interpreted as an overhaul of political, legal and social institutions following a period of state violence, we often see that it is used as 'a by-word for a bundle of transformative efforts, mostly of a legal nature'.³ While academics have promoted 'four pillars' of transitional justice — prosecutions, truth-telling, reparations and institutional reform — the UN has recently added 'national consultation' as a 'fifth pillar',⁴ demonstrating the synergy that enriches this process.

It is always worth remembering that, at the core of the transitional justice processes, is the judicialisation of politics. That is, the attempt to turn political conflicts in a society into legal questions to deal with a legacy of systemic human rights abuses in order to promote social reconstruction and a better future for that society. Transitional justice, understood as such, provides the legal instruments to acknowledge, repair and compensate victims, and prosecute perpetrators and beneficiaries of systemic repression, during dictatorship. The general aim of transitional justice mechanisms is to 'de-collectivize injury and responsibility [and] re-describe systemic violence as individual crimes'.⁵ A simple example would be the abolition in Argentina of the Law of *Obediencia Debida*, which exempted the armed forces from any responsibility on the basis of the military's 'duty to obey commands'. By abolishing this law, each and every member of the military who acted against the people by repressing and torturing them became a perpetrator.

History is then the engine that moves the transitional justice processes. It is because of the weight of history that these processes need to take place to be able to build a new present and a better future. Its main objective is to make justice to that past legally available through trials, truth commissions and other mechanisms and, symbolically, through acts of remembrance, public recognition and acknowledgement. The problem with historical events is that they have a 'restless nature',⁶ and as such they have significant and durable transformational effects. The past is elusive. We can only reassess it and, through that process, achieve a different interpretation/perspective that can lead to a different 'truth', which in turn can lead to justice, forgiveness and reconciliation. Historical events also have a genealogy within any society that

¹ Christine Bell, Colm Campbell and Fionnuala Ní Aolain, 'Transitional Justice: (Re)Conceptualising the Field' (2007) 3 *International Journal of Law in Context* 81. For a genealogy of the term see Ruti G Teitel, 'Transitional Justice Genealogy' (2000) 16 *Harvard Human Rights Journal* 69.

² Bell et al, above n 1, 83.

³ Ibid.

⁴ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (10 March 2010) 9.

⁵ Robert Meister, 'Ways of Winning: The Costs of Moral Victory in Transitional Regimes' in Alan D Schrift (ed), *Modernity and the Problem of Evil* (Indiana University Press 2005) 92.

⁶ Robin Wagner-Pacifici, 'Theorizing the Restlessness of Events' (2010) 115 *American Journal of Sociology* 1351.

connects with national identity. This needs to be acknowledged, as we cannot aspire for a universal recipe for transitional justice that fits all cases. Seeking the truth in the past is one of the pillars of transitional justice. This requires exploring how the past articulates with memory and justice, a quest that is essential to understanding these transformative processes.

Given the pivotal role that history plays in transitional justice, we are delighted to begin this issue with an article by Berber Bevernage, a colleague from Ghent University, who explores the relationship between transitional justice and historiography. He argues that the evaluation of the relationship between transitional justice and history is dependent on special ways of perceiving the nature of both practices. Many historians feel tempted by the idea of closure to historical interpretations that some of the transitional justice mechanisms bring about. The possibility that a truth commission could determine unquestionably the reality of the past, and lock it in forever, is tempting but controversial. Historiography then turns into an exercise of truth searching and a resistance to forgetting the past. While this is important, Bevernage argues that transitional justice should also pay attention to the 'politics of time' or 'historicisation'. If it does not, it could encounter ethical issues as this historicising discourse symbolically delimits the borders between past and present.

Michael Humphrey from the University of Sydney explores further the relationship between law and memory in the context of a discussion on the Amnesty Laws in Spain. Looking at the role of law in shaping collective memory of past violence, he analyses it as another example of the judicialisation of politics. In the same way that there are laws against the denial of the Holocaust and the Armenian genocide, there are also laws that address the memory of victims of past state violence by recognising their suffering and promoting accountability and reconciliation. Humphrey argues that by legislating on these matters, 'memory remains under the surface of law and sometimes becomes the object of laws'⁷ that, although created on the basis of global human rights standards, lack political consensus. These laws need to be undone to make those rights realisable for the entire population.

Wendy Lambourne, from the Centre of Peace Studies at the University of Sydney, has presented a case study of Burundi, analysed as an example of how external transitional justice models were applied to restore the rule of law. Lambourne illustrates how 'the four pillars of transitional justice', as taught to a forum of local community facilitators to restore democracy, proved to be lacking. She claims that these four pillars — prosecutions, truth-telling, reparations and institutional reform — failed to achieve the pivotal aim of accountability and reconciliation, despite following UN transitional justice frameworks. Lambourne also provides us with an overall view of the different theoretical frameworks proposed by academics and practitioners in this field and calls on us to gain 'a genuine engagement with local communities in the co-creation of a contextualised approach to transitional justice'. It is within each community that the key to the mechanisms of transitional justice may be found. There are no suitable general rules but a different model for each country.

Of a similar position is the paper by Kamal M Showaia from the Centre for Security Governance, who analyses the current challenges and future prospects of the Libyan case.

⁷ Vivian Grosswald Curran, 'History, Memory and Law' (2011) 16 *Roger Williams University Law Review* 100.

Showaia calls our attention to the important role that tribalism and religion play in the transitional justice processes and invites us to incorporate them into a better model for achieving the rule of law in that troubled country. This paper confirms again the impossibility of having one set of rules that is applicable to all cases.

Alice Diver from the Transitional Justice Institute of the University of Ulster discusses the Irish case. She analyses the recent controversies around the issue of removing the Union Flag from public buildings in Northern Ireland, which was an attempt to extinguish an ‘uncomfortable reminder of the troubled history and politics’ of the country. Diver demonstrates how this gesture was read as a symbol of the erosion of Protestant cultural heritage and identity. She calls our attention to the fact that

[o]ne of the factors inhibiting the development of a political, civic and communal commitment to dealing with the past, is a deep suspicion that opponents only want to excavate a truth which they can manufacture into ammunition with which to continue the conflict.⁸

The author argues that long-held ‘other-side’ fears and perceptions should be acknowledged and respected, as should symbolic items of cultural heritage that ‘belong’ to new minorities in the community. For Diver, transitional justice processes should be guided by principles of international human rights law on cultural heritage rights and the fiduciary obligations that guarantee peacemaking. She deals extensively with the relevant legal instruments and includes a ‘peacekeeper’ checklist of processes to follow to avoid making similar mistakes that could jeopardise the consolidation of new democracies. This interest in cultural heritage opens up a whole area of research dealing with the relevance of important symbols in the affected communities that should be respected and used to strengthen mutual trust.

Spencer Wolff, recently from the University of Cape Town, presents us with a South African case study, where the issues of human dignity and freedom of speech are explored in the wake of Nelson Mandela’s death. Using three recent controversies as examples, Wolff denounces how the pillars of the Truth and Reconciliation Commission have been undermined using a piece of German legislation that protects ‘personality rights’ — reputation, honour and privacy — over freedom of expression with the aim of shielding public figures, especially politicians, from civic scrutiny. The undermining of constitutional protections for an independent press and judiciary has enhanced this change in perspective. Wolff wonders whether the commission’s principle of speech-empowering will eventually be abandoned in the new democracy in favour of the speech-protection paradigm, thereby sabotaging the principles of human dignity and freedom of speech that inspired Mandela.

Rodrigo Acuña and Estela Valverde from the Department of International Studies at Macquarie University present a case study about the Venezuelan experience with transitional justice. The authors look at the different mechanisms used in this country to facilitate transitional justice processes, from state institutional reforms in the constitutional and judicial areas to a thorough review of the police and prison systems. They argue that President Hugo Chávez had a double

⁸ Commission for Victims and Survivors (Northern Ireland), *Dealing with the Past: Advice to Government* (June 2010) 38 [178] <http://cain.ulst.ac.uk/victims/docs/cvs/cvs_280610.pdf>.

political project: to redress social inequality and to implement a new rule of law, two elements that they see as intrinsically related. The authors claim that the *Caracazo* revolt — the worst case of state repression in Venezuela before Chávez was in office — became a politically symbolic event for him because it addressed both aspects of the Bolivarian experiment: inequality and implementation of the rule of law. The authors look at the advances and contradictions within the Venezuelan transitional justice processes during the Bolivarian experiment (1999–present) and argue that, although the opposition is running a harsh campaign to discredit President Maduro's government, the advances made in redressing social inequality might be strong enough to provide the pillars to edify a stronger rule of law.

Presenting an important contribution to this edition, Jennifer Balint from the University of Melbourne explores the relationship between transitional justice and state crime, a burning problem in many new democracies. She argues that because of the high reliance of transitional justice on the institution of law 'as a companion to the political goal of enabling political transition and effecting justice in the wake of state crime', the law finds itself lacking in many instances. Law's traditional interest in accountability for particular individual crimes heralds the need for new political-legal concepts to adapt itself to the larger transitional justice programs of institutional and social reform. Balint argues it is essential to develop new concepts and frameworks to support the legal task of achieving the rule of law in post-conflict societies, as legal bodies such as truth commissions and international tribunals are ill equipped to deal with these broader issues.

The depth and breadth of these diverse, yet complementary, articles represent an exemplary sample of where the field of transitional justice is venturing at the moment, its interdisciplinarity and the paths it might take in the future. This edition is a comprehensive collection to be added to the readings of any transitional justice course and an outstanding contribution to the scholarly body in this field. We would like to express our sincere thanks for all the efforts of the authors in making this new research available to our readers and to all the peer reviewers and student editors who generously helped to make this edition possible.

Estela Valverde
Ilija Vickovich

TRANSITIONAL JUSTICE AND HISTORIOGRAPHY: CHALLENGES, DILEMMAS AND POSSIBILITIES

BERBER BEVERNAGE*

The relationship between transitional justice and historiography is a complex and contested one. Many historians have pleaded for a greater engagement of their discipline in the field of transitional justice. However, many others have strongly criticised this sort of engagement. In this article, I argue that the evaluation of the relationship between transitional justice and the writing of history is strongly dependent on particular ways of conceiving the nature of both practices. I claim that both supporters and critics have predominantly focused on transitional justice's popular theses about 'reconciliation through truth telling' and about the 'healing force of remembering' or 'remembrance as justice'. Accordingly, they have defined the (potential) function of historiography in transitional justice in terms of a search for (objective) truth and/or as a struggle against forgetting. This approach is important but too restricted and one should also pay attention to another aspect: that of the 'politics of time' or 'historicisation'. I argue that a historicising discourse is often used in transitional justice in order to create or regulate people's notions of temporal 'distance' and in order to symbolically delimit the borders between past and present. This raises a number of questions about the ethics of the use of a historicising discourse in transitional justice.

I INTRODUCTION

The relationship between historiography and transitional justice is a complex and contested one. Many historians have pleaded for a greater engagement of their discipline in the field of transitional justice and several have put this into practice by, for example, serving as investigators in historical commissions or by functioning as expert witnesses in court cases. However, at the same time, many historians have strongly criticised this sort of engagement. In this article, I argue that the evaluation of the role, potential and desirability of the engagement of historiography in transitional justice has been strongly dependent on particular ways of conceiving the nature of historiography as well as particular ways of conceiving of transitional justice. I claim that both supporters and critics have predominantly focused on transitional

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justice's popular theses about reconciliation through truth telling and about the healing force of remembering or remembrance as justice. Accordingly, they have defined the function of historiography in transitional justice practices in terms of a search for (objective) truth and/or as a struggle against forgetting.

This approach is important but too restricted and I argue that one should also pay attention to another feature of the relationship between historiography and transitional justice: that of a specific 'politics of time',¹ which one could call historicisation. I argue that historicising discourse is often used in transitional justice in order to create or regulate people's notions of 'temporal distance' and in order to symbolically delimit the borders between past and present. This raises a number of new ethical questions about the use of a historicising discourse in transitional justice.

I first discuss the way in which the evaluation of the relationship between historiography and transitional justice has revolved around ideas of truth versus lie or myth, and remembrance versus forgetting. After this, I explain my thesis about the importance of politics of time in transitional justice. Rather than trying to provide a closed set of final conclusions, this paper attempts to provide a fruitful starting point for further discussions on the potential role of historians and historiography in transitional justice.

II TRUTH VERSUS MYTH

One obvious way in which historians seem to be able to contribute to transitional justice and broader attempts to deal with the legacy of violent pasts, is by establishing 'historical truth' and by deconstructing 'historical myths'. The idea that truth telling can contribute to reconciliation and nation-building, and can even be considered a form of (restorative) justice in itself, has been a very central one in the discussions and literature on transitional justice. It is one of the central theses that provides a *raison d'être* to the establishment of truth commissions (which may well be called the institutional flagships of transitional justice). Moreover, it also has been one of the underlying ideas that has sparked an increasing interest in so-called 'didactic legality'² among legal scholars, and it has provided some of the central arguments underlying the creation of so-called memory laws in several countries.³ A right to (historical) truth has even increasingly

¹ I use this expression in the way in which it is defined by Peter Osborne: 'a politics which takes the temporal structures of social practices as the specific objects of its transformative (or preservative) intent'. See P Osborne, *The Politics of Time: Modernity and Avant-Garde* (Verso, 1995) xii.

² On 'didactic legality', see: Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trial of the Holocaust* (Yale University Press, 2001); Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Transaction Publishers, 2000).

³ On 'memory laws', see Luigi Cajani, 'Criminal Laws on History: The Case of the European Union' (2011) 11 *Historein* 19.

emerged as an established part of international law.⁴ All of this provides an obvious source of attraction to historians, many of whom consider the search for (objective) truth as their core business,⁵ and see themselves as ‘myth breakers’.⁶

Organisations such as the Institute for Historical Justice and Reconciliation in the Hague (‘IHJR’)⁷ and the Alliance for Historical Dialogue and Accountability in New York (‘AHDA’)⁸ cross the border between academia and advocacy and put historiography ‘on the line’ to contribute to reconciliation and peacebuilding, and to promote democracy. The IHJR focuses on ‘historically divided societies’. It has completed projects in the former Yugoslavia and Kenya and is running projects in Armenia-Turkey and the Palestinian territories. It ‘uses the innovative and effective methodology of shared narratives to engage key local stakeholders in dealing with their past’.⁹ The IHJR created a seven step ‘theory of change’ for which it draws on ‘historians and experts’ from antagonistic communities to come together and create and disseminate ‘shared historical narratives’, ‘informed interpretations’ and ‘shared information’ that shows all sides of the conflict.¹⁰ The AHDA similarly describes its mission as centred around the construction of shared narratives through ‘historical dialogue’, and argues that this way of using ‘historical memory’ is an ‘underutilized mechanism for addressing conflict’.¹¹

Although they shun the outright (neo)positivist discourse that is found in many truth commissions, and explicitly warn that even a shared narrative is ‘unlikely to be linear or mono-

⁴ This new juridical philosophy was pioneered in a ruling by the Inter-American Court of Human Rights in 1988, which stated that states not only are obligated to prevent human rights violations but that they also have a binding legal responsibility to investigate past violations within their jurisdiction. Other pioneering work was done by some NGOs, including the Centre for Human Rights Legal Action in Guatemala and the London-based Article 19, which were among the first to articulate the right to know the truth in the early 1990s. Toward the end of the 1990s, the idea of a right to truth eventually was adopted by the UN. For a detailed discussion, see Antoon de Baets, *Responsible History* (Berghahn Books, 2009) 154–163; Y. Naqvi, ‘The Right to the Truth in International Law: Fact or Fiction?’ (2006) 88 *International Review of the Red Cross* 245.

⁵ Although most professional historians have, in the wake of post-modernist and post-structuralist criticisms, become critical of the more naive notions of absolutely ‘objective’ truth, the idea of ‘objectivity’ remains one of the central regulating ideals of the profession. For a classic discussion of this ideal in the American case, see Peter Novick, *That Noble Dream: The ‘Objectivity Question’ and the American Historical Profession* (Cambridge University Press, 1988); Paul Newall, ‘Historiographic Objectivity’ in Aviezer Tucker (ed), *A Companion to the Philosophy of History and Historiography* (Wiley-Blackwell, 2010).

⁶ On historians as myth-breakers, see Chris Lorenz, ‘Drawing the line: “Scientific” History between Myth-making and Myth-breaking’ in Stefan Berger, Linas Eriksonas and Andrew Mycock (eds), *Narrating the Nation: Representations in History, Media and the Arts* (Berghahn Books, 2008) 35–55.

⁷ See Institute for Historical Justice and Reconciliation, *Institute for Historical Justice and Reconciliation* <<http://historyandreconciliation.org/>>.

⁸ The Alliance for Historical Dialogue and Accountability (‘AHDA’) is a joint initiative of the Swinburne Institute for Social Research and Columbia University’s Institute for the Study of Human Rights. See Alliance for Historical Dialogue and Accountability, *Alliance for Historical Dialogue and Accountability* <<http://www.hrcolumbia.org/ahda/>>.

⁹ Institute for Historical Justice and Reconciliation, *About the Institute for Historical Justice and Reconciliation* <<http://historyandreconciliation.org/about/>>.

¹⁰ See Institute for Historical Justice and Reconciliation, *Strategic Plan — IHJR: March 2014–March 2016* (March 2010) <<http://historyandreconciliation.org/wp-content/uploads/2014/01/Strategic-Plan-Website-Version2.pdf>>.

¹¹ See Alliance for Historical Dialogue and Accountability, *Program Overview* (2014) <<http://www.hrcolumbia.org/ahda/>>.

vocal and most likely has distinct registers and diverse perspectives’,¹² the ideas of historical truths versus lies, and myth-making versus myth-breaking, are central to the mission of both organisations in a direct or indirect way. The baseline of IHJR reads that it ‘seeks to dispel public myths about historic legacies in societies divided by conflict’.¹³ The basic ideas underlying its mission are succinctly explained in one of its annual reports, which states that ‘misconceptions of history’ are the cause of many current-day ethnic and nationalist conflicts.¹⁴ The IHJR, therefore, believes that confronting and overcoming these ‘distortions of historical reality’, by creating understanding and shared narratives, will contribute to the creation of stable peace. According to Elazar Barkan — one of the most active and eloquent spokespersons of the AHDA — the power of historiography in the context of peacebuilding and reconciliation is situated in the fact that it strives toward objectivity and that it is ‘non-fiction’.¹⁵ Barkan recognises that combining ‘historical advocacy’ with the maintenance of the highest professional standards can be challenging.¹⁶ Yet, he is convinced that the methodology or skills of historians (eg source criticism, knowledge of contexts etc), as well as the subject of history itself can contribute to reconciliation via the construction of ‘negotiated histories’. To cite Barkan:

Historical claims vetted by experts become ‘practical truth’ and noncontroversial in the public arena. On the contrary, controversial conclusions might be innovative, interesting and challenging, yet they are unlikely to achieve the status of truth until embraced by the profession.¹⁷

As mentioned in the introduction, the idea of a historical activism in the name of reconciliation, peace or even historical justice is not supported by all historians. Interestingly, it is exactly the ideas of (objective) truth versus lie, and myth making versus myth-breaking, that are at the core of many arguments about the reasons for not entering transitional justice or at least being sceptical about it.

Predictably the use of historicising discourse in courts or tribunals and state-sponsored truth or historical commissions, together with the more positivist claims about truth telling, have been most fiercely criticised. Historians especially fear the tendency to present the findings of tribunals and commissions as official history and they reject all claims that are too hubristic about the possibility of finding final historical truths.

Some historians take a principled position and reject each confluence between the search for historical truth and the search for a political good (eg nation-building) or a judicial aim. According to Asher Moaz, historical research should never be subjected to any limitations

¹² Institute for Historical Justice and Reconciliation, *Annual Report 2010* (2010) 5 <http://historyandreconciliation.org/wp-content/uploads/2012/07/IHJR_AnnualReport10.pdf>.

¹³ Institute for Historical Justice and Reconciliation, *IHJR in Brief* <<http://historyandreconciliation.org/ihjr-in-brief/>>.

¹⁴ Institute for Historical Justice and Reconciliation, *Annual Report 2009* (2009) <http://historyandreconciliation.org/wp-content/uploads/2012/07/IHJR_AnnualReport09.pdf>.

¹⁵ Elazar Barkan, ‘History on the Line: Engaging History: Managing Conflict and Reconciliation’ (2005) 59 *History Workshop Journal* 229, 231.

¹⁶ Elazar Barkan, ‘Introduction: Historians and Historical Reconciliation’ (2009) 114 *American Historical Review* 899, 903.

¹⁷ Barkan, ‘History on the Line’, above n 15, 234.

imposed ‘from the outside’: ‘More properly, one historian’s researches should be criticised by another historian, and not be made the subject of an examination by a state institution possessing an official status’.¹⁸ This is especially when the submission of historical truth to the straightjacket of legal reasoning is conceived as a major threat — whether it be in the form of judicial verdicts by courts and tribunals, in the form of quasi-verdicts by truth commissions, or in the form of so-called memory laws such as those that have been introduced in several countries to criminalise holocaust denial. Tristram Hunt, for example, stresses the ‘fundamental chasm’ that separates the legal and historical professions is

[p]artly due to a degree of naivety but also a shade of arrogance within the legal world, [where] there is a belief that what is recorded within the court room or inquiry hall can constitute the irrefutable history of the past. This is both intellectually circumspect and historically dangerous.¹⁹

The recent principled rejections of the use of historiography in transitional justice, in this sense, go back on a much older tradition of criticising the judicialisation of history. It resembles the influential criticisms of the confluence of history and (criminal) justice by prominent intellectuals, such as Hannah Arendt and Carlo Ginzburg.²⁰

Interesting discussions can also be found among those historians and academics who do not oppose the use of historiography in truth and historical commissions or trials and tribunals in principle, but critically reflect on practical challenges, limitations and possibilities. An important discussion on this more practical level is centred around the question about which sort of institution, and which corresponding regime of truth, would offer the best possibilities for, or create the least restrictions on, the construction of a contextualising and complex historical truth. Most historians would probably intuitively believe that historical truth can best be reached under the conditions of free academic research but that, outside of this traditional habitat, preference goes to so-called historical commissions followed by classical truth commissions. They would also believe that the hardest contexts for historians and historical truth are those with a stronger judicial character, most notably criminal courts and tribunals.

Recent research, however, shows that this intuitive belief needs to be nuanced. Some commentators convincingly argue that courts and tribunals *can* yield rich historiography or at least can deliver important contributions to historical research and debate. In his rich and inspiring book *The Memory of Judgment*, Laurence Douglas has, for example, challenged dominant views on the relation between history and jurisdiction. Douglas does this by arguing that, depending on their specific legal strategy and didactic paradigm, certain courts successfully confront their ‘dual burden’ of judging *and* representing the past. Douglas moreover challenges another widespread vision by rejecting the idea of a strong contrast between the open character

¹⁸ Asher Maoz, ‘Historical Adjudication: Courts of Law, Commissions of Inquiry, and “Historical truth”’ (2000) 18 *Law and History Review* 559.

¹⁹ Tristram Hunt, ‘Whose Truth? Objective Truth and a Challenge for History’ (2004) 15 *Criminal Law Forum* 193, 193.

²⁰ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 1994); Carlo Ginzburg, *The Judge and the Historian* (Verso, 2002); See also Pieter Lagrou, ‘“Historical Trials”: Getting the Past Right — or the Future?’ in Christian Delage and Peter Goodrich (eds), *The Scene of the Mass Crime: History, Film, and International Tribunals* (Routledge, 2013) 9–22, 10.

of historical inquiry and the allegedly closed or final character of judgment. Legal understandings too, Douglas argues, can be fluid and frequently undergo revision.²¹ As he explains: ‘Individual trials must be staged to reach closure; yet, the discourse of legal judgment and the historical understanding it contains remain fluid and can be complexly revised’.²² Richard Wilson similarly claims that tribunals can produce good historiography. Here too, results can strongly vary. However, according to Wilson, the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), for example, in some cases produced rich and innovative insights on the history of the former Yugoslavia. Much, according to Wilson, depends on the presence or absence of political constraints, and more specifically on the question of whether courts and tribunals function in a national or in an international context.²³

The historical quality of the findings of truth commissions can also strongly vary from case to case. Some of the most famous truth commissions, such as the South African Truth and Reconciliation Commission (‘TRC’) and the Argentinean *Comisión Nacional sobre la Desaparición de Personas* (‘CONADEP’), yielded mediocre or even poor historical insights. Yet, other truth commissions, such as the Guatemalan *Comisión para el Esclarecimiento Histórico* (‘CEH’) and Sierra Leonean Truth and Reconciliation Commission (‘SLTRC’) did much better on this level.²⁴ In my own research on the government appointed historical commission that inquired into the Belgian responsibility for the 1961 murder of the Congolese Prime Minister Patrice Lumumba, I found that the presence of professional historians does not necessarily yield better or more profound historiographical insights than those yielded by many truth commissions, which are seldom staffed by professional historians (at least not in the higher ranks).²⁵

However, discussions on the use of historiography in transitional justice are not restricted to the question of whether, and to what extent, good historiography can be produced in a context of state-sponsored commissions or in a judicial setting. They also revolve around the more fundamental question: whether the search for historical truth and a political good can ever be successfully combined, even in situations where the initiative is taken by historians themselves and where no (direct) pressure comes from legal institutions or overseeing states. The question then becomes whether one of these aims will not always tend to prevail over, and come to compromise, the other. Do shared narratives aiming at reconciliation or nation-building not

²¹ This dominant vision is clearly expressed by the French philosopher Paul Ricoeur, in Paul Ricoeur, *Memory, History, Forgetting* (University of Chicago Press, 2004) 319. Ricoeur claims that:

It remains that the definitive character of the verdict marks the most obvious difference between the juridical approach and the historiographical approach to the same events: what has been judged can be challenged by popular opinion, but not retried; *non bis idem*; as for the review of the decision, it ‘cuts only one way’ (Garapon).

²² Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trial of the Holocaust* (Yale University Press, 2001) 4.

²³ Richard Wilson, ‘Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia’ (2005) 27 *Human Rights Quarterly* 908; Richard Wilson, ‘Humanity’s Histories: Evaluating the Historical Accounts of International Tribunals and Truth Commissions’ (2007) 80 *Politix* 31.

²⁴ See, eg, Greg Grandin, ‘The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala’ (2005) 111 *American Historical Review* 46.

²⁵ Berber Bevernage, ‘History by Parliamentary Vote: Science, Ethics and Politics in the Lumumba Commission’ (2011) 9 *History Compass* 300.

always to a certain extent have to be compromised narratives in order to be successful? Conversely, does the search for historical truth actually always provide a good basis for nation-building and reconciliation, or does it rather pose a threat to the latter aims if it is uncompromisingly prioritised?

It indeed has to be noticed (as the IHJR and AHDA seem to acknowledge) that contested historical legacies are not always caused by misconceptions, lies or myths and thus cannot always be solved by truth telling. The efficacy of historical truth for reconciliation seems doubtful in situations where the conflict is not based on violence — that in retrospect turns out to have been senseless, irrational or even counterproductive — but rather on mutually exclusive interests that are structurally reproduced and continue to exist into the present. Some truths, it seems, simply cannot lead to reconciliation. Also, for historians it is (relatively) easy to help where simple ‘facts’ are denied by negationists or malevolent revisionists. However, things become much more difficult where conflicts revolve around more complex interpretations or evaluations of historical phenomena. Academic historiographical practice shows that, on this more complex level, historians themselves often cannot reach consensus. This is not due to a lack of will to be ‘objective’ or due to malicious intents. It seems to be an inherent feature of the epistemic nature of this practice — a feature often linked to historians’ characteristic use of narratives.²⁶ In a similar way, it can be questioned whether academic historiography actually offers a good starting point to help us draw a strict line between myth-making and myth-breaking. For example, the Dutch theorist of history Chris Lorenz argues that even in ‘scientific history’ this is not easily done, certainly not when the latter’s intimate relation to nationalism and nation-building is at play. Lorenz argues that, from its genesis in the early 19th century onwards, academic history has always suffered from an unresolved tension between epistemological (or ‘*Wissenschaftsanspruch*’) and practical (or ‘*Orientierungsanspruch*’) claims — with the first always undermining the second and vice versa.²⁷

III THE HEALING FORCE OF REMEMBERING AND REMEMBRANCE AS JUSTICE

A second obvious way in which historians seem to be able to contribute to transitional justice is by preventing forgetfulness from taking place. Historians often identify themselves as individuals struggling against forgetfulness. They share this self-representation with many transitional justice advocates. Transitional justice is often considered to be essentially about the conflict between a will to remember and an effort to forget. Even though some argue that it is important to find a proper balance between too much forgetting and too much remembrance,²⁸ most transitional justice scholars and activists believe remembrance is inherently superior to forgetting, and claim that this is the case in relation to both the striving for healing and

²⁶ This was most prominently pointed out in some key texts by historical theorists such as Hayden White, Frank Ankersmit and Louis Mink. See Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Johns Hopkins University Press, 1987); Frank Ankersmit, *Narrative Logic: A Semantic Analysis of the Historian’s Language* (The Hague, 1983); Louis Mink, ‘Narrative Form as a Cognitive Instrument’ in Robert Canary and Henry Kozicki (eds), *The Writing of History: Literary Form and Historical Understanding* (University of Wisconsin Press, 1978) 129–49.

²⁷ Lorenz, above n 6.

²⁸ See, eg, Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press, 1998).

reconciliation and the striving for justice. Many are indeed convinced that collective remembrance of past evils can have a healing force. And, as Luc Huyse remarks, recent truth commissions have often been based on the idea that the remembrance of the truth generates an alternative or even superior form of justice.²⁹ This representation of transitional justice has been of great importance in the creation of its identity (dare I say myth of origin) and has led to important discussions. But it is also intellectually restrictive, and certainly problematic, when assessing the potential role of historiography.

Firstly, the broad consensus about the superiority of remembrance over forgetting is a relatively recent phenomenon, which is actually not at all self-evident. As Timothy Garton Ash claims, the advocates of forgetting have been of considerable influence throughout history.³⁰ Much of post-war West European democracy, for example, has been constructed on the foundation of a politics of forgetting. Further, it was as late as 1975 when Spain made its, once widely celebrated, transition to democracy with a conscious policy of forgetting.

Paradoxically, the Spanish case has recently been most often referred to by supporters of the idea of the superiority of remembrance. They refer to the recent upsurge of memory movements in that country as the ultimate proof of a natural and indestructible urge of people to remember, and the futility or dysfunctionality of forgetting as the basis of any politics aiming at national reconciliation and stable democracy.³¹

Yet it should be asked whether the latter movement for forgetting actually holds in the long run, and whether it works for all cases. The Indian intellectual Ashis Nandy, for example, has claimed that the values of history and remembrance (which according to him are Western values that were externally imposed on many countries) have had a very negative effect on his country and more specifically on the religious tensions between Hindi and Muslims.³² He therefore pleads for a more critical reflection on the value of history and remembrance and an exoneration of what he calls the ‘principle of principled forgetting’. When it comes to nation-building and stopping violence, Nandy provocatively argues that one should not construct alternative histories but rather search for alternatives *to* history.

Nandy does not stand alone when making this sort of claim. Actually he takes part in a long intellectual tradition. Ever since Friedrich Nietzsche famously argued that humanity has to learn to forget and think ahistorically in order to be able to live, many prominent intellectuals have pleaded against an ‘obsession’ with history in the name of a more present or future-oriented ethics.³³ In the context of post-conflict situations, and transitional justice more specifically, similar claims have been made by people such as Jean Bethke Elshtain, who defends the resort to

²⁹ Luc Huyse, *All Things Pass, Except the Past* (Van Halewyck, 2009).

³⁰ Timothy Garton Ash, ‘The Truth about Dictatorship’ (1998) 45 *New York Review of Books* 35; See also Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004).

³¹ For a discussion of this view see Berber Bevernage and Lore Colaert, ‘History from the Grave? Politics of Time in Spanish Mass Grave Exhumations’ 7 *Memory Studies* (forthcoming).

³² Ashis Nandy, ‘History’s Forgotten Doubles’ (1995) 34 *History and Theory* 44.

³³ Friedrich Nietzsche, *Vom Nutzen und Nachteil der Historie für das Leben* [On the Use and Abuse of History for Life] (Diogenes, first published in 1873, 1984 ed); See also, for an influential recent version of this argument, Keith Jenkins, ‘Why Bother with the Past? Engaging with Some Issues Raised by the Possible “End of History as We Have Known It”’ (1997) 1 *Rethinking History* 56.

a ‘knowing forgetting’ in situations where groups are held hostage to a burdened past, and are in great need of the ‘drama of forgiveness’. She writes that:

People are very fond of citing Santayana’s claim that those who don’t know their history are doomed to repeat it. But perhaps the reverse is more likely, namely, that it is those who know their history too well who are doomed to repetition.³⁴

A similar position is defended by Bruce Ackerman who claims that young democracies should not focus primarily on corrective or retrospective justice, but rather on forward-looking constitutional and bureaucratic reform.³⁵ To get rid of the destabilising force of burdened pasts, Ackerman even advises transitional societies to burn the ‘stinking carcasses’ that are often still left in their official archives (such as the Stasi files in East Germany).³⁶

Beyond this thorny discussion on the relative advantages or disadvantages of remembrance or forgetting, a second problem arises with this representation of transitional justice as involved in the struggle of remembrance against forgetting. The problem is that this struggle is often cast in far too simplistic and dualist terms. Even though theorists have repeatedly argued that memory and forgetting are intricately linked, a highly dichotomist interpretation of these concepts keeps dominating the imagination of both supporters and critics of transitional justice, and it has equally constrained the debate on the possible engagement of historians. This can be illustrated by referring to the South African case. There, dualist thinking about memory and remembrance has led to the paradoxical situation in which the Commissioners of the TRC (such as Desmond Tutu and Alex Boraine) presented its mission as a ‘struggle of memory against forgetting’, often citing Kundera and Santayana.³⁷ However, many critics, including several historians, precisely argued that the TRC was a sort of ‘exercise in forgetting’,³⁸ that it induced ‘social amnesia’,³⁹ or that it provided ‘a nod at remembering in the interests of a profounder forgetting’.⁴⁰ While the criticisms about the dimensions of amnesia in the TRC are to be taken seriously, they tend to obscure the enormous differences between the work of the TRC and the state-imposed amnesia that existed under Apartheid rule. For example, during Apartheid, records were systematically destroyed to keep certain processes secret, while it has been part of the TRC’s mandate to investigate these malpractices. Moreover, I am convinced that the fundamental TRC concept of

³⁴ Jean Bethke Elshtain, ‘Politics and Forgiveness’ in Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice After Civil Conflict* (Georgetown University Press, 2003) 43; See also, A G Loureiro, *The Ethics of Autobiography: Replacing the Subject in Modern Spain* (Vanderbilt University Press, 2000) quoting Jorge Semprún, who stated on a personal level, that he attributed his survival after Buchenwald to ‘a long cure of aphasia, of voluntary amnesia, in order to survive’.

³⁵ Bruce Ackerman, *The Future of the Liberal Revolution* (Yale University Press, 1992) 72–73.

³⁶ Ibid 81.

³⁷ See especially, Truth and Reconciliation Commission of South Africa, *Report (1998–2003)* vol 1; See also A Boraine, *A Country Unmasked* (Oxford University Press, 2000); D M Tutu, *No Future without Forgiveness* (Doubleday, 1999).

³⁸ Jacques Derrida, ‘Archive Fever in South Africa’ in Carolyn Hamilton et al (eds), *Refiguring the Archive* (Kluwer Academic Publishers, 2002) 38–80, citation on 54.

³⁹ Anthony Holiday, ‘Forgiving and Forgetting: The Truth and Reconciliation Commission’ in S Nuttall and C Coetzee (eds), *Negotiating the Past: The Making of Memory in South Africa* (Oxford University Press, 2000) 43–56; I De Kok, ‘Cracked Heirlooms: Memory on Exhibition’ in S Nuttall and C Coetzee (eds), *Negotiating the Past: The Making of Memory in South Africa* (Oxford University Press, 2000) 57–74.

⁴⁰ Verne Harris, *Truth and Reconciliation: An Exercise in Forgetting?* 3 November, 2002 (unpublished paper that was featured on the website of the South African History Archive but has since been removed).

making amnesty conditional on truth telling rests on a sincere conviction that simple forgetting will no longer do as a way to deal with the past.

Finally, when considering the problem of transitional justice exclusively in terms of a conflict between remembering and forgetting, one can hardly explain why the turn to historicising discourses can often be found in countries that do not seem to be confronted with a lack of memory, but that primarily suffer from what Charles Maier has termed a ‘surfeit of memory’.⁴¹ Therefore, I have argued in previous publications, that we should transcend the memory–forgetting dichotomy, and focus more closely on diverse ways of remembering, which can sometimes have radically different features and ethical or political effects.⁴² The current field of transitional justice, I argue, is primarily the arena for a conflict between two strongly differing ways of remembering that manifest contrasting or even opposite temporal features. This brings me to my third and last point about the (potential) engagement of historians and their discourse in transitional justice.

IV HISTORICISATION: PUTTING THE PAST IN ITS PLACE

There is, of course, another aspect of modern historiography, about which it is sometimes said, that it can help in dealing with the legacies of a violent past: that of historicising phenomena or putting phenomena in their (proper) time. A long and honorable tradition attributes to historians the emancipatory potential to resist both the tyranny of the past over the present, as well as the totalitarian dominance of the present over past and future. Historians can do this, it is said, by demonstrating the fundamental differences that exist between past and present.

One prominent member of this intellectual tradition is the French historian Henry Rousso.⁴³ According to Rousso, the *métier* of the historian results in a liberating type of thinking because it rejects the idea that people or societies are conditioned by their past without any possibility of escaping it.⁴⁴ The historian can do this because, in contrast to the ‘activist of memory’, they only bring the past into the present in order to demonstrate the fundamental ‘distance’ that separates these two realities. While ‘activists of memory’ ignore the ‘hierarchies of time’, and do not seem to grasp the distance between past and present, historians observe the past where it belongs (or ‘à sa place’) and are self-conscious that they do so from the present, where they belong (or ‘notre place’). One could paraphrase Rousso’s argument as follows: a good historian inherently is an emancipator, because by measuring time, he or she knows what is contemporary or actual, and what is past or bygone, and because he or she also knows what is the proper timing of phenomena.

⁴¹ Charles Maier, ‘A Surfeit of Memory? Reflections on History, Melancholy, and Denial’ (1993) 5 *History and Memory* 1936.

⁴² Berber Bevernage, *History, Memory and State-Sponsored Violence* (Routledge, 2011); Berber Bevernage, ‘Writing the Past Out of the Present: History and the Politics of Time in Transitional Justice’ (2010) 69 *History Workshop Journal* 111.

⁴³ Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France* (Ralph Schoolcraft trans, University of Pennsylvania Press, 2002) [trans of: *La hantise du passé: entretien avec Philippe Petit* first published 1998].

⁴⁴ *Ibid* 10, quoting Philippe Petit.

This same plea, for a proper relation to time and timing, also plays a prominent role in Rousso's well-known refusal to function as an expert witness in the Holocaust trial of Maurice Papon, which only took place several decades after the facts. The problem with this trial, according to Rousso, was that due to the great distance in time, it tended to apply a presentist ethical perspective to the historical events, and became a trial of memory rather than a normal judicial process. In this context, Philippe Petit appropriately writes that Rousso became a contemporary historian to 'accept the irreparable'.⁴⁵

The Dutch historian Bob de Graaff,⁴⁶ holds similar ideas about the ethical value of historiography. He too, considers the historian to be an expert of proper times and timing. He draws a contrast with (genocidal) victims and survivors for whom, according to de Graaff, the difference between the past and present is vague and who live in a synchronic rather than diachronic time or even live in an 'extra-temporality'.⁴⁷ He refers to holocaust victims for whom, he claims, the 'past remains present', and to whom it seems as if atrocities 'only happened yesterday or even today'.⁴⁸ The task of historians, in contrast, is to place events, even genocidal ones, in their time: literally to 'historicize' them. Historians have to do this by trying to 'determine the individual character of particular epochs and by that demarcate one epoch vis-à-vis the other'. As de Graaff puts it: 'the historian historicizes' in the sense of 'closing an epoch by recognizing its entirely individual/particular character'.⁴⁹ The historian recognises the fact that the past can be 'called up' again, but in contrast to the survivor he does this merely voluntarily. Moreover, he also 'registers' that facts of the past are 'bygone', 'definitely lost' or have 'come to a downfall'.⁵⁰

Good historiography therefore, according to de Graaff, is *the* antidote for resentment. Much like Rousso, de Graaff considers that the professional duty of the historian is also socially desirable: that there is also a societal justification to 'draw a line under victimhood'. Sooner or later our gaze has to be redirected from the past to the future. De Graaff therefore approvingly cites the literary author Hellema that: 'it has become about time [*hoog tijd*] to put the past in its place'.

I have long shared this vision of Rousso and de Graaff. It can hardly be doubted that the historicising skills historians form are an essential part of our critical thought, and that they are potentially of great importance to transitional justice, especially its search for a closure without forgetting. However, I have become convinced that this historicising approach comes with serious risks and ethical dilemmas when applied to transitional justice.

In order to explain this, I must return once more to Rousso's plea to study the past where it belongs (that is, in the past) and from where we (historians or contemporaries) belong, as well as

⁴⁵ Ibid 10, quoting Philippe Petit: 'Pour accepter l'irréparable, il s'est fait historien du temps présent' [In order to accept the irreparable, he became a contemporary historian].

⁴⁶ Bob de Graaff is known as a member of the research team that was commissioned by the Dutch government to scrutinise Dutch responsibilities in the Srebrenica massacre.

⁴⁷ Bob de Graaff, *Op de klippen of door de vaargeul: De omgang van de historicus met (genocidaal) slachtofferschap* [On the Cliffs or Through the Channel: On the Way Historians Deal with (Genocidal) Victimhood] (Humanistics University Press, 2006) 27. The translations from this text are the author's own.

⁴⁸ Ibid 28.

⁴⁹ Ibid.

⁵⁰ Ibid 28, 71.

de Graaff's claim that 'it [is] about time to put the past in its place'. There are three questions about this issue: firstly, how do historians know the proper place for the past; secondly, where do they get the authority to put 'in its place' or 'close off' the past; thirdly, how can they decide when the time has come to do this?

A *How do Historians Know the Appropriate Place for the Past?*

Firstly, one should ask whether historians can simply observe the borders between past and present, and whether they thereby, in Rousso's words, can also determine the place where they themselves belong as historians and where their subject of study belongs (eg, academic historiography, the archive, the historical museum, etc).⁵¹ Can we claim to know the proper place of the past or is this place rather the product of an act of putting in its place and thus constituted performatively? This question may seem rather sophisticated, but it is not. Since the historical present can never be reduced to a single point in time, its definition will always, as French historian Jacques Le Goff notes, remain a basic problem to historians, whether they recognise this or not. Moreover, Le Goff rightly argues that the definition of the present always contains ideological aspects.⁵²

The latter especially is the case in contexts of profound political, social and cultural transitions, where the borders between present and past are often vague. Truth commissions, for example, are generally not created after transition processes are completed or consolidated, but themselves make up an important part of these transitions. As such, I have argued that these commissions should not be considered as mechanisms that merely reflect on the past retrospectively, but rather as actively constituting and regulating the categories of past and present.⁵³ The use of historicising discourse in truth commissions, and in 'new' democracies in general, form a part of a broader politics of time in which these countries attempt to exorcise the ghosts of the past by actively positing what belongs to their (judicial, political, social, cultural, etc) present and what cannot or should not be considered part of this present. Thus, this process actively posits what can be considered timely or part of actuality and what to the contrary should be considered anachronistic, old, bygone or definitely lost or downfallen. In order to understand this phenomenon and its important political and social effects, I advocate an analysis that interprets the use of historicising discourse in transitional justice, not just as a type of constative language, but also as a type of language containing performative dimensions that actively produce certain realities.⁵⁴ I agree with the French historian Michel de Certeau, when he claims that the division between past and present is not merely an absolute axiom of historiography, but the result of an

⁵¹ This question has been the central question of a collective volume that I co-edited with Chris Lorenz. See Chris Lorenz and Berber Bevernage (eds), *Breaking up time: Negotiating the Borders Between Present, Past and Future* (Vandenhoeck & Ruprecht, 2013).

⁵² Jacques Le Goff, *Histoire et Mémoire* [History and Memory] (Editions Gallimard, 1988) 31.

⁵³ Bevernage, *History, Memory and State-Sponsored Violence*, above n 42; Bevernage, 'Writing the Past Out of the Present', above n 42.

⁵⁴ This distinction between 'constative language' and 'performative language' was first introduced in language philosophy by the British philosopher J L Austin. See J L Austin, *How to do Things with Words* (Harvard University Press, 1962).

‘act of separation’ (or ‘*le geste de deviser*’), which conditions the very possibility of (modern, Western) historiography.⁵⁵

De Certeau rightly argues that the idea of a strict division between past and present is founded on a socio-political logic and in turn has important political implications. I believe the following citation about the practice of historiography also holds true for the use of historicising discourse in transitional justice

[w]ithin a socially stratified reality, historiography defined as ‘past’ (that is, as an ensemble of alterities and of ‘resistances’ to be comprehended or rejected) whatever did not belong to the power of producing a present, whether the power is political, social, or scientific ... Historical acts transform contemporary documents into archives, or make the countryside into a museum of memorable and/or superstitious traditions. Such acts determine an opposition, which circumscribes a ‘past’ within a given society.⁵⁶

Our knowledge on the general efficacy of the use of historicising discourse in transitional justice is still very limited. Yet, while historicising discourse might help transitional countries in their search for social closure, it can have two negative effects which are each other’s exact opposite: the first can be described as a sort of temporal Manichaeism which can lead to a ‘hyper-moralism’; the other can be described as temporal relativism which can lead to a ‘hypo-moralism’ or an incapacity to form ethical judgments.⁵⁷

A criticism often formulated against truth commissions and historical commissions is that, because of their focus on a strictly delimited period of the past, they pay little attention to the continuity of certain historical phenomena. Thus, they do not combine their retrospective focus enough with a critical analysis of the present.

The South African historian Colin Bundy, for example, strongly criticised the TRC in his country. According to him, the TRC focused too strongly on the strictly delineated period of Apartheid, which it described as the ‘beast of the past’, while it hardly took notice of continuities with the periods before and after.⁵⁸ Other commentators too deemed the strict focus of the TRC a missed chance for a more critical analysis of the ‘new’ South Africa.⁵⁹ The lack of a critical scrutiny of the present can, on an ethical level, indeed result in the emergence of a double standard whereby a sometimes-moralistic condemnation of past injustice is combined with an

⁵⁵ Michel de Certeau, *L’écriture de l’histoire* [The Writing of History] (Éditions Gallimard, 1975) 16. The translations from this text are the author’s own.

⁵⁶ Michel de Certeau, ‘History: Science and Fiction’ in Wlad Godzich and Jochen Schulte-Sasse (eds), *Heterologies: Discourse on the Other* (Brain Massumi trans, University of Minnesota Press, 2006) 216 [first published 1983].

⁵⁷ In previous publications, I have already identified another negative potential ethical effect of the use of a historicising discourse in transitional justice: namely what I have identified as its ‘allochronist’ tendency (a term from Johannes Fabian). This is the tendency to (symbolically) allocate into another time or treat as living anachronism those people who refuse to participate in the process of reconciliation or nation building. See Bevernage, *History, Memory and State-Sponsored Violence*, above n 42.

⁵⁸ Colin Bundy, ‘The Beast of the Past: History and the TRC’ in W James and L van de Vijver (eds), *After the TRC: Reflections on the Truth and Reconciliation Commission in South Africa* (David Philip Publishers, 2001) 9–20.

⁵⁹ Jacobus Du Pisani and Kwang-Su Kim, ‘Establishing the Truth about the Apartheid Past: Historians and the South African Truth and Reconciliation Commission’ (2004) 8 *African Studies Quarterly* 77.

inertia or even blindness for present-day injustices. Worse even, the past can even come to function as a metaphorical storehouse for all evil, which then no longer seems part of the present, or in relation to which contemporary evil seems rather innocent. When this is the case, a tendency toward temporal Manichaeism emerges, which unburdens the present by burdening the past. Richard Wilson, for example, formulated such a critique against the South African TRC, which he criticised for condemning violence of the past while identical violence was still continuing in prisons only a few miles away.⁶⁰

Remarkably, the South African TRC itself became a victim of the very logic of temporal Manichaeism to which it tended. To many people's regret, the commissioners of the South African TRC did not succeed in reaching consensus about all of its central findings. The fifth volume of its final report, therefore, includes a *Minority Position* by Afrikaner commissioner Wynand Malan. Malan, among other things, did not agree with the report's analysis of Apartheid and Apartheid violence. Interestingly, according to Malan, the report primarily failed on a historiographical level, and he uses a historicising approach to denounce the report's analysis of Apartheid as being anachronistic. Malan posits that unity and reconciliation can only be achieved if history is reframed in such a way that it is made clear that both perpetrators and victims are victims of an 'ultimate perpetrator', namely 'the conflict of the past'.⁶¹

The limited attention paid to the persistence of the past in the present, and the related tendency toward temporal Manichaeism, can partly be explained by referring to the specific political and ideological context in which most truth commissions function. Yet, the postulate of the strict division of past and present, and the taboo on presentism and anachronism that underpins many of the dominant currents of Western historiography, also plays a central role here. Temporal Manichaeism is moreover reinforced by a widespread tendency in contemporary historiography that, as Pieter Lagrou appropriately remarks, increasingly focuses on horror and evil in the past and tends to evolve from a '*histoire du temps présent*' [history of the present] into a '*histoire des autres*' [history of the others].⁶²

Paradoxically, the logic of historicisation can also lead to a moral relativism and an incapacity for ethical judgment. This especially is the case when the absolute singularity of historical events and epochs is stressed. Due to the fact that we, in order to formulate an ethical judgment, always to a greater or lesser extent, need a certain standard that transcends the case under evaluation — which thus, in a certain sense, is ahistorical — a radical stress on the singularity of each historical situation can lead to a hypo-moralism. Most historians will not consider this a problem, but in the context of transitional justice and historical justice this can be highly problematic. This certainly is the case if one agrees with Antoon de Baets, that even if historians *qua* historians should not judge, then at least their insights should enable others to do so in an informed way.⁶³

⁶⁰ Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001).

⁶¹ Truth and Reconciliation Commission of South Africa, *Report* (1998–2003) vol 5, 443.

⁶² Pieter Lagrou, 'De l'histoire du temps présent à l'histoire des autres: Comment une discipline critique devient complaisante' [From Contemporary History to History of the Others: How a Critical Discipline Became Complacent'] (2013) 118 *Vingtième Siècle: Revue d'histoire* [Twentieth Century: Historical Review] 101.

⁶³ Antoon de Baets, 'Na de genocide: Waarheidsstrategieën van rechters en Historici' [After Genocide: Truth Strategies of Judges and Historians] (2003) 116 *Tijdschrift voor Geschiedenis* [Journal for History] 212, 225.

The problem of hypo-moralism by historicisation can, for example, be illustrated by referring to the case of the Lumumba commission. When writing their final report, to a great extent, the Belgian MPs fell back on research that was done by a specially appointed team of historians. The Belgian MPs also took over the latter's taboo on presentism. This taboo on presentism or, as the MPs put it, the fear to 'analyse and comment on the facts from a present-day worldview', effected a great reticence among the politicians to formulate an ethical judgment. This eventually led to a situation in which the Belgian role in the murder of Lumumba was morally condemned in a nominal way, but in which a series of disclaimers about the difference between 'norms concerning public morality of today' and 'personal moral considerations at that time' immediately defused or even cancelled this nominal condemnation on a political level.⁶⁴

For another example of hypo-moralism by historicisation, I want to return for a moment to the *Minority Position* in which Wynand Malan turned against the conclusions of his colleague commissioners in the final report of the South African TRC. Malan criticises the report on a methodological plane because the commission, according to him, made too much use of oral history, a type of history that he regards as untrustworthy. However, he also set up a historiographical argument against what he considers to be the TRC's all too moralist approach. He interprets this approach as the result of a lack of profound historical analysis. According to Malan, whoever engages in a 'real historical evaluation' of Apartheid cannot but recognise the existence of historical perspectivism. This refers to the fact that each historical phenomenon can become the subject of different legitimate perspectives, which should all be integrated if one wants to arrive at a 'shared history'. Malan, therefore, also criticises the fact that the TRC, in line with a UN ruling, refers to Apartheid as a crime against humanity.⁶⁵ For Malan, this clearly is a continuation of an old historical narrative and a 'battle of the past', since the UN took this decision back in 1973. In contrast, Malan, in line with his historicist approach, stresses that 'moral imperatives are phenomena of their times and locations'.⁶⁶

The appellation of Apartheid as a crime against humanity has great practical importance, because this crime is imprescriptible. Malan regrets that his colleague commissioners do not reject this imprescriptibility. He poses the rhetorical question of 'whether an investigation of apartheid under international law would have any present or future legal or political value'. This, according to Malan, might have been the case if it concerned genocide, because genocides remain a potential threat for many societies, but 'apartheid as a system is dead and buried forever'.⁶⁷ He therefore concludes that attempts to retroactively prosecute Apartheid crimes can only be considered as an anachronistic and senseless stirring up of the past.⁶⁸

⁶⁴ Bevernage, 'History by Parliamentary Vote', above n 25.

⁶⁵ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, opened for signature 30 November 1973, 1015 UNTS 243 (entered into force on 18 July 1976).

⁶⁶ Truth and Reconciliation Commission of South Africa, *Report* (1998–2003) vol 5, 448.

⁶⁷ *Ibid* 449.

⁶⁸ *Ibid* 445.

B *Where Do Historians get the Authority to put History ‘in its Place or ‘Close Off’ the Past?*

Secondly, and relatedly, one can ask from where do historians get the authority to ‘put in its place’ or ‘close off’ something of such great weight as ‘the past’, and whether this is merely on the basis of scientific contemplation. Would it not be worrying if historians would thereby only have to legitimate themselves by referring to their skill of measuring time? And what about the relation between the professional duty of historians to ‘close off’ epochs, by demonstrating their ‘entirely individual/particular character’,⁶⁹ and the social justification for this act? Can these two actually be distinguished and, if so, is it not often the case that historians tend to see closed, bygone or definitely lost and clearly identifiable epochs where this is deemed socially desirable?

This question should be raised because several thinkers have pointed out that the notion of the individuality/particularity of epochs itself, on a historiographical level, depends (at least partly) on the way in which we demarcate or periodise them.⁷⁰ Historians certainly dispose of a reasonable margin for decision making when demarcating one period in relation to the other and this makes it hard to talk in a passive, and de-politicising, way about the observing or recognising of different epochs. Some researchers therefore rightly speak about the existence of ‘periodisation politics’.⁷¹ This notion of periodisation politics is highly relevant in the case of ‘transitional’ countries or ‘new’ democracies that often base their national identity and international legitimacy on an (alleged) break with a dictatorial or violent past, and thus on a ‘discontinuous historicity’.⁷² The choice for a particular temporal demarcation is thereby never neutral, but can directly contribute to the legitimacy of the new regime.

C *How Do Historians Know That the Correct Time for Closure has Come?*

I want to return a last time to the citation that ‘it has become about time to put the past in its place’ to raise a third question: how can one know when this time has come? Can a historian say something about such an inherently ethico-political or even quasi-religious question? Even when we are convinced that at *some* point in time a line has to be drawn under the past, does the central question not remain at *what* point in time this line has to be drawn?

One can agree with Bob de Graaff when he claims: ‘[v]ictimhood is historically determined. It comes into existence at a certain epoch. It has a beginning, but also an end’.⁷³ One can hardly

⁶⁹ de Graaff, above n 47, 29.

⁷⁰ See, eg, Irmeline Veit-Brause, ‘Marking Time: Topoi and Analogies in Historical Periodization’ (2000) 37 *Storia della Storiografia* [History of Historiography] 3, 3; P Toohey, ‘The Cultural Logic of Historical Periodization’ in Gerard Delanty and Engin Isin (eds), *Handbook of Historical Sociology* (Sage, 2003) 209–219.

⁷¹ Several researchers have, for example, argued that periodisation often serves a striving for autonomy and sovereignty. See, eg, Hans Blumenberg, *The Legitimacy of the Modern Age* (Robert M. Wallace trans, MIT press, 1985) [trans of: *Die Legitimität der Neuzeit* (first published in 1966)]; Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time*. (University of Pennsylvania Press, 2008); Olivia Harris, “‘The Coming of the White People’: Reflections on the Mythologisation of History in Latin America’ (1995) 14 *Bulletin of Latin American Research* 9.

⁷² Wilson, above n 60, 16.

⁷³ de Graaff, above n 47, 28.

deny the social need to make a certain distinction between victimhood and what de Graaff calls ‘former victimhood’. The same seems to count for the distinction between perpetratorhood and ‘former perpetratorhood’. However, the question is whether this distinction between victims or perpetrators and former victims or perpetrators is not primarily an ethico-political differentiation, instead of a chronological or historical one. The problem with these issues is that they force us to make the leap from a measured time to an imperative time, and such a leap from the descriptive to the prescriptive always is problematic.

Moreover, there is the problem that each chronological moment can apparently be appointed as the proper time to draw a line under the past. This can be done by the ‘good historian’ but also by perpetrators or politicians with less noble intentions. This indeed is the logic that underpins many pleas for amnesty and amnesia: a logic which posits that it is never more timely to draw a line under the past than the moment when it is still present. How then do we ascertain for ourselves that we are not prematurely closing off the past?

It is clear that many war criminals, dictators and former dictators are suspiciously fond of historicising discourse. However, the issue of the proper time to close off the past is not restricted to the perverse or cynical cases of self-amnestying. As Brandon Hamber and Richard Wilson remark, governments often want to close off the past far earlier than involved individuals are willing or able to do.⁷⁴ It is, therefore, important that chronologies, or the fact that events belong to the chronological past, are not instrumentalised as an alibi for claiming that these events also belong to the past in a more substantial sense — in that they are considered *passé*, *bygone* or *history* in the pejorative sense.

V CONCLUSION

The debate about the possibilities, limitations and desirability of the contribution of historians and historiography to transitional justice up to now has primarily focused on the aspects of truth and the contrast between remembrance and forgetting. Both the proponents and the opponents of the use of history in the context of transitional justice have primarily focused on the tenability of popular transitional justice claims — about the reconciliation by truth telling, about remembrance as an alternative form of justice. Therefore, both sides have primarily conceived the use of historiography in terms of a search for objective truth or as struggle against forgetting. This approach is important and also yields a number of interesting questions. Yet, this focus remains too limited if one wants to fully understand the ethical implications of the use of historiography and historicising discourse in transitional justice.

One should also pay attention to another aspect of the relation between historiography and transitional justice: that of the specific politics of time implied by the practice of historicising. The role of historiography and historicising discourse within the field of transitional justice should not merely be related to its traditional functions of representing the past, of searching for truth or even of generating meaning or identity, but also to its concept of time and the specific way in which it conceptualises the relation between present and past. Historicising discourse can

⁷⁴ Brandon Hamber and Richard Wilson, ‘Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies’ (2002) 1 *Journal of Human Rights* 35.

be attractive in the context of transitional justice because of its ambivalent tendency to divide present and past merely by diagnosing its division: in other words, its alleged capacity to put the past in its place simply by recognising this place. While the logic of historicisation can be of great importance in dealing with historical injustice, it can also have a series of negative consequences. It can, for example, lead to hyper-morality as well as to hypo-morality, and can be abused to prematurely close the past or even legitimise impunity.

Does this mean that I see no ethical mandate for historians, and think that historians should not engage with transitional justice or truth and historical commissions at all? No. Historians should not stay away because historicising discourse is already often used in transitional justice without them being present. Historians, I believe, can play an important ethical role but primarily an indirect one. They should not claim that they can solve complex ethical or political dilemmas simply on the basis of their expertise in measuring time and determining the 'hierarchy of time'. In that case, chronology would indeed serve as an alibi for escaping ethico-political responsibilities. Historians can, however, play a critical role precisely by reflexively pointing out the use and abuse of historicising discourses and politics of time in such a way that ethical and political dilemmas are sharpened and the need for the taking of decisions and responsibility becomes more manifest.

LAW, MEMORY AND AMNESTY IN SPAIN

MICHAEL HUMPHREY*

There are now memory laws in many European states against the denial of the Holocaust and the Armenian genocide as well as laws to regulate history curricula about slavery and colonialism. Laws explicitly addressing the memory of victims have also become a major focus of transitional justice mechanisms to manage political transition by recognising victims of human rights abuse in order to promote accountability and reconciliation. This article explores the role of law in regulating Civil War memory in Spain by looking at three laws — the Amnesty Law 1939, the Amnesty Law 1977 and the Law of Historical Memory 2007. It argues that these laws reconstituted the political community based on an official collective memory, the selective recognition of victims and a political consensus. It argues that, while the Law of Historical Memory 2007 may have created new rights for families of the disappeared through global claim making, these rights have not been easy to realise. The surviving political influence of Francoists and public avoidance of Civil War memory as politically divisive, a legacy of the forgetting instituted by the Amnesty Law 1977, has continued to present significant obstacles to the realisation of rights created by the Law of Historical Memory 2007.

I INTRODUCTION

This article is about law, the regulation of memory and justice. Its focus is the role of law in shaping collective memory of past violence. Political conflict over memory highlights the fact that (living) memory remains under the surface of law and sometimes becomes the object of laws.¹ In Europe, the legislation of *memory laws* has recently been growing to defend the memory of historical victims of violence. There are now memory laws in many European states against the denial of the Holocaust and the Armenian genocide as well as laws to regulate history curricula about slavery and colonialism.² Laws explicitly addressing the memory of victims have also become a major focus of transitional justice mechanisms to manage political transition by recognising victims of human rights abuse in order to promote accountability and reconciliation. This article examines law and the regulation of Civil War memory in Spain and the political

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¹ Vivian Grosswald Curran, 'History, Memory and Law' (2011) 16 *Roger Williams University Law Review* 100.

² *Ibid* 100–2.

controversy around the passing and implementation of the Law of Historical Memory 2007.³ It argues that the Law of Historical Memory 2007 is in dialogue with two earlier laws regulating Civil War memory — the Amnesty Law 1939⁴ and the Amnesty Law 1977⁵ — which had selectively recognised victims to define citizenship rights and reconstitute the political community at the time of political transition. It argues that the legislating of historical memory may create new rights based on global human rights standards but the political consensus underlying the underpinning of memory laws — here amnesty laws — needs to be undone to make those rights realisable.

This article explores the role of law in regulating Civil War memory in Spain by looking at three laws — Amnesty Law 1939, the Amnesty Law 1977 and the Law of Historical Memory 2007. The first Law marks the end of the Spanish Civil War (1936–39) and the creation of a new regime under General Franco, the second emerges after Franco’s death in 1975 and the establishment of democratic Spain and the third introduces global human rights to democratise Civil War memory and challenge the Amnesty Law 1977. By framing these laws as *memory laws* this article seeks to reveal the historical dialogue about Civil War memory they contain and how law has been used to re-code collective memory at these transitions. The amnesty laws not only selectively quarantine past memory, but they also embody the tensions of the state-making project, the normalisation of violence, the marginalisation of social categories and the degree of attachment of citizens to the state. They conceal not only crimes but also the undeclared design of the state-building project and the relationship between elites, classes and minorities in shaping the nation. The emergence of the global transitional justice discourse helped create new collective identities and memory through claim making to democratise Civil War memory in Spain. Global human rights transforms injury and suffering of historically marginalised victims from a political identity/side into a subject status as victim, no longer adjudicated by political judgment about ‘deserving victims’⁶ but as victims of human rights abuse.

Civil War memory in Spain refers to the impact and legacies of the war launched by General Franco’s Nationalist forces when he staged a coup against the elected Republican government in 1936, what Franco called the National Uprising of 18 July 1936. The war was particularly fiercely fought on both the Republican and Nationalist sides. Each accused the other of war crimes/human rights violations often arising from an underlying logic of territorial cleansing of the enemy, especially on the Nationalist side.⁷ The overall war casualties are estimated at around 500 000 to 600 000. Around 50 000 were victims of Francoist repression after the end of the Civil War in February 1939 and a further 190 000 prisoners were executed or died in prison.⁸ Victory in the war became the founding act on which Franco based the political legitimacy of his

³ *Ley de Memoria Histórica* [Law of Historical Memory] (Spain) 26 December 2007, Law 52/2007, *Boletín Oficial del Estado* [Official State Bulletin] (‘BOE’) No 310, 27 December 2007 <<http://ley memoria.mjusticia.gob.es/cs/Satellite/LeyMemoria/en/memoria-historica-522007>>.

⁴ *Ley de 23 septiembre 1939* [Decree-Law 23 September 1939] (Spain) 23 September 1939, BOE No 278, 5 October 1939.

⁵ *Ley 46/1977, de 15 de octubre, de Amnistía* [Law 46/1977, of 15 October, Amnesty] (Spain) 15 October 1977, BOE No 248, 17 October 1977.

⁶ Michael Humphrey, ‘The Politics of Trauma’ (2010) 32 *Arts The Journal of the Sydney University Arts Association* 37, 40. For example, the *deserving victim* is often the one seen as the morally innocent victim.

⁷ Antony Beevor, *The Battle for Spain: The Spanish Civil War 1936-1939* (Phoenix, new ed, 2007).

⁸ Josep M Tamarit Sumalla, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice* (Intersentia, 2013) 6–7.

authoritarian regime between 1939 and 1975. While Franco recognised, compensated and celebrated his supporters under his new regime, he persecuted, marginalised and silenced the defeated Republican side. The defeated experienced two phases of repression: first during the war (1936–39) and second during the consolidation of the Franco regime (1939–75). In the first phase the Nationalist forces carried out summary executions and disappearances. The second phase at the end of the war saw the defeated criminalised by a range of laws punishing support for the Republican government. More than a million men were imprisoned and thousands were executed under this law.⁹ For the surviving victims and families of the victims, trauma and grievance centred on the experience of disappearance and the injustice and illegality of Franco's Councils of War and military tribunals.

Through the process of repression and censorship, the Franco regime created *two Spains*, the world of the victors and that of the defeated, each with very different memories of the Civil War. For the victors, the war was to be memorialised and commemorated as a necessary Nationalist war to save Christian Spain. For the defeated, the war continued, experienced as their ongoing repression as the *enemy* as well as a silenced personal traumatic memory. The impact of Franco's 36 year long rule was to so demonise his enemies and the horrors of the Civil War that at his death most people wanted to avoid the past as a source of dangerous division threatening the return of vengeful violence. Still today the polarised character of Civil War memory is evident in commemorations. For example, on 14 October 2013 the Vatican announced the beatification of 522 martyrs of the faith, largely priests and nuns, who were killed during the Spanish Civil War (1936–39). It represents the latest of a total of 1500 people beatified as 'martyrs'¹⁰ because they refused to renounce their faith during the Civil War.

II MEMORY LAWS

In political transition after conflict, the memory regulated is the memory of violence, loss and suffering. In addressing questions of justice and harm, memory laws define who is to blame for the violence and who is a deserving victim. The laws regulating memory have three elements: firstly, a statement of official collective memory; secondly, the criteria for inclusion and exclusion in the new social and political order; and thirdly, a political consensus which underpins law's legitimacy and endurance.

Firstly, the official collective memory produced by the state is based upon judgments about why war happened and who is to blame. The private memory of victims is selectively included in an official collective memory in order to constitute a collective identity and membership based on ideas about cause, blame and the deserving victim. The collective memory included in the laws is reinforced by a public culture of memorialisation and commemoration of anniversaries in rituals and cultural productions in the form of books, film, photography and music.

⁹ Angela M Guarino, 'Chasing Ghosts: Pursuing Retroactive Justice for Franco-Era Crimes against Humanity' (2010) 33 *Boston College International and Comparative Law Review* 61.

¹⁰ Paul Hamilos, 'Vatican Beatifies over 500 "Martyrs of the Faith" Killed During the Spanish Civil War', *The Guardian* (online), 14 October 2013 <<http://www.theguardian.com/world/2013/oct/13/vatican-beatifies-martyrs-killed-spanish-civil-war-pope>>.

Secondly, inclusion in the new order is determined by the parameters of entitlement based on a moral lens which identifies the deserving victim — whose suffering should be acknowledged. The creation of *two Spains* based on victory and defeat clearly demarcated who were to be the beneficiaries of the new Spain. Impunity, lustration and compensation were implemented according to who was seen as the *moral victim*.

Thirdly, amnesty laws are juridical expressions of the political consensus and asymmetrical power underlying them. The consensus is elaborated through related laws marginalising opponents and rewarding supporters. Moreover, the memory laws create their own inertia because of the political risk in trying to challenge the underlying political consensus which brought them into existence. These laws regulating memory give juridical form, and thereby legitimacy, to that political consensus.

This article argues that the construction of the victim is central to the way these laws have sought to regulate Civil War memory. The Amnesty Law 1939 constructs the politicised victim of war in which only those on the victor's side are seen as deserving victims and beneficiaries of justice and recognition. The Amnesty Law 1977 constructs the universal victim based on corporeal suffering and the Law of Historical Memory 2007 constructs the universal victim of human rights abuse. How the victim is constructed shapes the way justice, moral community and state legitimacy are configured and Civil War memory is re-coded. Victims construct their claims and constitute their collective identities with reference to specific publics. Each memory law addresses a specific public.

The Law of Historical Memory 2007 is a juridical response to the emergence of global human rights as an international public sphere, constituted through a set of global standards and mechanisms for victims to make rights claims. Law shapes subjectivity by establishing the parameters in which individuals construct themselves as subjects of injustice. International law and lawyers have created ideas, rights and instruments to provide victims with a new basis for constructing collective memory and identity with respect to a globally abstract and unknown public. Consequently, global human rights has emerged as an instrument for global governance in which transnational organisations support victims in making rights claims to abstract publics. Transitional justice refers to an international legal field that has functioned to expand the reach and intervention of human rights through developing exportable practices of legal and moral intervention. The legitimacy of global human rights follows from the importance of public appeal as a mechanism of rights compliance in a globalising world.

A *Amnesty Law 1939*

The Amnesty Law 1939 was a declaration of victory by the Nationalists in their war or 'Crusade to save Christian Spain'.¹¹ The Law was declared under martial law introduced after the military coup d'état in 1936 and lasted until 1948. The law followed an earlier amnesty declared on 13 September 1936 which pardoned everyone who had committed 'crimes against the Constitution, against public order, breached laws regarding possession of arms and explosives, homicides,

¹¹ Carmen Lamarca Perez, *Tratamiento Juridico Del Terrorismo* [Judicial Treatment of Terrorism] (Centro de Publicaciones del Ministerio de Justicia [Centre of Publications of the Ministry of Justice], 1985) 128.

injuries'¹² as long as they agreed ideologically with the Franco regime. The Amnesty Law 1939 functioned as a 'reverse amnesty'¹³ law because it set out to prosecute for rebellion those who had defended Republican legality. The only concession was a partial amnesty given in January 1940 to some political prisoners serving sentences of 12 years or less — the vast majority of prisoners accused of 'military rebellion'¹⁴ were sentenced to long sentences, with many awaiting the death penalty. This was followed by a series of further partial pardons between 1945 and 1969 at anniversaries and commemorations of Franco's rule.¹⁵ The collective memory of the war celebrated the cause of the National Movement and sought to blame the Republicans for the situation that caused the war and to expunge their project from historical record. Victory signified the defeat and elimination of the project of the enemy. Moreover, the official collective memory of victory became the source of legitimacy of Franco's National Movement through which he justified ongoing repression to punish those responsible for the Civil War. The *origin-based* legitimacy of victory, the founding narrative of the National Movement, continued as the basis for governance through fear and sustained marginalisation of anyone identified with the Republican side.

The Amnesty Law 1939 rewarded Franco's supporters and punished his Republican enemies. The law had the wider effect of abolishing the legality of the Second Republic. The *two Spains* refers to the division of the society produced by victory into the included and excluded. Repression was seen as a process of purification targeting the main enemies of the regime, 'the liberals, reds and separatists'.¹⁶ The National Movement pursued repression through legal and political means to extract revenge and to remove Republicans from any positions of influence. The benefit of amnesty granted to the Nationalists under the Amnesty Law 1939 was amplified by the extensive legal repression of Republicans. The state of affairs created by these penal laws came to be known as *justicia al revés*, 'upside down justice'.¹⁷ The General Prosecutor of the Supreme Court instructed the *causa general* [general legal investigation] under the Decree 26 April 26 1940, which sought to *do justice* against those who committed crimes during the period of *red domination*. The General Prosecutor collected information about crimes committed against people and property in the Republican zone but also by 'the authorities, armed and security forces and supporters of left-wing Republican governments since the establishment of the Second Republic in 1931'.¹⁸ The *causa general* persisted until the 1960s as an ongoing legal accounting of the crimes of the Republican side. A wide range of laws and special tribunals targeting specific groups and their activities facilitated the judicial repression of political opponents. These included the Law of Political Responsibilities 1939;¹⁹ the Law of the

¹² Paloma Aguilar Fernández, *Memory and Amnesia: The Role of the Spanish Civil War in the Transition to Democracy* (Mark Oakley trans, Berghahn Books, 2002) 76 [trans of: *Memoria y olvido de la guerra civil española* (first published 1996)].

¹³ Perez, above n 11, 128.

¹⁴ Michael Richards, *After the Civil War: Memory Making and Re-Making Spain since 1936* (Cambridge University Press 2013) 72.

¹⁵ Aguilar Fernández, *Memory and Amnesia*, above n 12, 97.

¹⁶ Josep M Tamarit Sumalla, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice* (Intersentia, 2013) 8.

¹⁷ *Ibid* 59.

¹⁸ *Ibid* 69.

¹⁹ Law of Political Responsibilities 1939 (Spain) 9 February 1939, BOE No 81, 22 March 1939.

Repression of the Masons and Communists 1940,²⁰ the Law of State Security 1941,²¹ the Basic Law 1944,²² military justice 1945; the legal decree defining and repressing the crimes of banditry and terrorism 1947; and the Law of Public Order 1959.²³

The Law of Political Responsibilities (*‘Ley de Responsabilidades Políticas’*) legislated on 9 February 1939 is an example of the social penetration of legal investigation of the past directed at punishing those the regime blamed for the war. It made political parties, trade unions and other organisations illegal and imposed economic penalties on business people that had supported the Republic. The process of investigation itself opened up the opportunity for abuse and coercion because judges were required ‘to obtain a report about the conduct of the accused from the local council, another from the Guardia Civil, another from the Falange and a fourth from the local priest’.²⁴ It meant law was abused as an arbitrary means of repression through detentions without charge, torture, imprisonment, executions, exiles, fines and professional disqualifications.

Repression deeply penetrated personal lives. Political revenge saw widespread physical elimination of opponents and their flight into exile. Laws designed to dismantle Republican state institutions such as the Law of the Depuration of the Publicly Employed (*‘Ley de Depuración de Empleados Públicos’*) deprived Republican supporters of jobs and careers through lustration of public employees, which included judges, university professors and teachers.²⁵ Under Law 25 August 1939, 80 per cent of jobs in all public institutions were assigned to veterans on the Nationalist side.²⁶ Moreover, repression implicated ordinary people through a process of collaboration and reporting that impacted community and family life. In certain cases an emission of guarantees of good conduct allowed detainees to be excused if they could get respectable members of society to guarantee their good conduct, a practice which undermined them through humiliation and indebtedness.

The unequal treatment of the dead and missing of the Civil War also underwrote division between the victors and the defeated. Under Decree 16 May 1939 the fees associated with burial, exhumation and reburial of remains of victims of *red barbarism* killed in the war were waived or reduced. Moreover, the heroes and martyrs of the Nationalists were buried in a huge mausoleum, *El Valle de Caídos* [The Valley of the Fallen], in Cuelgamuros as a monument to victory. Franco also encouraged commemoration of victory by the Nationalist associations of ex-captives, ex-combatants and the families of ‘martyrs’²⁷ through the remembering of their victimhood and collective trauma. By contrast, the families of the dead and missing on the Republican side were neither unable to find out what had happened to their relatives nor exhume them, even in cases

²⁰ Law of the Repression of Freemasonry and Communism 1940 (Spain) 1 March 1940, BOE No 62, 2 March 1940.

²¹ Law of State Security 1941 (Spain) 4 January 1941, BOE No 101, 11 April 1941.

²² Law of the New Revised Edition of the Penal Code 1944 (Spain) 19 July 1944, BOE No 204, 22 July 1944.

²³ Law of Public Order 45/30 July 1959 (Spain) BOE No 182, 31 July 1959.

²⁴ Sumalla, above n 16, 48.

²⁵ Alicia Gil Gil, ‘Spain as an Example of Total Oblivion with Partial Rehabilitation’, in Jessica Almqvist and Carlos Esposito (eds), *The Role of Courts in Transitional Justice: Voices from Latin America and Spain* (Routledge, 2013) 103, 105.

²⁶ Sumalla, above n 16, 58.

²⁷ Richards, above n 14, 69.

where they knew approximately where they had been buried.²⁸ This private trauma of the marginalised eventually became the focus of a social movement for exhumations which began in the late 1970s and became systematically organised in 2000.²⁹

The Amnesty Law 1939 came at the end of the Civil War and was the foundation of victor's justice. It was based on the imposed consensus of the victorious. There was no peace negotiation or movement towards national reconciliation. The political significance of war, Elaine Scarry argues, is that it can produce effects which outlast its termination. 'A military contest differs from any other contest in that its outcome carries the power of its own enforcement'.³⁰ War has the ability to produce outcomes which appear incontestable even if defeat is not absolute. Victory gives 'rise to the fiction that its outcome cannot be (or should not be, or must not be) contested?'.³¹ The Amnesty Law 1939 was a juridical expression of Franco's military victory which resulted in the total defeat of the Republicans and their large scale elimination, imprisonment and exile. For the Republicans, defeat only opened a new phase of repression in which they became the object of persecution through criminalisation and marginalisation.

The logic of war allowed Franco to erase the Republican project from public memory. However, victory was not by itself enough to secure his dictatorship. He built his legitimacy on 'a policy of marginalising the losing side, a justification of war and the exhibition of victory'.³² The only political organisations legally allowed to exist — National Movement, Falange Party, National Syndicalists — were those supporting him. The victor/vanquished war narrative blocked any possible initiatives for reconciliation and further entrenched the *two Spains*. Franco's political authority as *Caudillo*,³³ was sanctified in the bodies of the Nationalist martyrs and monuments — for example, the Valley of the Fallen — and the faithful to establish modern Spain.

Franco's celebration of *Veinticinco Años de Paz* [25 years of Peace] revealed how the discourse on the past was changing from 'origin-based' legitimacy to a 'performance-based legitimacy'.³⁴ It shifted the narrative of state legitimacy to the achievement of peace which became the basis of the social consensus that underpinned the transition to democracy in 1977. Repression achieved a widespread depoliticised subjectivity oriented towards preserving the peace and belief in the need for peace. The campaign celebrated the achievement of peace and poured political opprobrium on the idea of disturbing what had been achieved with such sacrifice. In practice, repression had succeeded in keeping the lid on any opposition through subjectivities produced through the isolation imposed by the banning of political and worker organisations and the individual traumatic memories reinforced by the ongoing fear of arrest, torture and imprisonment.

²⁸ Layla Renshaw, *Exhuming Loss: Memory, Materiality and Mass Graves of the Spanish Civil War* (Left Coast Press, 2011).

²⁹ Francisco Ferrándiz, 'Cries and Whispers: Exhuming and Narrating Defeat in Spain Today' (2008) 9 *Journal of Spanish Cultural Studies* 177.

³⁰ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press, 1985) 96.

³¹ *Ibid* 108.

³² Aguilar Fernández, *Memory and Amnesia*, above n 12, 33.

³³ *Caudillo* refers to a military-political leader. During Franco's dictatorship in Spain state and official documents refer to him as *Caudillo de España* [the Leader of Spain].

³⁴ Aguilar Fernández, *Memory and Amnesia*, above n 12, 5.

B *Amnesty Law 1977*

The transition to democracy after Franco's death in 1975 was punctuated by the Amnesty Law 1977 which re-coded Civil War memory by creating symmetry between the victors and vanquished as victims. Both sides were now blamed for causing the fratricidal civil war and both had suffered. Official memory was created by the state through the Amnesty Law 1977, the juridical narrative of forgetting, and the 'good memory' (*la buena memoria*), the discourse of forgetting, silence and equivalence of victims, to realise modern democratic Spain.³⁵ Ricard Vinyes describes the *good memory* as the 'pacification of memories'.³⁶ The juridical narrative in the Amnesty Law 1977 constructs the new subject of the victim as universal based on their bodily suffering, not their political or moral attributes.³⁷ The victim of *human rights abuse* emerges only later with the Law of Historical Memory 2007.

The *good memory* constructs Spain as a model of transition to democracy, realised as a political product rather than one with a historical cause.³⁸ Ruti Teitel coins the term 'transitional amnesty' with reference to the Spanish case. Amnesty is adopted as a 'forward-looking measure to excuse all crimes, to repudiate the past regime and at the same time reinforce liberalizing political change'.³⁹ The *good memory* avoided the past and civil war memory because it had come to be seen as divisive and a risk to the *peace* achieved under the dictatorship. Franco had so manipulated and demonised the past that all parties approached transition by renouncing revenge. In fact, public knowledge about the Civil War era was so limited that most people were unaware that the Republican government had been democratically elected.⁴⁰ As Aguilar observes, 'only a nation so traumatised by war could be so devoted to peace, and not only during the postwar period, but throughout the Franco era and beyond'.⁴¹ One consequence of this aversion towards the past, and manufactured ignorance of it, was the complicity of civil society in making no demands for debate about past injustice or compensation for victims.⁴²

The political consensus underlying the Amnesty Law 1977 was the political *pacto del olvido* (or 'pact of forgetting') brokered by the political elites and subsequently agreed to by the majority of Spaniards. It was approved by 93.3 per cent of parliamentarians in October 1977.⁴³ I will return to the political consequences of this pact below. The exercise of transition to create post-Franco democratic Spain was important because it engaged people in a process of 'negotiation, pact-

³⁵ Ricard Vinyes, 'La Memoria Del Estado' [The Memory of the State] in Ricard Vinyes (ed), *El Estado y la Memoria: Gobiernos y Ciudadanos Frente a los Traumas de la Historia* [The State and Memory: Governments and Citizens Facing the Traumas of History] (RBA Libros, 2009) 23, 35.

³⁶ Ibid 40.

³⁷ Ibid 42.

³⁸ Ibid 35.

³⁹ Ruti G Teitel, *Transitional Justice* (Oxford University Press, 2000) 52.

⁴⁰ Paul Preston, *The Politics of Revenge: Fascism and the Military in Twentieth-Century Spain* (Routledge, 1990).

⁴¹ Aguilar Fernández, *Memory and Amnesia*, above n 12, 135.

⁴² Sergio Gálvez Biesca, 'El Proceso de la Recuperación de la "Memoria Histórica" en España: Una Aproximación a los Movimientos Sociales por la Memoria' [The Process of the Recovery of "Historical Memory" in Spain: An Account of Social Movements for Memory] (2006) 19 *International Journal of Iberian Studies* 25.

⁴³ Gil Gil, above n 25, 108.

making, giving ground, and tolerance'.⁴⁴ This was important not only because of the substance but because 'it left behind a long tradition of intolerance, imposition, subjection of the opponent and *tragalás* or imposed constitutions'.⁴⁵ Reconciliation and rehabilitation were based on making victor and vanquished equivalent and turning them into victims of the Civil War, both entitled to compensation and impunity. The defeated were selectively included through a bureaucratic-legal process focused on reparations in the form of pensions and compensation payments for injury. However these reparations measures have been criticised as selective, piecemeal and often inadequate.⁴⁶ The Royal Decree-Law on 5 March 1976⁴⁷ recognised their entitlement to compensation for their injuries and granted them pensions, but widows were excluded. A Royal Decree-Law on March 1978⁴⁸ granted pensions to relatives of persons killed as result of the Civil War with special recognition of the destruction of *Guernica*.⁴⁹ It was not until 1984 that the law formally recognised rights of the Republican veterans and their families from the Civil War.⁵⁰ The function of commemorative national days was also changed. The Victory Parade held on 1 April 1939 became Armed Forces Day.⁵¹ In order to more closely link the monarchy with reconciliation, the 10th anniversary of the King's coronation on 22 November 1985 was used to inaugurate a monument to 'all the Spanish fallen'.⁵² The political and legal neglect of issues such as long-term discrimination and the disappeared left the victims of repression marginalised during the Civil War and after it. The political and social consensus around peace through forgetting excluded these marginalised victims who lacked any alternate collective memory to make their demands.

The forward-looking project upon which the Amnesty Law 1977 was premised is captured in the statement 'Spain is the problem, Europe is the solution'.⁵³ As Blakeley points out, the forward-looking orientation of the Law did not mean Civil War memory was forgotten. It was present as a warning about returning to the past.⁵⁴ The political elite, with the acceptance of the majority, produced a consensus around avoidance of the threat of disorder embodied in Civil War memory and the transformation and modernisation of Spain through incorporation into Europe. The widespread pro-amnesty demonstrations across the political spectrum — including the left and separatist movements — aimed at the release of political prisoners and highlighted the asymmetry between the victors and vanquished. Similar support by leftist groups for amnesty to secure the release of political prisoners occurred during transition to democracy in Uruguay, in

⁴⁴ Aguilar Fernández, *Memory and Amnesia*, above n 12, 151.

⁴⁵ Ibid.

⁴⁶ Ibid 198.

⁴⁷ Royal-Decree Law 5 March 1976 (Spain) BOE No 84, 7 April 1976.

⁴⁸ Royal-Decree Law 21 December 1978 (Spain) BOE No 305, 22 December 1978.

⁴⁹ Aguilar Fernández, *Memory and Amnesia*, above n 12, 199. Guernica is a Basque Country town in northern Spain that was bombed by the Italian and German air forces on 26 April 1937. The aerial bombing provoked international outrage at the time and Picasso's famous painting entitled 'Guernica' commemorates the human and material destruction wrought.

⁵⁰ Madeleine Davis, 'Is Spain Recovering its Memory? Breaking the *Pacto del Olvido*' [the Pact of Forgetting] (2005) 27 *Human Rights Quarterly* 858, 863.

⁵¹ Aguilar Fernández, *Memory and Amnesia*, above n 12, 204.

⁵² Ibid 208.

⁵³ Jose Ortega y Gasset, *Man and People* (WW Norton, 1963) quoted in Victor Perez-Diaz, *The Return of Civil Society: The Emergence of Democratic Spain* (Harvard University Press, 1993) 1.

⁵⁴ Georgina Blakeley, 'Politics as Usual? The Trials and Tribulations of the Law of Historical Memory in Spain' (2008) 7 *Entelequia Revista Interdisciplinar* 315, 316.

which the groups negotiated with the military in the *Pacto del Club Naval* ('Naval Club Agreement') in 1984. The Amnesty Law 1977 in Spain and the Amnesty Law 1986 in Uruguay highlight the asymmetry in these top-down transitions in which the weaker party is forced to compromise by trading impunity for the powerful to achieve basic rights for the weak.⁵⁵

The political consensus brokered by the elite was underwritten by a constitutional referendum in 1978, democratically affirming the agreements of the transition. However, the narrative of peaceful transition as a bureaucratic achievement neglected the role of popular movements in resisting the dictatorship and shaping the political environment of transition.⁵⁶ Gradually it became apparent that the political consensus of the *pacto del olvido* was too narrow, as those excluded from the agreement began to demand rights and seek legal remedies. The defeated victims recognised under consensus were in practice limited to those in the service of the Republican state and army — soldiers and civil servants. Two other categories of victims emerged as sources of opposition — the families of the disappeared and those condemned under the Councils of War and the military tribunals.⁵⁷ The issue of the disappeared in particular led to the emergence of a bottom-up victims' rights movement, initiated by an exhumation movement and a new legal activism in the context of the emerging transitional justice movement against impunity. The meaning of impunity in Spain however was different to the Southern Cone — Argentina, Chile, Uruguay — where it referred to amnesty laws imposed by militaries to prevent accountability for crimes against humanity. In Spain, impunity did not refer to blocked accountability because those responsible were already dead. Instead, Vinyes argues, impunity referred to the democratic state's unwillingness to 'destroy politically and juridically the legal validity of the Councils of War and the sentences issued by the special tribunals of the dictatorship against resistance, opposition and its social setting'.⁵⁸ These had produced mass imprisonment as well as executions under Franco's rule.

The globalisation of justice through the emergence of a 'transitional justice culture'⁵⁹ contributed to the erosion of the 'sacralised culture of *consenso*'⁶⁰ underpinning the Amnesty Law 1977. Transitional justice culture is based on 'a set of beliefs and practices grounded in rejection of impunity, confrontation of the past, prioritising state accountability and aiming towards a broader societal inclusion of past regime victims'.⁶¹ In Spain, the development of transitional justice culture was boosted by two high profile legal cases: firstly, Judge Baltazar Garzón's attempt to extradite Pinochet; and secondly, the terrorist bombings of commuter trains in Madrid.⁶² The Pinochet case introduced the principle of universal jurisdiction into the Spanish courts, opening up the analogous Spanish experience of amnesty and impunity with transition to democracy. The terrorist train bombings produced a crisis of confidence in the Popular Party ('PP') government,

⁵⁵ Louise Mallinder, 'Uruguay's Evolving Experience of Amnesty and Civil Society's Response' (Working Paper No 4, Institute of Criminology and Criminal Justice, Queen's University Belfast, 16 March 2009) 18–20.

⁵⁶ Josep Maria Colomer, *La Transición a La Democracia: El Modelo Español* [Transition and Democracy: the Spanish Model] (Anagrama, 1998).

⁵⁷ Stephanie R Golob, 'Volver: The Return of/to Transitional Justice Politics in Spain' (2008) 9(2) *Journal of Spanish Cultural Studies* 127.

⁵⁸ Vinyes, above n 35, 37.

⁵⁹ Golob, above n 57, 128.

⁶⁰ *Ibid* 127.

⁶¹ *Ibid*.

⁶² *Ibid* 132.

and the unexpected election of the Socialist Party *Partido Socialista Obrero Español* ('PSOE') under Zapatero (2004–8) with the promise to *tell the truth*. The electoral victory allowed Zapatero to embark on policies to enhance Spanish citizenship, which included support for associations searching for truth about the past and democratising Civil War memory.⁶³

C *Law of Historical Memory 2007*

The Law of Historical Memory 2007, legislated by the Socialist government under Prime Minister Zapatero, aimed at democratising Civil War memory. The Law created the new 'individual right to personal and family memory'⁶⁴ and also sought to extend the recognition already given to victims of the Civil War. In the Aims and Purposes of the Law, it states it seeks to enhance the 'knowledge of our history and the promotion of democratic memory'.⁶⁵ At the heart of the Law of Historical Memory 2007 was the new victim, not the defeated, suffering Republican victim, but the *victim of human rights abuse* informed by a transitional justice culture. This human rights framing reconstituted the dyadic relationship underlying Civil War memory; however, this time not defined as a relationship between victor and defeated but between perpetrator and victim. It re-coded the Civil War memory by revealing the number of unrecognised victims and the institutional responsibilities for human rights violations. However the Law recognised victims' rights more than it created victims' rights. It broke the silence on the scale of past repression and allowed the private memory of the traumatised victims of the Civil War and dictatorship to contest the *consenso* underpinning the Amnesty Law 1977 by pluralising memory. The Law did not, however, challenge impunity. It only declared illegitimate the decisions of the military tribunals and councils of war. It did not provide for the annulment of their judgments.⁶⁶

In fact, the Law was the culmination of growing concerns about moral reparations and the passing of a series of laws that reinstated rights of victims identified with the Republican side. The conservative government (under the *Partido Popular*) of José María Aznar in 2002 passed the Law of Recovery of Nationality,⁶⁷ which was directed at exiles from the Spanish Civil War and approved a decision of the Constitutional Commission of the Congress of Deputies for moral recognition of all victims of the Spanish Civil War and of those who suffered.⁶⁸ The Zapatero

⁶³ Ibid 133. See also Paloma Aguilar Fernández, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case' (2008) 13 *South European Society and Politics* 417.

⁶⁴ José María Sauca Cano, 'El derecho ciudadano a la memoria histórica: concepto y contenido' [The Right of the Citizen to Historical Memory: Concept and Content] in José Martín Pallín y Rafael Escudero Alday [Law and Historical Memory] (eds), *Derecho y memoria histórica* (Editorial Trotta, 2008) 73, 77–8.

⁶⁵ The 'Law of Historical Memory' quoted in José Luis De La Cuesta Arzamendi, 'Spanish Legislation on Historical Memory' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflict, Victimization, and Post-Conflict Justice* (Intersentia, 2010) vol 2, 983, 992. See also *Ley de Memoria Histórica* [Law of Historical Memory] (Spain) 26 December 2007, Law 52/2007, *Boletín Oficial del Estado* [Official State Bulletin] No 310, 27 December 2007 <<http://leymemoria.mjusticia.gob.es/cs/Satellite/LeyMemoria/en/memoria-historica-522007>>.

⁶⁶ Aguilar Fernández, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case', above n 63.

⁶⁷ Civil Code Law of Recovery of Nationality 2002 (Spain) 8 October 2002, BOE No 242, 9 October 2002.

⁶⁸ Aguilar Fernández, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case', above n 63, 422.

Socialist government set out to provide material reparations through a wide variety of laws to address grievances over war pensions and the confiscated assets of unions and political parties. It also supported commemoration and other symbolic non-legislative actions to promote recognition of victims, acknowledge the impact of exile and recognise the suffering of political prisoners.⁶⁹ The Royal Decree 10 September (1891/2004)⁷⁰ established an inter-ministerial commission to study the situation of the victims of the Civil War and Francoism whose aim became to promote equal recognition and reparations for victims of civil war including support for associations searching for truth and recovery of historical memory and those who support victims.⁷¹

The Law's construction of the victim as the *victim of human rights abuse* emerged from the claim-making of the relatives of the disappeared and the legal activism of prominent judiciary such as Baltazar Garzón around the Pinochet extradition. The analogous case of disappearance and impunity in Latin America, especially Chile, saw the local exhumation movement in Spain become the focus for creating new rights of victims most marginalised by the Amnesty Law 1977. The strategy of Chilean human rights groups filing cases in Chilean courts, going global by promoting universal jurisdiction in Spanish courts and, 'in an effort to bring the values of transitional justice culture back home',⁷² provided a model for the Spanish exhumation movement. Garzón's role in the Pinochet extradition proceedings gave impetus to Spanish groups internationalising their rights claims to seek the truth and exhume the remains of their missing family members. The Association for Historical Memory,⁷³ founded in 2000, was one of the most active in seeking to challenge the Amnesty Law 1977. In 2002, the United Nations ('UN') Working Group on Enforced or Involuntary Disappearances included Spain in a list of countries failing in their human rights responsibilities to investigate disappearances. After representations by the Association for the Recovery of Historical Memory ('ARMH')⁷⁴ to the UN Working Group, it recommended that the Spanish government support investigations into the victims of repression.⁷⁵ Even though most cases occurred before 1945, beyond the scope of the Committee's brief, the effect of the listing was to raise the public profile of the issue in Spain.⁷⁶

The Law of Historical Memory 2007 promoted reconciliation through a 'non-adversarial, "victim-as-citizen" — centred and inclusion-oriented means of using the law, and state power, to advance some values of transitional justice culture'.⁷⁷ It represents the victim-centred choice of transitional justice by examining past violence through the experience of victims rather than through the crimes of perpetrators. The Law itself represents a clear break with the *pact of*

⁶⁹ Ibid 422–4. See Table 1 Principal Material Reparation Measures of the PP's Last Term (2000–04) and the PSOE's First Term in Office (2004–08).

⁷⁰ Royal Decree 1891/2004 of 10 September (Spain) BOE No 227, 20 September 2004.

⁷¹ De La Cuesta Arzamendi, above n 65, 990.

⁷² Golob, above n 57, 132.

⁷³ Ferrándiz, above n 29, 178.

⁷⁴ The Association for the Recovery of Historical Memory (ARMH) is the most prominent of the national victims' organisations which emerged from the local movement for the exhumation of mass graves of Civil War victims in Spain. See Ferrándiz, above n 29.

⁷⁵ Davis, above n 50, 859.

⁷⁶ Aguilar Fernández, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case', above n 63, 429.

⁷⁷ Golob, above n 57, 137.

forgetting by greatly enhancing the rights of victims and opening up discussion of Civil War memory.

A central aim of transitional justice culture is to re-educate citizens about past violence through victim testimony to national publics and thereby bring about national reconciliation. The human rights construction of the victim in the Law of Historical Memory 2007 arises out of the local exhumation movement going global to appeal to an ‘international abstract public’⁷⁸ to leverage the Spanish state to comply with its human rights obligations. The Law authorised the collective identity and rights claims that victims had made to international human rights agencies and an international abstract public, thereby relocating the rights claims to a *domestic public*.

The passing of the Law of Historical Memory 2007 signalled a break with the *pact of forgetting* on which political consensus underlying the Amnesty Law 1977 had been based. However, despite political convergence about the need for moral reparations for Republican victims, this did not go as far as a consensus for the Law of Historical Memory 2007. The Socialist Party PSOE had only begun to make demands for greater recognition of Republican victims in opposition, without ever having proposed it during their first period of government between 1982 and 1986. It had not even been part of their political agenda during the 2004 election campaign.⁷⁹ From the perspective of many Francoists, the Law of Historical Memory 2007 was not just about reburying the Republican dead but a project of vengeance with the aim of criminalising the Franco regime. For them, the Law’s prohibition of political rallies at Franco’s Valley of the Fallen monument confirms it.⁸⁰

Political opposition to the Law of Historical Memory 2007, and its aim of breaking the *pact of silence* of 1977, surfaced in the Supreme Court over the case of Judge Baltazar Garzón in 2010. Three private parties representing right-wing organisations⁸¹ accused Garzón of exceeding his judicial authority by opening investigations into 22 alleged cases of illegal detention and forced disappearance that involved more than 100 000 victims. Internationally, the idea that Spanish courts should prosecute a judge for investigating crimes against humanity was strongly condemned. Human rights organisations such as Human Rights Watch responded arguing that the Spanish government should abide by the UN Human Rights Committee’s 2009 call to end the Amnesty Law 1977.⁸²

The impact of these accusations of criminal behaviour against Garzón saw him stood down from his role as investigating magistrate by the Supreme Court in 2010. Although the Supreme Court subsequently (in January 2012) acquitted Garzón of the charge of malfeasance for *knowingly exceeding his powers* — ie violating the Amnesty Law 1977 — he was convicted for the use of illegal wiretaps in another case on public corruption (‘Gürtel’). The effect of these Supreme

⁷⁸ Ronald Niezen, *Public Justice and the Anthropology of Law* (Cambridge University Press, 2010) 223.

⁷⁹ Aguilar Fernández, ‘Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case’, above n 63, 427.

⁸⁰ James J Friedberg, ‘Wane in Spain (of Universal Jurisdiction): Spain’s Forgetful Democratic Transition and the Prosecution of Tyrants’ (2012) 114 *The West Virginia Law Review* 825, 895.

⁸¹ *Manos Limpias* [Clean Hands], *Libertad e Identidad* [Liberty and Identity], *Falange Española* [Spanish Falange].

⁸² Human Rights Watch, *Spain: End Amnesty for Franco Era Atrocities* (19 March 2010) <<http://www.hrw.org/news/2010/03/19/spain-end-amnesty-franco-era-atrocities>>.

Court decisions was firstly to close off legal remedy for the victims of the crimes of Franco's dictatorship in Spanish courts, and secondly, to remove Garzón from the judiciary for 11 years.⁸³ The overall impact of these decisions was to sideline Garzón as a judicial activist and leader on the issue of victims' rights in relation to crimes against humanity in Spain. On the whole, public opinion polls showed support for Garzón — a *Metroscopia* opinion poll showed that 61 per cent of respondents believed that Garzón was a victim of persecution because the Supreme Court removed him from office for 11 years.⁸⁴

Not only has the impetus for exhumations and identification of remains been slowed by the removal of Garzón as a judicial activist but also by the loss of government political and economic support with the arrival of the Conservative PP government of Prime Minister Mariano Rajoy in November 2011. In the context of the severe economic crisis in Spain and the implementation of austerity measures, cutbacks have been seen in social spending at home and abroad including for the organisations funded to exhume and identify victims of Franco's repression such as ARMH. The PP government's opposition to the use of universal jurisdiction in Spanish courts in cases of genocide, crimes against humanity and war crimes has seen them introduce a Bill to limit the use of universal jurisdiction to cases where the suspect is a Spanish national or a foreigner resident in Spain.⁸⁵ The strategy of using universal jurisdiction in Spanish courts to *go global* with the aim of bringing attention to domestic human rights abuses has greatly increased since the Chilean human rights organisations' initiative to extradite Pinochet. The term *lawfare*, turning the political into the legal as a means of coercion, has come to be used to describe this strategy.⁸⁶ Recent arrest warrants issued by Spanish courts against former Chinese officials over crimes against humanity in Tibet has been a catalyst for the Bill limiting universal jurisdiction. Garzón has criticised the Bill arguing that the government was putting diplomatic and trade issues ahead of questions of international law and justice.⁸⁷

Even though Garzón has been removed as judicial activist around Civil War memory and universal jurisdiction is being severely limited in Spanish courts, this has not prevented others launching investigations in other countries. Argentine lawyers previously involved in the universal jurisdiction case held in Spain against the ex-marine officer Scilingo from the Naval Mechanics School ('ESMA'), a notorious secret detention centre in Buenos Aires, have opened a case investigating the crimes against humanity committed by the Franco regime.⁸⁸

⁸³ Interights, *Baltasar Garzón v Spain* <<http://www.interights.org/garzon/index.html>>.

⁸⁴ 'El 61% afirma que Garzón es víctima de una persecución' [61% Say that Garzon is the Victim of Persecution] *El País* (online), 2 February 2012 <http://politica.elpais.com/politica/2012/02/09/actualidad/1328820937_252009.html>.

⁸⁵ International Federation for Human Rights, *Spain: The Bill on Universal Jurisdiction Must Be Rejected* (10 February 2014) <<http://www.fidh.org/en/europe/spain/14632-spain-the-bill-on-universal-jurisdiction-must-be-rejected>>.

⁸⁶ Jean Comaroff and John L Comaroff, *Law and Disorder in the Postcolony* (University of Chicago, 2006).

⁸⁷ Sonya Dowsett and Inmaculada Sanz, 'Spain Sets Economy Above Human Rights Says Pioneering Judge', *The Star* (online), 20 February 2014 <<http://www.thestar.com.my/News/World/2014/02/20/Spain-sets-economy-above-human-rights-says-pioneering-judge/>>.

⁸⁸ Paul Hamilos, 'Argentina Calls for Extradition of Francoists over Human Rights Abuses', *The Guardian* (online), 20 September 2013 <<http://www.theguardian.com/world/2013/sep/19/argentina-spain-franco-extraditions>>.

III CONCLUSION

Law is used during periods of political transition to regulate historical memory. The Law of Historical Memory 2007 in its name is explicit about that purpose. However, in addressing historical memory it reveals an important dialogue about Civil War memory with earlier memory laws — the Amnesty Law 1939 and the Amnesty Law 1977. Each of these laws was constituted by a narrative of violence, a statement of wrongs about who are the deserving victims, and an underpinning political consensus. Central in these violence narratives is the construction of the victim — the one who deserves recognition and reparations for injury or loss. These violence narratives are politically foundational and in moments of transition define legitimacy, membership and entitlement. Civil War memory has been so controversial and bitter precisely because Franco's victory meant the total defeat and elimination of the Republican project under Franco's National Movement. Socially and politically this amounted to the elimination, expulsion or exclusion of Republicans from Franco's New Spain in 1939. Moreover, because defeat is never really complete, despite the enthusiasm of power associated with victory, repression continued under the dictatorship as a mechanism to ensure victory was permanent. Those excluded were repressed and marginalised for most of the dictatorship.

Each of these memory laws sets out the official memory, criteria for inclusion and the political consensus. The construction of the victim changes according to the violence narrative. In the Amnesty Law 1939 the victory narrative constructs a political victim — those on the winning side who deserve recognition, reward, reparations and those on the losing side who are criminalised and socially and economically dispossessed. In the Amnesty Law 1977 the narrative of forgetting constructs a universal apolitical suffering victim as the basis for a broader reconciliation. In the Law of Historical Memory 2007 the narrative of remembering and reconciliation constructs a universal human rights victim. Each law seeks to regulate memory as the basis for political participation in the new political order. But the regulation of official memory is also part of the constitution of it through control over the production of knowledge. Control over public debate about the past and over the content of school curricula quarantine the past from those who have no direct memory of the Civil War and isolate those who do share familial knowledge about victimisation during the Civil War and dictatorship and who are silenced by marginalisation, trauma and insecurity. The Amnesty Law 1977, based on the pact of forgetting, is informed by a depoliticised subjectivity about the threat of disorder and a return to violence which produced public avoidance of Civil War memory. The Law of Historical Memory 2007 insists on an inclusive remembering as the basis for national reconciliation. These memory laws have constituted new Civil War memories. The Amnesty Law 1977 constructed Civil War memory as the opposite of the peace achieved under Franco's dictatorship.⁸⁹ The Law of Historical Memory 2007 legitimated a transitional justice culture in which the families of the disappeared forged a new collective identity and memory coalescing around legal claims about their right to know the fate of their family members. The Law of Historical Memory 2007 is a product of human rights learning from analogous situations in Chile and Argentina and the role of Spanish courts in conducting prosecutions for crimes against humanity under universal jurisdiction.

⁸⁹ See the fictitious conversation between two lawyers, the rightist Manuel Fraga Iribarnel and leftist Baltazar Garzón, on the benefits of peaceful transition and forgetting. Friedberg, above n 80, 829–40.

But the Amnesty Law 1939 and the Amnesty Law 1977 that have regulated Civil War memory have proved historically very resilient and difficult to overthrow. The political consensus underlying these Laws concealed an asymmetrical power clearly apparent in the benefit of impunity. What was revealed by Garzón's removal as investigating judge into crimes against humanity committed during the Franco regime was the lack of political consensus that still exists to challenge the Amnesty Law 1977. The Law of Historical Memory 2007, and the new rights of victims of the disappeared it creates, was not enough to nullify the Amnesty Law 1977. These legislated rights for families of the disappeared to exhume mostly unmarked gravesites in fact turned out to be difficult to realise in practice. The task of identifying gravesites and getting permission to excavate was often prevented, or greatly delayed, by bureaucratic processes and veto at the local community level.⁹⁰

Memory laws are the product of the emergence of a transitional justice culture based on the creation of *global abstract publics* and the ability to leverage global human rights to create new national rights for victims. However, what the struggle over Civil War memory reveals is that memory is socially and politically embedded. Contests over collective memory are constrained by official memory and the political consensus underpinning it. Amnesty laws as memory laws have proven remarkably resilient, precisely because they rest on political subjectivities produced by repression and violence and because to challenge them remains a political risk. We will have to wait to see whether the latest strategy of *going global* to realise human rights domestically by Argentine courts under universal jurisdiction investigating crimes against humanity during Franco's dictatorship will consolidate the new rights created in the Law of Historical Memory 2007.

⁹⁰ Natalie Maystorovich, *The Judicialisation of Social Movements for the Exhumation of Mass Graves in Spain: A Perspective on the Instrumentality of Law in Advancing the Interests of Social Exhumation* (Honours Thesis, University of Sydney, 2012).

WHAT ARE THE PILLARS OF TRANSITIONAL JUSTICE? THE UNITED NATIONS, CIVIL SOCIETY AND THE JUSTICE CASCADE IN BURUNDI

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Burundi has experienced cycles of political and genocidal violence for the past 40 years. Under the terms of the Arusha Peace and Reconciliation Agreement of 2000, the government was expected to establish a Truth and Reconciliation Commission followed by a Special Tribunal. The United Nations, meanwhile, has supported the creation of a forum of local community facilitators ('FONAREC') who are being trained to educate and inform local communities about the four pillars of transitional justice and the importance of popular participation in the TRC process. But what are these four pillars and who has defined them? This paper surveys some of the different theoretical frameworks and pillars of transitional justice proposed by scholars and practitioners. It questions the appropriateness of the UN framework of transitional justice being imposed in Burundi, with its limited perspective on accountability as prosecutions, and its failure to include reconciliation as a fundamental component. The paper challenges the domination of the 'justice cascade' of Western legal human rights discourse and practice in the field of transitional justice, with its tendency to transplant pre-existing models and frameworks, and calls instead for a genuine engagement with local communities in the co-creation of a contextualised approach to transitional justice.

I INTRODUCTION

As one of the poorest countries in the world, Burundi is struggling to recover from 40 years of political and genocidal violence, including a civil war during which approximately 300 000 people died and many more were wounded, internally displaced or became refugees. The Arusha Peace and Reconciliation Agreement of August 2000 established the terms for United Nations ('UN') peacekeeping and peacebuilding, including a transitional justice process to promote accountability as well as reconciliation. In this paper, I explore the UN approach to transitional

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justice, its theoretical and empirical foundations, and the extent to which it is fulfilling the promise of national consultations, civil society participation and local ownership.¹

The UN Secretary-General declared in his 2004 report on the *Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, that: ‘The most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out’.² Scholars and practitioners before and since have expressed concern about the exclusion of civil society views and the lack of focus on victims in the top-down nationally and internationally driven transitional justice industry.³ Criminal law processes have been singled out for particular criticism because of their lack of concern for the needs of victims, and their focus on the rights of the accused for a fair trial and the need to establish evidence according to narrow legal precepts. The importance of localisation and ‘transitional justice from below’ has been advocated by researchers drawing on theories of development and principles of legitimacy and sustainability, and I have argued previously for a rethinking of transitional justice to focus on a transformative approach applying the principles of participation, contextualisation, local ownership and capacity-building.⁴

In order to address these concerns in the context of legal trials, the concept of outreach has been added to the lexicon and practice of transitional justice, emphasising the importance of transparency and information dissemination to the local population. I have proposed the concept of ‘inreach’ to be added to the focus on outreach, to emphasise the role of information flow in the

¹ Civil society actors are considered to operate within a state in at least three ways that are relevant to transitional justice: 1) they can act as a ‘bulwark of freedom’ against an oppressive state; 2) they can act as an intermediary between the state and the market in ways that are either constructive (eg building social trust and civic capacities) or destructive (eg fostering revenge or resistance to democratic change); or 3) they can operate in the public sphere to support the functioning of a viable democratic government. Domestic civil society can thus play a role in improving the effectiveness of transitional justice by supporting or holding the government to account through democratic participation. Civil society can, of course, take on a ‘negative’ role and undermine the means and ends of transitional justice, but that is not the type of civil society participation advocated in this article. This article is also less concerned with the role of international civil society, although undoubtedly important in the field of transitional justice. However, it is concerned with domestic civil society that may need strengthening in the post-mass violence context. D Crocker, ‘Truth Commissions, Transitional Justice, and Civil Society’ in R I Rotberg and D Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press, 2000) 99, 109–114.

² Kofi Annan, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc S/2004/616 (24 August 2004) para 16.

³ See, eg, Crocker, above n 1, 99, 99–121; P Lundy and M McGovern, ‘The Role of Community in Participatory Transitional Justice’ in K McEvoy and L McGregor (eds), *Transitional Justice from Below* (Hart Publishing, 2008) 99, 99–120; Wendy Lambourne ‘Outreach, Inreach and Civil Society Participation in Transitional Justice’ in Nicola Palmer, Phil Clark and Danielle Granville (eds), *Critical Perspectives in Transitional Justice* (Intersentia, 2012) 235, 235–261.

⁴ Rosalind Shaw and Lars Waldorf with Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, 2010); Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing, 2008); Wendy Lambourne, ‘Transitional Justice and Peacebuilding After Mass Violence’ (2009) 3(1) *International Journal of Transitional Justice* 28–48.

other direction, from the people to the court or other transitional justice mechanism.⁵ The idea of ‘inreach’, or civil society participation in the design and implementation of transitional justice, is seen as important, rather than simply gathering civil society feedback on a transitional justice mechanism designed and implemented by the international community or national government.

In 2010, the UN issued a new report on transitional justice that included national consultations as its fifth key pillar, in addition to the four substantive key pillars of prosecutions, truth-telling, reparations and institutional reform.⁶ I argue in this paper that, despite the implication that the UN is therefore going to respond to the views of affected populations through ‘national consultations’, this has not been the case in practice. The UN’s emphasis on four predefined key pillars undermines the potential for considering local perspectives on transitional justice priorities. Its guiding principles result in further contradictions in practice and I argue that they therefore fail to effectively support the goals of local ownership and participation. The transitional justice options promoted by the UN continue to be limited to the standard mechanisms of courts and truth commissions, with an emphasis on prosecutions, reflecting the normative priorities of a practice that is grounded in international law and human rights discourse, rather than authentically engaging in meeting the needs of affected populations. Truth commissions are seen as an acceptable interim alternative to prosecutions because they can satisfy the ‘right to know’ (truth-seeking) and can also potentially address the ‘right to reparation’, but because they cannot provide the ‘right to justice’ (prosecutions) they are regarded as insufficient in themselves.⁷

The South African model of a Truth and Reconciliation Commission offering conditional amnesties, forgiveness and reconciliation, for example, has been rejected as inadequate, while more recent transitional justice processes have included both truth commissions and tribunals operating in tandem, such as in Sierra Leone.⁸ Local affected communities and national governments are not offered the opportunity to develop alternative mechanisms tailored to meet their particular goals and priorities, especially since the permanent International Criminal Court (‘ICC’) has come into being.⁹ The ICC has the most progressive and comprehensive approach to local ownership and participation, as reflected in its policy on outreach, but in practice this promise has not been fulfilled.¹⁰ Local affected populations are not directly represented in the decisions of the national government, the ICC Prosecutor or the UN Security Council to refer a

⁵ Wendy Lambourne, ‘Outreach, Inreach and Civil Society Participation in Transitional Justice’ in Nicola Palmer, Phil Clark and Danielle Granville (eds), *Critical Perspectives in Transitional Justice*, (Intersentia, 2012) 235, 235–261; Norman Henry Pentelovitch, ‘Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals’ (2008) 39(3) *Georgetown Journal of International Law*.

⁶ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, DPA/UNSG/2010-00904 (10 March 2010).

⁷ Swisspeace, ‘A Conceptual Framework for Dealing with the Past: Holism in Principle and Practice’ (Background Paper, Dealing with the Past, Swisspeace 2012).

⁸ William A Schabas and Shane Darcy (eds), *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (Kluwer Academic, 2004).

⁹ To be clear, I am not suggesting that local affected populations might not prioritise prosecutions, but rather that their multiple transitional justice needs are not being addressed by assuming that they do.

¹⁰ International Criminal Court, *Strategic Plan for Outreach of the International Criminal Court*, Doc No ICC-ASP/5/12 (29 September 2006); Mariana Goetz, ‘The International Criminal Court and its Relevance to Affected Communities’ in Nicholas Ward and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, 2008).

case or initiate investigations, nor have they been able to influence the design or conduct of the transitional justice process controlled by the ICC.

Whilst local traditional or informal approaches are being promoted by transitional justice scholars and some practitioners, the UN appears not to take such alternatives seriously. The ‘justice cascade’ prevails, with a sometimes grudging nod towards the truth commission alternative, with little recognition that other more creative options might prove to be more appropriate in different cultural and conflict contexts. For example, the purpose of truth recovery, as articulated in the UN’s guiding principles on transitional justice, appears to be limited to a factual/forensic truth whilst failing to recognise the more personal/narrative, social/dialogical and healing/restorative truths identified as also important by the South African Truth and Reconciliation Commission.¹¹

In this paper I use the Burundian experience as an example to illustrate how the UN’s approach to transitional justice, confined as it is to promoting one model with its four key pillars, has limited the opportunity for local civil society to develop its own culturally relevant approach to transitional justice.¹² At the same time, civil society work on trauma healing, reconciliation and peacebuilding at the micro-level in local communities is not recognised by the UN as contributing to transitional justice and peacebuilding at the macro-level. I conclude that the UN’s approach to transitional justice could be more effective in addressing impunity if it works more closely with existing local civil society networks in addition to national governments to develop a contextually relevant approach to transitional justice that goes beyond the imposition of a predefined set of key pillars.

Before exploring the UN’s approach to transitional justice in Burundi and the involvement of civil society, this paper will first review the context of the Burundian civil war and peace process. This will be followed by an analysis of different theories and models of transitional justice, with their alternative ‘key pillars’, including the model being developed by Burundian civil society as an adaptation of the UN model to the Burundian cultural and conflict context. The data for this analysis has been drawn from my research and interviews conducted during several visits to Burundi in 2012 and 2013 with members of local civil society in the capital, Bujumbura, and the rural town of Gitega, and my observations during a workshop on transitional justice which I ran for the Quaker Peace Network in Burundi in July 2013.¹³ I also spoke with staff of the UN mission’s Transitional Justice Unit, international donors, the Burundian government and international non-government organisations.

¹¹ Alex Boraine, ‘Defining Transitional Justice: Tolerance in the Search for Justice and Peace’ in A Boraine and S Valentine (eds), *Transitional Justice and Human Security* (International Center for Transitional Justice, 2006) 22, 22–37.

¹² Chandra Lekha Sriram, ‘Transitional Justice and the Liberal Peace’, in E Newman, R Paris and O P Richmond (eds), *New Perspectives on Liberal Peacebuilding* (United Nations University Press, 2009) 123.

¹³ I visited Burundi in May, June and December 2012 and in July 2013. Local and international NGOs consulted included Trauma Healing and Reconciliation Services (THARS), Healing and Rebuilding Our Communities (HROC), MiPAREC and Impunity Watch, as well as FONAREC community facilitators in Bujumbura and Gitega. The workshop I conducted was held at the THARS Training Center in Gitega from 9–11 July 2013.

II ETHNIC TENSIONS, GENOCIDE AND CIVIL WAR

Burundi, together with its more well-known neighbour, Rwanda, was colonised by Germany as part of German East Africa in 1890, and following World War I, it became a League of Nations mandate, and later, following World War II, a trust territory of Belgium. The kingship structure and geographical boundaries of Burundi remained relatively unchanged since the mid-19th century, with a very high population density in a country less than the size of Belgium.¹⁴ In pre-colonial Burundi, rank and privilege were determined largely by social status rather than ethnic identity as such, although these tended to coincide,¹⁵ and there were no wars or conflicts between the majority Hutu and minority Tutsi groups.¹⁶ The political system was relatively stable, and the Hutu/Tutsi divide remained more fluid in Burundi even under Belgian colonial rule, compared with neighbouring Rwanda, with the result that post-independence in 1962 an ethnically-mixed government emerged in Burundi.¹⁷ However, political stability quickly eroded over the next four years, with an increase in Hutu/Tutsi differences and a number of coups d'état, resulting in Tutsi military rule from 1966 until the beginning of the civil war in 1993.¹⁸

Like Rwanda, Burundi has experienced genocide, but the history of power dynamics, political coups and violence since independence has been more volatile and more politically and ethnically complex. In 1972, approximately 200 000 Hutu were massacred by the Tutsi army in response to a violent Hutu uprising against Tutsi rule, and up to an estimated 300 000 Hutu refugees fled to neighbouring countries.¹⁹ It was after the genocide of 1972 that the Hutu/Tutsi divide became more widely and deeply entrenched. Hutu were thereafter almost totally excluded from political and military leadership, education and business,²⁰ and the memories continued to haunt the Hutu masses, creating a collective trauma driven by fear of another 'holocaust'.²¹ In 1988, a small violent uprising, incited by extremists afraid of impending liberal reforms, was followed by a localised but still vicious revenge massacre by the Tutsi army, which added further fuel to Hutu fears.²²

Efforts towards democratisation resulted in a brief period of Hutu-led government, which was abruptly ended when the President was killed in a coup d'état in 1993.²³ An estimated 50 000 Tutsi lost their lives in revenge killings, and a further 700 000 Hutu refugees fled in fear of reprisal massacres.²⁴ The civil war had begun.

¹⁴ Nigel Watt, *Burundi: Biography of a Small African Country* (Hurst & Company, 2008) 23–24.

¹⁵ René Lemarchand, *Burundi: Ethnic Conflict and Genocide* (Woodrow Wilson Center Press, 1996) 10.

¹⁶ Peter Uvin, *Life After Violence: A People's Story of Burundi* (Zed Books, 2009) 7.

¹⁷ Lemarchand, above n 15, 1.

¹⁸ Uvin, above n 16, 9. For an explanation of how and why ethnic tensions rose during this period, see also Lemarchand, above n 15, 58–75.

¹⁹ Watt, above n 14, 34.

²⁰ Uvin, above n 16, 10.

²¹ Lemarchand, above n 15.

²² Watt, above n 14, 41.

²³ Uvin, above n 16, 11–14.

²⁴ Watt, above n 14, 48.

III PEACE PROCESS AND TRANSITIONAL JUSTICE

Violence had become a political strategy in Burundi, with coups a regular occurrence when any hint of political stability seemed on the horizon. Factional splits in the Hutu rebel movement resulted in a number of rebel groups emerging to fight the Tutsi-dominated security forces and the local Tutsi militia, whilst divisions amongst the Tutsi elite also fuelled the violent approach to political power.²⁵ The internationally mediated Arusha Peace and Reconciliation Agreement ('Arusha Agreement') was signed on 28 August 2000, and the UN provided a peacekeeping mission which supervised the election of a power-sharing government in 2005.²⁶ However, the fighting continued until December 2008 when the last of the rebel groups, Palipehutu-FNL, finally agreed to disarm, but only after reassurances that they would not be arrested and prosecuted.²⁷ Other transitional justice issues that were discussed during the final peace negotiations included the release of combatants and prisoners of war, integration of former combatants into the security forces, and the rebels' preference for a 'Truth, Forgiveness and Reconciliation Commission'.²⁸

The 2000 Arusha Agreement had already provided a framework for transitional justice in Burundi, including the establishment of a Truth and Reconciliation Commission ('*Commission de la Verité et Réconciliation*', or 'CVR') in order to investigate the crimes committed in Burundi, promote reconciliation, and clarify and rewrite the country's history.²⁹ It also stipulated that the transitional government would request the UN Security Council to set up an international judicial commission of inquiry, which would be followed by a request for an international criminal tribunal for Burundi should evidence be found that acts of genocide, crimes against humanity or war crimes had been committed.³⁰ An interim agreement to establish a special chamber within the Burundian court system was replaced by the proposal for a special tribunal, but negotiations between the UN and the Burundian government to establish a judicial mechanism floundered based on disagreements about the relationship between the two proposed bodies.³¹

A CVR and National Consultations

Legislation for the establishment of the CVR was adopted in December 2004, but it was not implemented. Further progress was delayed until the government agreed to national consultations

²⁵ Lemarchand, above n 15; David Taylor, 'Truth under the Avocado Trees. Local Needs and Burundi's TRC: Whither the Truth?' (2013) 7 *Journal of East African Studies* 450.

²⁶ The UN Peacebuilding Commission and Fund have also supported the Burundian government with achieving poverty reduction and other peacebuilding priorities. David John Penklis, *Implications of the 1993 to 2008 Burundi Peace Process for United Nations Peacekeeping Operations*, (unpublished PhD Thesis, 2011, University of Sydney).

²⁷ Stef Vandeginste, 'Burundi's Truth and Reconciliation Commission: How to Shed Light on the Past While Standing in the Dark Shadow of Politics' (2012) 6 *International Journal of Transitional Justice* 355.

²⁸ Ibid 3.

²⁹ Taylor, 'Truth Under the Avocado Trees', above n 25, 4.

³⁰ Vandeginste, 'How to Shed Light on the Past', above n 27, 2.

³¹ 'The Transitional Justice Process in Burundi' (Briefing Paper, International Centre For Transitional Justice, 18 April 2011); Taylor, 'Truth Under the Avocado Trees', above n 25, 3; Vandeginste, 'How to Shed Light on the Past', above n 27, 2.

on transitional justice following the recommendation of the Kalomoh report arising from the UN assessment mission that was submitted in March 2005.³² The national consultations in Burundi arose because of the insistence of the United Nations, and the terms of the process were set out in an agreement signed in November 2007 between the Burundian government, civil society and the UN.³³ Consistent with the UN's subsequently published guiding principles, these terms included an assurance that the consultations would be independent, balanced and inclusive of women and different categories of victims.³⁴

However, the consultations did not give respondents the opportunity to express their preference on the type of transitional justice mechanism, but instead asked about specific aspects of each of the four pillars predefined as constituting a truth and reconciliation commission in order to seek the truth and a special tribunal to achieve prosecutions, along with reparations and institutional reform.³⁵ The consultations also asked about the period of inquiry to be covered by transitional justice, and about what Burundians thought would assist in building reconciliation and a sustainable peace. Other than these two more open questions, it is clear that the UN has been able to impose not only its predefined four pillars, but also the types of transitional justice mechanisms available to Burundians.

The results of the national consultations released in 2010 have been interpreted as revealing majority support for the establishment of a Truth and Reconciliation Commission with a mixed national and international composition and a mandate to investigate the full range of crimes from independence in 1962 until the end of the civil war in 2008, as well as provision for reparations.³⁶ However, the proposal for a mixed truth commission was not pursued. Instead, after the 2010 elections, the Burundian government established a technical committee composed of seven members appointed by the government, which released its report (known as the 'Kavakure report') on 18 October 2011. The Burundian President announced that a Truth and Reconciliation Commission would be launched by the 50th anniversary of independence on 1 July 2012,³⁷ and several draft versions of a law with guiding principles for the proposed CVR were presented to Parliament. However, it took until May 2014 before the law to establish the Truth and Reconciliation Commission was finally passed and promulgated by the President.³⁸

³² Stef Vandeginste, 'Transitional Justice for Burundi: A Long and Winding Road' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Springer-Verlag, 2009) 393, 393–422.

³³ 'The Transitional Justice Process in Burundi' (Briefing Paper, International Centre For Transitional Justice, 18 April 2011). The consultations were funded by the UN Peacebuilding Fund.

³⁴ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, DPA/UNSG/2010-00904 (10 March 2010); 'The Transitional Justice Process in Burundi' (Briefing Paper, International Centre For Transitional Justice, 18 April 2011).

³⁵ *Rapport des Consultations Nationales sur la mise en place des Mechanismes de Justice de Transition au Burundi* (Government of Burundi and United Nations, 20 April 2010).

³⁶ Mathieu Boloquy, Selim Mawad and David Taylor, 'Victim's Perspectives on the Independence of the TRC' (Newsletter, Issue No 2, Impunity Watch, February 2013); *Rapport des Consultations Nationales sur la mise en place des Mechanismes de Justice de Transition au Burundi* (Government of Burundi and United Nations, 20 April 2010).

³⁷ Vandeginste, 'How to Shed Light on the Past', above n 27, 2.

³⁸ For an analysis of how the Burundian government has been appearing to comply with international obligations in relation to transitional justice whilst failing to genuinely commit to their implementation, see David Taylor, 'We Have no Influence: International Discourse and the Instrumentalisation of Transitional Justice in Burundi' (2013) 2(3) *Stability: International Journal of Security and Development* 1, 1–10.

In July 2013, when I was in Burundi, expectations were high that the Parliament would pass a third draft of the legislation in its current sitting, but it failed to do so. Notably, this draft contained some significant amendments from the second draft presented in November 2012, including removal of any reference to consultations prior to the appointment of the CVR commissioners. This and other changes in the draft law signalled the government's intention to retain political control over the mandate and functioning of the CVR, going against most of the advice of the UN and preferences of civil society.

Whilst the Burundian government asserted its control over the transitional justice process and continued to delay creation of the CVR, the UN has maintained a mandate in its political missions to support transitional justice, most recently the UN Office in Burundi ('BNUB') established in 2010, which includes a Transitional Justice Unit ('TJU').³⁹ Impotent to affect the Burundian government's policies and facing the threat of expulsion from the country, the TJU was instead tasked with supporting civil society engagement in transitional justice in addition to its existing project on witness protection preparing for the eventual creation of the CVR. However, the interviews I conducted with representatives of non-government organisations in Burundi in 2012 and 2013 revealed disappointment with the UN's approach: they reported a lack of support for transitional justice-related programs in local communities from the BNUB/TJU because of constraints in the type of funding available. At the same time, the TJU, with funding provided by BNUB, has created the FONAREC/JT ('*Forum National des Relais Communautaire en Justice de Transition*', or 'Forum of Community Facilitators in Transitional Justice'), which is discussed later in this article.

B *GRJT and Civil Society*

Meanwhile, local Burundian and international non-government organisations, Impunity Watch and Global Rights, formed the Reflection Group on Transitional Justice ('*Groupe de Réflexion sur la Justice Transitionnelle*' or 'GRJT') in 2006 to enable information exchange and strengthen of civil society involvement in the transitional justice process. Along with the UN and other local civil society groups, the GRJT commented on the Kavakure report and its members have made submissions to the government regarding subsequent versions of the draft law for the establishment of the CVR.⁴⁰ These comments have included criticisms that the draft law failed to comply with international standards and did not reflect the findings of the national consultations.

The third draft of the law, which was presented to Parliament in December 2012, included amendments that provided for pardon in exchange for confessions (conditional amnesty), and gave the Burundian government the sole authority to nominate and select the commissioners

³⁹ UN Security Council resolution 2137 of 13 February 2014 extends the mandate of BNUB to the end of 2014 and includes the following in relation to transitional justice: 15. *Calls upon* the Government of Burundi to work with international partners and BNUB for the establishment of transitional justice mechanisms, including a credible and consensual Truth and Reconciliation Commission to help foster an effective reconciliation of all Burundians and durable peace in Burundi, in accordance with the results of the work of the Technical Committee, the 2009 national consultations, Security Council resolution 1606 (2005) as well as the Arusha agreement of 28 August 2000.

⁴⁰ See Boloquy, Mawad and Taylor, above n 36; Taylor, 'Truth Under the Avocado Trees', above n 25 for an analysis of the draft law and the potential for the proposed TRC to meet the needs of the local population.

instead of opening the process to public participation.⁴¹ This development was disturbing but not surprising given that the government comprises a number of former rebel leaders who could be accused of genocide, war crimes and crimes against humanity through the CVR, and who thus have a vested interest in maximising their control of the Commission.⁴² By contrast, 53 per cent of respondents in the national consultations rejected political involvement in the appointment of the commissioners, fuelled by mistrust of their political leaders, and 77 per cent preferred to see a hybrid commission comprising both foreign and Burundian commissioners as a means to counter political influence and potential corruption.⁴³ Approximately 88 per cent of respondents indicated that civil society should be involved in selecting the commissioners. An overwhelming majority (93 per cent) of respondents believed that the commissioners should come from civil society while 73 per cent thought they should come from the government.⁴⁴

It is therefore a challenge for civil society in Burundi to have a meaningful say in the proposed CVR, despite the national consultations and UN presence. Essentially, the design and implementation of the CVR and any other national transitional justice process is in the hands of the Burundian government, which is unlikely to support a robust investigation through a truth commission, far less prosecutions through the establishment of a special tribunal.

Despite the continuing presence of BNUB, the influence of the UN over transitional justice in Burundi has gradually reduced since the release of the Kalomoh report on the UN assessment mission and passing of UN Security Council Resolution 1606 in 2005 endorsing the report's recommendations,⁴⁵ with the last flurry of impact appearing to be the conduct of national consultations in 2009 and release of the ensuing report in 2010. Local and international civil society actors in Burundi are asking why the UN did not do more to ensure that the CVR was established in a timely fashion, while the victims and perpetrators going back to 1962 are still alive, and furthermore, why the government has been allowed to ignore the results of the national consultations in terms of the proposed CVR mandate.⁴⁶

Local civil society actors are also questioning their own lack of influence over the transitional justice process, despite evidence that in other areas civil society has been successful in influencing government policy especially when it engages in media campaigns.⁴⁷ Vandeginste maintains that 'societal pressure from below has not been very significant', at least in terms of its impact on government decision-making in relation to transitional justice, despite extensive civil society lobbying efforts through the GRJT.⁴⁸ In addition to the national consultations, several international and local civil society initiatives have reported on research revealing further insights into the needs, expectations and priorities of victims and others in the Burundian

⁴¹ Boloquy, Mawad and Taylor, above n 36.

⁴² Taylor, 'We Have No Influence', above n 38, 3.

⁴³ Boloquy, Mawad and Taylor, above n 36.

⁴⁴ *Rapport des Consultations Nationales sur la mise en place des Mechanismes de Justice de Transition au Burundi* (Government of Burundi and United Nations, 20 April 2010).

⁴⁵ Kofi Annan, *Letter Dated 11 October 2009 From the Secretary General to the President of the Security Council*, UN Doc S/2005/158 (11 March 2005); SC Res 1606, UN SCOR, 5207th Mtg, UN Doc S/RES/1606 (20 June 2005).

⁴⁶ Interviews with local and international NGO representatives in Bujumbura, December 2012 and July 2013. For an analysis of the UN role, see also Taylor, 'We Have No Influence', above n 38.

⁴⁷ Interview with representative of local civil society media organisation, Bujumbura, July 2013.

⁴⁸ Vandeginste, 'Burundi's Truth and Reconciliation Commission', above n 27, 8.

population.⁴⁹ As with the national consultations, the government appears to be ignoring these efforts at civil society participation in the design and implementation of transitional justice processes in Burundi.

IV FONAREC AND THE FOUR PILLARS OF TRANSITIONAL JUSTICE

The UN, through FONAREC/JT, has invested significant resources in training community facilitators in its model of transitional justice, rather than using the opportunity to extend consultations to gather information in order to contribute to the design of transitional justice processes and a model more appropriate for the Burundian context. The FONAREC ‘Guide for Community Facilitators during Transitional Justice’ is clear that it is ‘an information document rather than a consultation of the population’ as ‘that consultation had already been carried out during the national consultation’.⁵⁰ Crucially, the FONAREC guide replaces the UN’s fifth pillar of national consultations with the promotion of ‘popular participation’, with the aim of training community facilitators at all levels of Burundian society throughout the country. The UN is apparently treating national consultation as a one-off event, whilst restricting its ongoing commitment to local participation to information provision and sensitisation rather than continuing to engage Burundian civil society in the design and implementation of transitional justice. Whilst empowerment with information is important and the FONAREC process is contributing to some kind of capacity-building, it is insufficient to promote local ownership and better address the needs and priorities of the affected population.

The FONAREC/JT training for community facilitators is firmly grounded in the four pillars of transitional justice from the UN Secretary General’s 2010 Guidance Note.⁵¹ As such, it focuses on prosecutions rather than the broader concept of accountability, and it does not include reconciliation or healing except as a subset of reparations, along with memorialisation. Meanwhile, local Burundian NGO Trauma Healing and Reconciliation Services (‘THARS’), has produced its own brochure about transitional justice. The content is also based on the UN’s four pillars, but includes healing along with reparations as one of the ‘pillars’, to match its priorities in its work with local communities. It adds sections on reconciliation and forgiveness, again consistent with its perception of priorities. THARS has conducted a survey on Burundian attitudes towards transitional justice, as well as experiences of trauma, and it has been pursuing a program relating to transitional justice and trauma sensitisation amongst rural communities.

The FONAREC/JT community facilitators were selected from local human rights NGOs and other prominent individuals in civil society who were identified, elected by the community and provided with training. The community facilitators were identified and selected on the basis of four criteria in order to gain the confidence and trust of all the population: firstly, to be a member of a civil society organisation, faith-based organisation, or a community leader recognised for his (or her) engagement in service to the community; secondly, to be known in the community as a

⁴⁹ Boloquy, Mawad and Taylor, above n 36; Taylor, ‘Truth Under the Avocado Trees’, above n 25.

⁵⁰ Forum National des Relais Communautaires pour la Justice de Transition (FONAREC/JT), *Le Guide du Relais Communautaire en Justice de Transition* (OHCHR September 2012).

⁵¹ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, DPA/UNSG/2010-00904 (10 March 2010).

person of integrity with irreproachable moral qualities; thirdly, not to belong to the executive bodies of a political party or a member of an influential political party; and fourthly, not suspected of having committed crimes in the past crises. Ethnic and gender balance were also important criteria in the selection process.⁵²

In my discussions with THARS in late 2012, I discovered that they were unaware of the existence of FONAREC/JT until I, an international researcher, introduced them to the local FONAREC community facilitator who had been trained by the UN TJU in transitional justice. My research also suggested that other NGO members of the GRJT were not included in the outreach efforts of the UN to establish a network of community facilitators throughout Burundi. I have not been able to ascertain if this was a deliberate policy of the UN TJU to bypass civil society members already active in transitional justice for training as community facilitators, but it does seem strange that it appears they were not consulted. On the other hand, it could reflect the widely acknowledged reluctance of civil society actors in Burundi to communicate, cooperate and coordinate their activities, whether due to alleged cultural predispositions or simply the inevitable result of the need to compete for funds in the NGO sector.

The FONAREC guide lists under each pillar ‘key messages to memorise’. This approach reflects an extremely prescriptive attitude towards training, which confirms the UN and international experts as the source of knowledge about transitional justice. This has been introduced as an alien concept unrelated to existing Burundian concepts and processes, and fails to foster any meaningful sense of local ownership or participation in the transitional justice process. The guide maintains that ‘since transitional justice is something new which is not known by the Burundian population, FONAREC/JT deems it necessary to organise training, information, sensitisation and social mobilisation activities in order to build the capacities of the Burundian population so that it can participate in that process’.⁵³

The FONAREC community facilitators have been empowered with information to help them ‘to better understand the basic notions related to transitional justice’,⁵⁴ but it seems they have not been invited to contribute their own ideas about transitional justice nor gather the opinions of others in local communities throughout Burundi. The guide aims to enable the community facilitators to ‘fulfil their role by providing clear, accurate and precise pieces of information’.⁵⁵ Admittedly, elicitive approaches to training and inclusion of inreach as part of this outreach exercise would require a greater investment of time and facilitation skills, as well as analysis, communication and application. However, I argue that such an investment could be worthwhile if it promotes capacity-building and local initiatives to foster ongoing involvement in transitional justice and peacebuilding, whatever that might look like. It could also do more to foster a civil society empowered to influence the national government in its policies and practice.

This is indeed the outcome that I have witnessed unfolding as a result of my small scale, individual effort to run one training workshop in a more elicitive style with 20 Burundian Quaker

⁵² Forum National des Relais Communautaires pour la Justice de Transition (FONAREC/JT), *Le Guide du Relais Communautaire en Justice de Transition* (OHCHR September 2012) 9–10.

⁵³ Ibid 5.

⁵⁴ Ibid.

⁵⁵ Ibid.

community leaders.⁵⁶ Not only are they developing their own locally contextualised model of transitional justice, but they are also taking aspects of this model into their own work, including advocacy through the GRJT, endeavouring to play a more significant role in influencing government plans for the CVR and other aspects of transitional justice.

V TRAUMA HEALING AND THE TRUTH AND RECONCILIATION COMMISSION

In addition to involvement in the GRJT, civil society actors in Burundi have focused on preparing the local population for the planned CVR, including psychosocial sensitisation and addressing the legacies of psychological trauma. It was evident that, while a peace agreement had been reached and armed conflict had ended, Burundians faced many peacebuilding challenges in the context of extreme poverty and political indifference at the national level, as well as the psychological scars and social breakdown resulting from 15 years of civil war and mass population displacements. Despite intensive involvement of the UN in peacekeeping and peacebuilding, the focus on political and economic development has failed to address the psychosocial impacts of genocide and cycles of trauma on individual and community well-being and ability to engage constructively across the ethnic and political divide.

At the macro-level of UN-led peacebuilding and transitional justice, limited attention is paid to the role of trauma healing and psychosocial services.⁵⁷ Processes of healing, forgiveness and reconciliation are associated with personal, spiritual transformation, which is rarely considered appropriate to include in the political or legal spheres of transitional justice at national or international levels. Despite being a priority of the South African TRC, forgiveness, healing and reconciliation have not featured prominently in the goals of other truth commissions, and even those which were modelled on the South African example (such as Liberia's TRC) have not followed such a path so explicitly.⁵⁸

At the micro-level, however, faith-based civil society actors recognise the critical role of individual and collective healing for transitional justice and peacebuilding. Especially in African contexts such as Burundi, where religion and spirituality play a prominent role in individual beliefs and community life, healing and reconciliation are identified as priorities. THARS, for example, has focused its work on healing linked with capacity-building in order to foster peace and reconciliation in local communities, and has connected this work with the national and international transitional justice and peacebuilding agenda. Such localised approaches to reconciliation and community development based on individual and collective healing can contribute to the prevention of further violence and a more sustainable peace through an experience of transformation that goes beyond the traditional confines of transitional justice and

⁵⁶ The three-day workshop 'Transitional Justice: Theory and Practice' was organised by the Quaker Peace Network ('QPN') Burundi in conjunction with Trauma Healing and Reconciliation Services ('THARS') and conducted by Dr Wendy Lambourne, Centre for Peace and Conflict Studies, University of Sydney. It was held at the THARS Training Centre in Gitega, Burundi, on 9–11 July 2013. Twenty leaders of Quaker-based civil society organisations (CSOs) in Burundi participated in the workshop.

⁵⁷ Wendy Lambourne and Lydia Wanja Gitau, 'Psychosocial Interventions, Peacebuilding and Development in Rwanda' (2014) 8(3) *Journal of Peacebuilding and Development* 23, 23–36.

⁵⁸ James Tonny Dhizaala, *The Liberian Truth and Reconciliation Commission: Contribution to Peace and Reconciliation* (unpublished PhD thesis, University of Sydney, 2013).

peacebuilding in the political, economic and legal spheres. These understandings and priorities are reflected in the local model of transitional justice being developed by the Quaker Peace Network in Burundi, which adapts and challenges the UN model and its definition of the key pillars of transitional justice.

The work of THARS in Burundi is also aiming to learn from past experiences of transitional justice processes in other countries (such as the South African TRC), where there has been minimal recognition of trauma, its impact on participation in transitional justice, and the impact of transitional justice on trauma. By focusing on the importance of psychosocial accompaniment, THARS is seeking to reduce the chances of retraumatisation as a result of the CVR, and to combine this approach with sensitisation, trauma healing and reconciliation programs in local communities. THARS has produced a brochure and a training program on transitional justice which include an emphasis on healing, forgiveness and reconciliation in addition to the four pillars of transitional justice identified by the UN and promulgated by FONAREC/JT. THARS is also playing a leading role as part of the Quaker Peace Network Burundi in developing a localised and more contextually sensitive model of transitional justice.

VI WHAT ARE THE PILLARS OF TRANSITIONAL JUSTICE?

The four pillars of transitional justice as defined by the United Nations and taught to civil society in Burundi through the FONAREC/JT program comprise: prosecution initiatives, truth-seeking processes, reparations programs and institutional reform.⁵⁹ This training in a fixed model of four pillars contradicts the UN's third guiding principle which 'eschews one-size-fits all formulas and the imposition of foreign models' and calls for the 'identification, support for and empowerment of domestic reform constituencies to develop and implement their own transitional justice and rule of law agenda'. It seems, however, that the UN through the BNUB TJU and FONAREC program has not pursued this approach, as the process of national consultations had already been carried out.

My interviews with FONAREC local facilitators in Bujumbura and Gitega revealed that training had been provided by UN 'experts' on transitional justice and that they had not provided any information about alternative models. Instead, they appeared to be following a limited concept of outreach as the dissemination of information rather than gathering of opinions or solicitation of input, in direct contradiction to the fifth pillar of national consultations calling for 'meaningful public participation', 'allowing states to craft an appropriate context-specific transitional justice programme' and helping 'victims and other members of civil society to develop local ownership of the resulting programme'.⁶⁰

Other models of transitional justice illustrate the lack of consensus over what constitutes the key pillars and how they should be defined, and in particular, place more emphasis on accountability rather than the more narrow focus on prosecutions. They often include reconciliation or

⁵⁹ As previously mentioned, the UN Secretary-General's Guidance Note included national consultations as a fifth pillar, while the FONAREC guide instead added reference to the importance of popular participation.

⁶⁰ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, DPA/UNSG/2010-00904 (10 March 2010).

relationship transformation as an additional pillar (see Table 1). Stephan Parmentier, for example, proposed Truth, Accountability, Reparations and Reconciliation (‘TARR’) as the four key components of his model of transitional justice.⁶¹ Based on his experience with the South African TRC, Alex Boraine proposed a model of transitional justice that also includes accountability rather than prosecutions, and reconciliation rather than national consultations as the fifth pillar.⁶² Boraine also emphasises the importance of including the four types of truth as defined by the South African TRC: factual/forensic, personal/narrative, social/dialogical and healing/restorative truth.⁶³

TABLE 1
KEY PILLARS OF TRANSITIONAL JUSTICE

UN/FONAREC	Parmentier	Boraine	Lambourne	Quaker Peace Network
Prosecutions	Accountability	Accountability	Accountability	Accountability
Truth-seeking	Truth	Truth recovery	Truth: knowledge and acknowledgement	Truth daring
Reparations	Reparations	Reparations	Socioeconomic justice	
	Reconciliation	Reconciliation	Relationship transformation	Positive relationships
Institutional reform		Institutional reform	Structural transformation Political justice	Leadership development
Popular participation			Local ownership and capacity-building	Community empowerment

In my model I propose the concept of transformative justice which comprises four types of justice as goals and a set of principles which I argue are important to accompany the design and implementation of transitional justice.⁶⁴ I include accountability, comprising both restorative and

⁶¹ Stephan Parmentier, ‘Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court in Dealing with Political Crimes’ (2003) 41(1) *International Annals of Criminology* 203, 203–223.

⁶² Boraine, above n 11, 26–31.

⁶³ Ibid 28–9.

⁶⁴ Wendy Lambourne, ‘Transformative Justice, Reconciliation and Peacebuilding’ in Susanne Buckley Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge, 2014) 19, 19–39.

retributive justice, rather than just prosecutions; knowledge and acknowledgement as a category including the four types of truth, as a form of psychosocial justice; socioeconomic justice for the future rather than just reparations for the past; political justice and structural transformation (instead of institutional reform); relationship transformation which incorporates reconciliation; as well as procedural, symbolic and ritual aspects and principles of local ownership and capacity building. I emphasise the importance of a holistic, comprehensive and integrated approach to transitional justice, which addresses root causes and aims to promote a transformative peace. My model was developed as a result of field research interviews conducted in four countries recovering after mass violence — an inductive approach combined with an application of peacebuilding and conflict transformation theories. By contrast, the assumption that prosecutions and rebuilding the rule of law are essential components of transitional justice reflects a human rights approach, which can sometimes be antithetical to peacebuilding. I therefore argue that the assumptions of the UN legalistic human rights approach deserve interrogation and potential adaptation rather than automatic application without regard for local context.⁶⁵

The UN's approach to supporting civil society in Burundi has failed to take into account the contested nature of transitional justice, and the manner in which it has imposed its model of key pillars runs counter to its own guidelines and is inconsistent with recent scholarship advocating the importance of local ownership, civil society participation and inreach as well as outreach. National consultations do not equal local participation, and training Burundians in the UN model of transitional justice is not the most effective strategy for fostering local ownership.

A restricted definition of outreach is also reflected in the UN's Guidance Note: 'the impact and sustainability of transitional justice will depend significantly on ensuring that they are understood and communicated coherently during and after their implementation'.⁶⁶ There is no mention here of gathering feedback or input to improve the functioning of the transitional justice mechanisms, far less adapting them to address the needs and priorities of affected communities as advocated by scholarship in the field.⁶⁷ On the other hand, the FONAREC guide does suggest that community facilitators were expected to collect views and hear concerns of victims in relation to the transitional justice process.⁶⁸ So it seems the UN's intention was to support inreach as well as outreach, but at the same time it seems to be promoting the active participation of the population in a rather controlling manner: participation in a way that accepts and supports the CVR or whatever other mechanisms are established. Similarly, the idea of inreach is included in the mandate of the International Criminal Court, but this aspect of outreach has not received much attention in the ICC's work to date and, as mentioned earlier, the local affected population has no say in whether or not the ICC is involved.⁶⁹

⁶⁵ Sriram, above n 12, 121–3. I am not arguing that local approaches to transitional justice might not also favour prosecutions and the rule of law, but rather that these priorities should not be assumed and imposed by external actors without regard for their impact on peacebuilding.

⁶⁶ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, DPA/UNSG/2010-00904 (10 March 2010).

⁶⁷ See, for example Crocker, above n 1, 99–121; Lundy and McGovern, above n 3, 99–120; Lambourne, above n 3, 235–261.

⁶⁸ Forum National des Relais Communautaires pour la Justice de Transition (FONAREC/JT), *Le Guide du Relais Communautaire en Justice de Transition* (OHCHR September 2012).

⁶⁹ Lambourne, above n 3, 235–261.

As discussed, when the UN TJU in Burundi pursued its engagement with local communities, it did so by training civil society leaders in its predefined key pillars of transitional justice, thereby imposing a restricted view of what transitional justice could entail. By contrast, in the training workshop I conducted in July 2013 in Burundi, I sought to enable a Habermasian dialogical process of engagement, by facilitating a mutual learning experience from which local Burundians emerged with the beginnings of their own hybrid model of transitional justice with five pillars adapted to their specific conflict and cultural circumstances and priorities (see Table 1). The group subsequently took the initiative to meet again in December 2013 to further consult with others inside and outside the Quaker Peace Network in order to develop the model. QPN Burundi was planning to publish the model for the Burundian community with a view to promoting a more effective approach to transitional justice consistent with supporting national cohesion, peace and development in their country.

All of this activity by local civil society, the UN and other international non-government actors has been occurring in the vacuum left by the Burundian government's lack of action in setting up the proposed Truth and Reconciliation Commission. Assumptions within the UN framework about national consultations as being equivalent to local consultations are clearly not substantiated in Burundi. The national government has ignored the recommendations arising from the national consultations, as it made changes to the draft legislation for establishing the CVR, so the standard mechanism promoted by the UN and agreed to by the government has been looking less and less like something that is addressing the needs and priorities of the local affected communities. Most importantly, the idea of promoting dialogue, participation and local ownership is not being fulfilled, except in the sense that the national government is maintaining a tight control over ownership of the internationally mandated, national transitional justice process.

It seems that respect for state sovereignty leaves the UN no choice but to regard national ownership as local ownership, which goes some way to explaining the tensions evident in the UN Guidance Note. This respect for state sovereignty creates a significant gap in principles of democratisation and participation when the government is not open to the views of civil society and local communities. The UN guiding principle that calls for the 'centrality of victims in the design and implementation of transitional justice processes and mechanisms' is reduced to empty rhetoric if the government is not responsive.⁷⁰

As argued by Kora Andrieu, there is a danger in the international community's 'technocratic, one-size-fits-all approach' to transitional justice in the context of fragile, newly created post-conflict governments where excessive legalism or focus on supporting national processes can seem 'distant and remote to those who actually need it'.⁷¹ This was the criticism levelled against the early ad hoc international and hybrid tribunals set up by the UN, but has continued to be a factor in the era of the ICC despite research, policies and mandates advocating a more localised approach. The fact that Burundi has until now had no tribunal or truth commission is a function of the national ownership afforded by the UN, rather than the expressed wishes of the population for both accountability and truth-telling.

⁷⁰ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, DPA/UNSG/2010-00904 (10 March 2010).

⁷¹ Kora Andrieu, 'Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm' (2010) 41(5) *Security Dialogue* 537, 537–558.

The Burundi experience highlights the tensions inherent in relationships between local communities, national governments and international organisations in the design and implementation of peacebuilding, as well as in transitional justice where the liberal democratic model is being imposed without consideration for local cultural alternatives. On the other hand, accountability or prosecutions should not be denied merely on the grounds of rejecting Western institutions of international law; as my research and that of others has revealed, retributive justice is a legitimate demand of victims and others who have experienced mass atrocity crimes.⁷²

VII CONCLUSION: WHOSE JUSTICE?

Civil Society is the key. It pulls the divergent time scales and dimensions of political and economic reform together. It is the ground on which both need to be anchored in order not to be blown away. The hour of the lawyer and the hour of the politician mean little without the hour of the citizen.⁷³

Based on an analysis of the transitional justice process in Burundi, this article has highlighted the challenges and tensions involved in determining whose justice will be addressed. The national consultations supported by the UN did not provide real choice or flexibility in how transitional justice might be designed or implemented. Despite the UN's intention to prioritise victims' needs and civil society participation, the implementation of transitional justice remains firmly in the hands of the Burundian government which is comprised of former rebel leaders who are understandably resistant to being held accountable for the past. At the same time, local, culturally contextualised and conflict sensitive approaches to transitional justice are being developed by civil society independent of the UN and national government.

The UN's guiding principles for transitional justice implementation clearly define its primary interest in strengthening national capacity and promoting compliance with international norms and standards, which in practice can stand in tension with its aim to ensure the centrality of victims and expressed commitment to local ownership or participation. As argued by Richmond in the context of peacebuilding more generally, 'international actors should make sure that their support of any formal institutions, whether state or peace infrastructure, are clearly based on a partnership with local dynamics of peace formation'.⁷⁴ Curtis has found similarly that the UN's emphasis on peacebuilding as stabilisation and control created a paradoxical outcome in Burundi in contradiction with its rhetoric of liberal governance and inclusive participation.⁷⁵

I have discussed how trauma healing interventions, such as those conducted by THARS in local communities in Burundi, which specifically focus on the individual psychological as well as relational aspects of micro-level peacebuilding, can be seen as contributing to transitional justice.

⁷² Sriram, above n 12, 122–123.

⁷³ Ralf Dahrendorf, *Reflections on the Revolution in Europe: In a Letter Intended to Have Been Sent to A Gentleman in Warsaw* (Random House, 1990).

⁷⁴ Oliver P Richmond *Peace Infrastructures and Peace Formation* [2012] No 10 *Berghof Handbook Dialogue Series*, 27.

⁷⁵ Devon Curtis, 'The International Peacebuilding Paradox: Power Sharing and Post-conflict Governance in Burundi' (2012) 112(446) *African Affairs* 72, 72–91.

Combining such inner transformation and relational transformation with macro-level political, economic and legal structural transformation, as I have argued elsewhere, provides the foundation for transformative justice.⁷⁶ LeBaron similarly emphasises the importance of engaging people in post-conflict societies in ways that address their psychological, spiritual, emotional, and physical needs — a holistic approach to peacebuilding.⁷⁷

I extend these arguments in relation to peacebuilding to the dynamics of engagement and partnership also required in the context of the ‘local turn’ in transitional justice: the need to conceptualise localisation in transitional justice as a dialogical process of co-creation rather than a geographically or culturally pre-defined idea of the ‘local’ and ‘informal’ versus the ‘Western liberal international’ and ‘formal’. My previous research in a number of post-mass violence contexts has revealed how these ideas and preferences are hybridised and co-exist in the imaginations and practices of local affected communities. In Burundi, this finding was confirmed as I observed the unfolding of a hybridised, ‘local’ model of transitional justice developed by the local Quaker Peace Network.

The work of THARS and other Quaker organisations in Burundi illustrates the significance of a psychosocial approach to ending cycles of violence through culturally appropriate trauma healing programs at individual and community levels, and reinforces the critical role of psychosocial interventions in a transformative holistic approach to transitional justice and peacebuilding. The model of transitional justice developed by the Quaker Peace Network in Burundi directly challenges the automatic application of external models of transitional justice in countries recovering from mass violence. This research exposes the inappropriateness and inadequacies of imposing assumptions about the key pillars that underpin transitional justice as advocated by the UN and driven by the justice cascade which dominates the theory and practice of transitional justice. Instead, a more locally driven, holistic and comprehensive approach to transitional justice which links the various spheres of community life can promote conflict transformation and a more sustainable impact on building peace.

The experience in Burundi highlights the potential capacity of civil society in the aftermath of mass violence to play a significant role in determining how the past is dealt with in order to support a peaceful future. It also illustrates the newly evolving efforts of the UN to support civil society participation as an important ingredient in successful transitional justice. But at the same time, the relative impotence of both civil society and the UN to influence the form and timing of transitional justice in Burundi brings into sharp relief the power and control exerted by the national government in the process (see Table 2). This in itself is nothing new in international relations, nor is it the only case where the transitional justice needs and priorities of civil society have been sidelined. However, it is perhaps the first time we can observe this phenomenon in the context of high levels of UN involvement and support for civil society participation.

⁷⁶ Lambourne, above n 64, 19–39.

⁷⁷ Michelle LeBaron, *Bridging Cultural Conflicts: A New Approach for a Changing World* (Jossey-Bass, 2003) 168–169.

TABLE 2
WHOSE JUSTICE? ACTORS AND THEIR LEVEL OF INFLUENCE

High influence	State/national government
Medium influence	United Nations Human rights advocates and international lawyers Transitional justice experts/consultants
Low influence	Other international civil society Local civil society: urban, elite, men, adults, able-bodied Survivors/victims
Minimal influence	Local civil society: rural, grassroots, women, youth/children, disabled IDPs, refugees and diaspora

Only time will reveal the final outcome of this battle for influence and control of transitional justice in Burundi, but in the meantime an analysis of the process suggests new ways of conceptualising the scope of methods for supporting transitional justice. Burundians have been able to express their views about transitional justice in various fora, and psychosocial interventions are promoting healing and reconciliation at a local community level. The danger remains that this progress with localised peacebuilding may be undermined if the national transitional justice process fails to meet people's expectations. This seems even more likely now that the law to create the long-awaited CVR has finally been passed by the Burundian government, given its failure to take into account the wishes of the population as expressed in the national consultations.

This article concludes, therefore, that in order to avoid such frustrations and possible return to violence, international donors, the UN and international civil society, could support additional means of pursuing transitional justice at the local community level rather than relying solely on a politically manipulated and flawed TRC process to deliver social transformation. These additional programs could build on the trauma healing, reconciliation and peacebuilding work already being conducted by local NGOs, as well as use of media strategies designed to reinforce the value of these localised approaches.

Such opportunities include, for example, support for members of the local population to participate in the CVR, through provision of psychosocial services and adequate resources for reparations. They also include creation of alternative avenues for local affected communities to achieve some of their transitional justice goals, such as traditional informal justice and reconciliation processes, as are occurring in Sierra Leone through the Fambul Tok project, after

the TRC failed to impact local reconciliation in that country.⁷⁸ Another method could involve local exhumations, construction of memorials and documentation of human rights violations (as occurred in Cambodia prior to the establishment of the Khmer Rouge Tribunal) in a way that brings together different ethnic memories to create a socially and politically inclusive truth of what has happened. This bottom-up approach to creating a shared history could proceed even in the absence of a meaningful government-led top-down process of truth-telling and truth recovery. In order to support the peace and reconciliation potential of documenting this shared history, the process could focus not only on responsibilities and events that contributed to the cycles of violence, but also collect evidence of the history of peaceful actions that saved lives and those who refused to participate in the violence.

There are no guarantees in transitional justice and peacebuilding, and no transitional justice process is ever perfect. Burundi is no exception in that political priorities of national elites determine the shape, content and timing of transitional justice. Where current political leaders are implicated in the history of violence and mass human rights violations, then peace and justice compromises are inevitable, as we have seen in the faltering transitional justice journey undertaken in Burundi. However, as this article argues, the UN and civil society can play a critical role in supporting a localised, transformative notion of transitional justice that goes beyond the confines of formal national or internationally driven processes to build a more sustainable community-level peace.

⁷⁸ See the Fambul Tok website for further information: <www.fambultok.org>.

TRANSITIONAL JUSTICE IN LIBYA: BETWEEN CURRENT CHALLENGES AND FUTURE PROSPECTS

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This paper examines the transitional period in Libya after the uprising against the 42-year long dictatorship of Muammar Qaddafi and the mechanisms needed for Libyan society to ensure an effective transition towards peace and justice. The paper analyses the Libyan revolution that caused a drastic change in the socio-political structure of the country and provides theoretical and practical proposals for effective transitional justice mechanisms. The paper also offers a series of proposals that could be a useful framework for effective transitioning towards justice, peace and democracy. The paper also highlights the role of religion and tribalism within the framework of transitional justice, and suggests that the significance of these two factors must not be overlooked in developing a comprehensive plan for a more peaceful and just Libya. The development of an effective justice system is needed to ensure the transparency in Libyan society. Without it, the potential for continuous insecurity and uncertainty will continue to dominate the post-revolutionary discourse of the country.

I INTRODUCTION

The recent revolts and uprisings throughout the Middle East and North African region have left a landscape of difficult socio-political transition. Libya, one of the countries severely affected by NATO actions and violent regime change, continues to face ongoing challenges with respect to its national security and human rights violations, not only by the previous dictatorial regime of Qaddafi, but also those that have occurred during and after the uprising.

The following segments analyse the challenging landscape of conflict in Libya, and provide theoretical and practical proposals for effective transitional justice mechanisms. Presently, managing and reintegrating a vast number of armed groups and revolutionaries is one of the critical challenges for the security of Libyan society. Without establishing security in the country, none of the measures of justice and reconciliation could be implemented, as the complex objectives and capacities of the armed factions of Libyan society continue to present a significant challenge for local and national efforts to achieve justice. To that end, this paper also outlines several transitional justice proposals for the post-Qaddafi government to effectively manage and implement disarmament and reintegration programs in order to transform Libyan

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society into a secure and peaceful state. In addition, the paper examines the role of religion in the reconciliation process and argues that Islamic values could play a significant role in helping the society not only heal from the past, but also move forward into a peaceful and just future.

The Libyan Revolution, or the ‘17 February Revolution’, started in February 2011 prompted by mass protests in Benghazi. Initial peaceful demonstrations quickly erupted into armed conflict as the Qaddafi forces tried to suppress the demonstrators. Initial violence was reported in the cities of Benghazi, Misrata, and the Nafusa Mountains, and later expanded to other areas, including the capital Tripoli. As the Qaddafi forces pressed heavily on civilian demonstrators, the threat of high civilian casualties impelled the international community to act under the Responsibility to Protect doctrine. This caused the UN Security Council to pass Resolution 1973, which mandated that member states and regional organisations ‘take all necessary measures’ to protect civilians.¹ Shortly after the resolution was passed on 17 March 2011, the United States, France and the UK enforced a no-fly zone and subsequently began military strikes against Qaddafi’s forces located in Benghazi.²

The seven-month bombing campaign ended shortly after the death of Qaddafi. A number of different armed groups emerged immediately thereafter. Most of them formed in opposition to the Qaddafi military apparatus and unified as protective forces for the local populations. However, their initial intentions of securing people in various localities became more volatile, as more and more unregulated arms began to enter the country, creating a state of high instability and insecurity. The armed groups’ decentralised operations, incompatible goals and violent transformation continue to challenge the national and regional security environment in post-Qaddafi Libya, which presents further challenges for implementing effective transitional justice processes.

Domestic politics of the Qaddafi regime created a general weakness of the state infrastructure and fractured the conditions of the country’s political landscape. For over 40 years Qaddafi’s regime purposely undermined state institutions, including the military, and heavily manipulated tribal, regional and political groups in order to maintain tyrannical power.³ The revolution itself allowed for some local groups to become even more empowered, which in turn weakened the capacity of state security. While the transitional authorities have inherited very weak national government institutions, they do have the responsibility to stabilise the country, manage the security services and ensure peaceful, safe and just transition in society.

II THE EMERGENCE OF ARMED GROUPS IN LIBYA

During the revolution, a vast number of armed groups emerged in Libya, initially in opposition to Qaddafi’s regime. However, the groups soon started to oppose one another creating complex local and national security issues. Kadlec noted in her Carnegie report that these militia exist as

¹ SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/Res/1973 (17 March 2011).

² Chris McGreal, ‘Coalition Attacks Wreak Havoc on Ground Troops’, *The Guardian* (Online), 20 March 2011 <<http://www.theguardian.com/world/2011/mar/20/libya-air-strikes-rain-down>>.

³ Christopher M Blanchard, ‘Libya: Transition and US Policy’ (Report, Congressional Research Service, 18 October 2012) 1 <<http://www.fas.org/sgp/crs/row/RL33142.pdf>>.

loose formations, organised along an unruly patchwork of brigades, attempting to take control of different regions of the country.⁴ McQuinn's assessment of the armed groups in Libya reveals that there are four distinct types of non-state armed groups currently operating in the country: revolutionary brigades, unregulated brigades, post-revolutionary brigades and militias.⁵ As of late, many of the armed groups initiated their operations in opposition to the newly elected transitional government, which created a highly insecure and untrusting environment in the capital city Tripoli.⁶ Therefore, understanding the complexity of the existing armed groups, including their goals, motivations and operations, as well as implementing effective means to control them, poses a grave challenge for the local and national authorities.

III SOCIAL STATUS AND TRIBAL ROOTS OF THE ARMED GROUPS

By and large, some of the armed groups' members came from socially and politically affluent communities with a status that allowed their groups to be accepted and seen as protective forces in those areas. Similarly, armed groups with strong local tribal roots have enjoyed the same trustworthy privileges as local tribal populations. During the early stages of the revolution, most of the groups were united against a single force, the Qaddafi military. But as the conflict evolved, many armed groups gained ideological as well as tactical strength, which caused them to turn against each other. Specifically, when any of the armed groups advanced its insurgency beyond the scope of its local operations, the chances for conflict with other groups increased. One of the earliest cases of such hostility was noted in the summer of 2011 when the groups from Misrata and Zintan infiltrated Tripoli, a city that already had its own local security and protective armed forces.⁷

This phenomenon began to spread throughout the country, and it quickly evolved into a complex inter-group conflict. Barfi notes the gang-resembling aspect of some of the armed groups and the mayhem that they have brought, not only to the communities in which they operate, but also the communities through which they transition or try to infiltrate.⁸ He further notes that the main operations of these armed groups evolved from the initial anti-Qaddafi movement to much more criminalised behaviour involving extortion, drugs and arms smuggling.⁹

Further complexities of Libya's armed groups involve vast ideological differences that govern their motivation. Several armed groups formed during, as well as after, the revolution, pledging their allegiance to the Qaddafi regime and severely opposing the revolutionary forces. A February 2012 report by Amnesty International revealed that some of the pro-Qaddafi armed group members were sub-Saharan immigrants that Qaddafi himself employed to fight against the

⁴ Amanda Kadlec, 'Disarming Libya's Militia', *Sada* (Online), 16 February 2012 <<http://carnegieendowment.org/sada/2012/02/16/disarming-libya-s-militias/9of5>>.

⁵ Brian McQuinn, 'Armed Groups in Libya: Typology and Roles' (Research Note No 18, Small Arms Survey, June 2012) 1 <http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-18.pdf>.

⁶ Kadlec, above n 4.

⁷ Ibid.

⁸ Barak Barfi, 'Who Are the Libyan Rebels', *New Republic* (online), 30 April 2011 <<http://www.newrepublic.com/article/world/87710/libya-rebels-gaddafi-ntc-saif>>.

⁹ Ibid.

revolutionaries.¹⁰ The Amnesty International report highlighted several cases of torture and detention of sub-Saharan immigrants by revolutionary groups, which further complicates justice and human rights issues not only for Libya, but for the African region as well.

The vast number of weapons loosely floating throughout the country was by and large stockpiled among the groups in Tripoli. Wood notes that one of the main and persistent dangers within Libyan society in the post-Qaddafi era is not only the immense availability of weapons, but also the fact that Libyans do not have a developed culture of gun ownership, ie they simply do not know how to use and/or store weapons safely.¹¹ The availability and ownership of unsecured weapons continue to threaten security in the capital. Interestingly, one of the Civilian KII ('Key Informant Interviews') reported that the weapons have also created a balance of power among the armed groups, a situation in which people are afraid to attack each other through fear of repercussions.¹² The interviewee stated:

It's not normal. Weapons are everywhere and cause tension in the community. In the time of Qaddafi no one had weapons. There was no culture of knowing how to use one. Now people want to have weapons. Everyone wants to show that he has a weapon.¹³

This situation continues to present a challenge for the local authorities, still unable to track down lost arms and disarm the population, which will invariably affect the process of transitional justice in Libyan society as a whole.

IV INITIAL LEGAL OBSTACLES TO EFFECTIVE TRANSITIONAL JUSTICE

The National Transitional Council ('NTC') was the first self-elected Libyan authority to lead the opposition during the uprising. The NTC enacted 38 laws during the transition, some of which were of particular concern. For example, Law 38, which deals with certain procedures regarding the transitional period, has been criticised for not seeking justice for the people but rather serving the interests of particular groups (such as protecting members of the NTC from future prosecution and appeasing militia groups).¹⁴ Specifically, Law 38 grants revolutionaries (Qaddafi opposition fighters) immunity. The rebels were granted immunity in order to protect them from prosecution for human rights violations they may commit during the course of their fight against the Qaddafi brigades.¹⁵ Such a precedent was considered a green light for the rebels to breach international humanitarian law during the conflict. That blanket of protection was justified by the NTC as promoting and protecting the revolution. Specifically, Law 38 states '[t]here shall be no penalty for military, security, or civil actions dictated by the February 17 Revolution that were

¹⁰ Ibid.

¹¹ David Wood, 'Understanding the Relationship between Communities and Armed Groups' (Report, Peaceful Change Initiative: AFAQ Libya, May 2012) 18
<http://www.peacefulchange.org/uploads/1/2/2/7/12276601/2012_05_relationships_between_communities_and_armed_groups_in_libya_web.pdf>.

¹² Ibid.

¹³ Ibid.

¹⁴ قانون رقم 38 لسنة 2012 بشأن بعض الإجراءات الخاصة بالمرحلة الانتقالية [Law no 38 of 2012 on Some Measures Regarding the Transitional Period] (Libya) art 4.

¹⁵ Ibid.

performed by revolutionaries with the goal of promoting or protecting the revolution'.¹⁶ The law entrenched a selective type of justice common during the Qaddafi time (against which Libyans arose in the first place) rather than ensuring the aspiration of an effective transitional justice mechanism based on human rights protection. It is pivotal for the new Libya to be built on the rule of law. Hence, those who violated international humanitarian law should be held accountable for the crimes they committed over the course of the conflict.¹⁷

Thousands of people who are accused of fighting for Qaddafi are still arbitrarily detained by rebel groups. Most of them have yet to be brought before the judiciary. Human Rights Watch reported torture and maltreatment in several detention centres run by militia forces.¹⁸ Some militias have been involved in other severe crimes, such as the conspicuous execution of at least 53 people in October 2011 in Sirte, and forced displacement of 30 000 people from the town of Tawergha, which is considered a crime against humanity.¹⁹ In this case, Law 38 states that even if a person who was confined by the militia is found not guilty by a court, that person has no right to raise a criminal or civil complaint against the state or the militia regarding the abuse they faced, unless the detention is proved to be arbitrary or based on fabricated charges. This causes much concern for the realisation of justice in Libya, as the wrongly detained and released people should have the right to resort to the judiciary and this right should never be revoked.²⁰

Libya is a state party to both the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* and the *Convention against Torture*. These Conventions prohibit state members from implementing laws that limit the prosecution of war crimes and crimes against humanity, and require all state parties to investigate and prosecute human rights abusers who commit atrocities on the member states' territory. The Libyan legislature clearly violated the aforementioned conventions by enacting Law 38, thinking only about how to protect the revolution and ignoring the calamities that might result from such immunity. The way this law is drafted displays the serious impact that it will have on the process of reconciliation and justice in the state. Since there is no time limit for this immunity, severe humanitarian law breaches will continue to be committed indefinitely by the militias until the legislature abolishes the immunity. It is possible that the militias will not stop violating human rights in the foreseeable future, as they enjoy full immunity from accountability.

In addition, the armed groups currently possess most of the states' weapons that the previous regime had been accumulating for decades. Perhaps this situation has created a balance of power between the state's official army and the militias. Thus the government has either been avoiding a direct confrontation with the armed groups, in order to avert another civil war in the country, or it does not have the full capacity to deter the militia groups. Recently the Libyan government instituted a security-making committee to tackle the militia type of groups illicitly occupying government assets and/or private properties that were possessed by former Qaddafi officials.

¹⁶ Ibid.

¹⁷ Libya Working Group, 'Libya: Establishing the Rule of Law' (Working Group Meeting Summary, Chatham House, May 2012)
<http://www.chathamhouse.org/sites/default/files/public/Research/Middle%20East/0512libya_summary.pdf>

¹⁸ Human Rights Watch, 'World Report 2012: Libya' (Report, Human Rights Watch, January 2012)
<<http://www.hrw.org/world-report-2012/world-report-2012-libya>>.

¹⁹ Ibid.

²⁰ Ibid.

This mechanism was initiated by the government to gradually decrease the phenomenon of militias that have been undermining the authorities' efforts towards democracy and justice in the country. For Libya to implement an efficient and effective transitional justice strategy, the legislature needs to eradicate immunity laws and enact several laws that ensure justice and reconciliation while simultaneously allowing for the truth to surface in society as a whole.

V EARLY TRANSITIONAL JUSTICE LAW

In February 2012, the NTC enacted the *Transitional Justice and National Reconciliation Law* to meet the needs of successful transition of governance in Libya. The law identified transitional justice as a set of legislative, judicial, administrative and social procedures that address human rights violations that took place during the rule of the former regime since 1969 (the year in which the Qaddafi regime took power). It also proposed to establish a reconciliation process between different categories of society.²¹

Notably, the way this law was written was so that it could not address the period of conflict starting on 17 February 2011 to the end of Qaddafi rule. Instead it was only aimed at the Qaddafi regime's atrocities, ignoring the fact that crimes have been committed by both pro-Qaddafi and pro-revolution people during the course of the revolution. Clearly, the NTC was unwilling to address the period of the revolution in order to avoid the possibility of holding the rebels accountable for their wrongdoings and protecting its own members.²²

In an attempt to mend this deficiency, in December 2013 the General National Congress passed Transitional Justice Law 29, which revoked the previous law and included the transitional period that ended with an election of a permanent legislative body.²³ However, the new law fails to address human rights violations committed in post-Qaddafi Libya, which is evident in the language used in the law, which revolves around investigating human rights violations that took place during the past regime. For instance, art 4, titled 'The Law Objectives', mentions that the Truth and Reconciliation Commission established by the law shall investigate and repair rights abuses committed throughout the Qaddafi regime.²⁴ The Law also limits the truth commission's work to last for a maximum of five years. This will present another difficulty challenging the commission's task, given the fact that truth commissions should be given more flexible time, as evidenced by past international experiences with truth commissions.²⁵ In the case of Libya, which was ruled by Qaddafi for over four decades during which vast numbers of human rights violations occurred, it may be a very challenging task for the truth commission to accomplish its work in a five-year period.

²¹ [Law no 17 of 2012 on Establishing the Rules of National Reconciliation and Transitional Justice] (Libya) art 1, 2.

²² [Abdelhaleem Abdeladeem, *شروط تطبيع العدالة الانتقالية في ليبيا*, عبد الرحيم عبد العظيم, *Transitional Justice Implementation Terms in Libya*] (Almanar, 2012)

²³ <<http://www.almanaralink.com/press/2012/11/25029/د-عبد-م-حم-د-ال-رح-ي-م-ع-ب-د-د>> [Law no 29 of 2013 on Transitional Justice] (Libya) art 32.

²⁴ Ibid art 4.

²⁵ Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, 2001) 72.

VI THE POLITICAL ISOLATION LAW

As a result of massive pressure imposed by some political parties on the General National Congress ('GNC') to enact a law by which a certain category of officials of the former regime are to be excluded from the political arena of the new Libya, the GNC passed the Political and Administrative Isolation Law no 13. It states:

Every person who occupied one of the following positions in the period between 1 September 1969 and 30 October 2011 shall be disallowed from practising any political and administrative work, and from running for any type of election and for leadership, functional administrative and financial positions in all of the public sector branches including corporations and institutions, in addition to establishing political parties and civil society organisations for a period of ten years. This applies to everyone who:

- participated in the 1969 military coup
- occupied the position of Prime Minister
- assumed the position of Minister or Chairman of a municipality or city
- occupied the position of Head of the Parliament
- assumed the position of Attorney General
- took over the position of the Governor of the Central Bank of Libya
- took over the position of an Ambassador or a representative at an international organisation
- was an Editor in Chief of a public newspaper or a head of a TV or radio station
- was a Judge or State Attorney who worked at the exceptional or revolutionary courts
- worked for the internal security department
- worked for the chief of staff command in the army.²⁶

All the above categories, among others, will be excluded from assuming any position in the new rule of Libya for 10 years. Such an arbitrary law will, of course, be a huge obstacle to effective and smooth transition to justice in the country. Additionally, the Libyan people would never accept and reconcile such a law, which is already evident by the ongoing protests among the public and human rights lawyers against such sweeping legislation.²⁷

It seems that the party or parties behind this law aim to acquire power and rule the country without contest. They were influenced by a similar experiment in Egypt, where the former ruling party of the Muslim Brotherhood pushed for a similar law to exclude their opponents from playing any role in the political landscape of the state, so they could become the dominant rulers of the country.²⁸ In Libya, the Muslim Brotherhood party, along with some other politically prominent parties, aspires to have the same ruling experience, with the very same political goals and without considering the future of true justice in the country. The experiment in Egypt failed,

²⁶ قانون رقم 13 في شأن العزل السياسي والإداري [Law no 13 of 2013 on Political and Administrative Isolation] (Libya) art 1(1).

²⁷ 'Clashes outside Libyan Foreign Ministry over Political Isolation Law', *Al Arabiya News* (online), 10 May 2013 <<http://english.alarabiya.net/en/News/middle-east/2013/05/10/Libya-activists-protest-militias-Islamists.html>>.

²⁸ ورقة موقف حول: قانون العزل السياسي والإداري الصادر في 23 أبريل 2012 [Report on: The Political Isolation Law of 23 April 2012] (Arab Network for Human Rights Information, 2012) <<http://www.anhri.net/?p=54845>>.

as this law was ruled unconstitutional by the Supreme Constitutional Court shortly after Morsi was elected.²⁹

Bu-Hamra, a law professor at the University of Tripoli, believes that this trend entrenches the concept of selective justice, which aims to achieve justice for a particular layer of society or serves a particular agenda of a group of people, instead of the whole of society.³⁰ The political isolation notion fosters the idea of eliminating anyone deemed to be a Qaddafi follower or loyalist. Broadly excluding a large group of people from any state department without adopting efficient and accurate criteria to firstly identify who the loyalists are, and secondly, to select their substitutes, would allow criminal groups to infiltrate into the new system. Unfortunately, this trend already seems to be the status quo in the new Libya. Such government strategy for containing the militia groups, especially in the police sector and the national army, without following efficient selection criteria, falls under the selective justice aforementioned and should be seriously reconsidered.

With the absence of the rule of law and the presence of the rule of militia instead, the new rule in Libya is forced to coexist with such abnormality of the state and allow the militias to have their own institutions. Because the militia groups were empowered to be in control of certain locations during the revolution, they now claim independence from the state and are unwilling to be under state control and follow its orders. For example, the militias that were protecting certain strategic locations and departments, such as oil refineries and universities, were allowed to create their own policing units or armies. The government continues to provide them with generous salaries, which suggests an implicit approval of their services to the government. As a result, the Libyan people experience a phenomenon of duality in state institutions; they are confused whether to go to the state police department to report a crime or to the security committee composed of rebels and militia type police, which is actually more powerful.

If continued, this duality in institutions will create state abnormalities and prove that the country has the status of a failed state, a process that will negatively affect the overall development of the country and the justice system in particular. This is currently the case. The Libyan authorities choose to coexist with these militias in order to avoid a potential clash with them. If the government continues to empower the militia by providing them with leading roles in society, in order to avoid conflict, the situation might create a more difficult terrain in a state in which various groups with different ideologies can penetrate the state system and foster divergence between the government's will and the militias' agendas.

²⁹ 'Court Rules Political Isolation and Election Laws Unconstitutional', *Egypt Independent* (online), 14 June 2012 <<http://www.egyptindependent.com/news/update-court-rules-political-isolation-and-election-laws-unconstitutional>>.

³⁰ [Alhadi Bu-Hamra, The Risk of Transformation from Transitional Justice to Selective Justice] (Almanara, 2013) <<http://www.almanaralink.com/press/2013/02/28153/ال-عدالة-من-التحول-بوحمره-الهادي>>.

VII THE CHALLENGE TO THE PROSECUTION MECHANISM

The dysfunctional judiciary continues to contribute to the pervasiveness of the overall issues with transitional justice. Similar to some experiments of post-conflict countries, judges, prosecutors and lawyers have been fearful of functioning in the absence of an official and capable policing system that can protect them and allow them to maintain their neutrality. After the fall of the former regime, a large number of prisoners escaped and joined the militia groups who were disguising their criminal history. Many members of the judiciary have been persecuted, and even assassinated, by the very criminals they imprisoned. Some of the criminals who were sentenced by the judiciary for committing serious crimes became ‘revolutionaries’ during the uprising, which allowed them to retaliate against the judges and engage in kidnapping, torture and assassinations of judiciary members. This trend caused most judiciary personnel to stay at home, or in some cases to relocate to other cities as they continued to fear for their safety. Recently, Abdelaziz Alhasadi, the former Attorney-General of Libya, was assassinated in Derna by anonymous assassins.³¹

Based on this reality, any attempt at establishing a functional and effective judiciary is irrational with the presence of such insecurity in the state. While there are plenty of capable and efficient judges to implement justice, ongoing instability and lack of security presents the main challenge towards achieving this goal. When the International Criminal Court demanded that the prosecution of Qaddafi’s officials should occur outside Libya, the new Libyan government rejected this notion, claiming that it had sufficient resources to implement justice within the country. However, given that the overall state insecurity impedes the effectiveness of the justice system, it could be recommended that the notion of an international tribunal be revisited, at least until the country is stable and secure. Presently there is a wide-spread fear that the judiciary system will continue to be virtually inactive, which will continue to undermine any future efforts at an effective transitional justice process.

VIII THE TRIBAL ROLE IN TRANSITIONAL JUSTICE IN LIBYA

The Libyan societal structure is mainly tribal. The tribes have played a significant role in the Libyan revolution, whether supporting the change, as was the case with a large number of them, or favouring the Qaddafi regime, as a small number of them did. Tribes have also played a significant role in mediating and solving disputes between Libyans, as tribal conflict resolution mechanisms are indigenous to the society. Tribal features of Libyan social make-up should be utilised more in this particular stage of Libyan history in order to institute better reconciliation or truth hearing mechanisms. Most recently, the GNC’s efforts to end the conflict between two tribes in the south of the country was successful. The head of the GNC called the chiefs of the Altabo and Awlad Sliman tribes, which were in an ongoing dispute over territory, to meet and reconcile with one another. Through the tribal mechanism of conflict resolution, the

³¹ اغتيل النائب العام السابق عبد العزيز الحصادي بدرانة وعريف بقاعدة بنغازي [The Assassination of Former Attorney General Abdul-Aziz al-Husadi in Derna and a Soldier in Benghazi Base] (Quryna Aljadida 2014) <<http://www.qurynanew.com/58787>>.

reconciliation between them worked and was a positive sign towards recognising the importance of tribes and their engagement in the transitional justice process in the rest of the country.³²

While the existence and role of tribes is vital, not only for the overall structure of society but also in effectively implementing transitional justice, it is imperative that they are included and referred to in the truth and reconciliation efforts. Unfortunately, Transitional Justice Law no 29 did not include tribes in the proposed truth commission; the commission would only be in liaison with the tribes when working on the reconciliation process. The legislature has thus far ignored the importance of tribes being included in reconciliation and the truth hearings commissions as members. However, given that the law has yet to be implemented, it is recommended that tribes, and especially their leaders, be included in the conversation about the justice process in the country.

IX RECOMMENDED POLICY FOR TRANSITIONAL JUSTICE MECHANISM

A *Vetting*

Instead of the broad political isolation law presented above, the Libyan government should implement a carefully designed vetting mechanism to administratively exclude certain individuals who were found to be involved in past abuses. If the perpetrators continue to serve in official positions of the new administration, people's trust toward the new regime will decline.³³ Likewise, the broad exclusions proposed in the Political Isolation Law suggest a weakness of the new regime, as they may wrongfully exclude those who did not commit any past crimes. Therefore, vetting processes should be designed to reinstate public trust in the new institutions by setting aside the abusers or unqualified individuals and preventing them from playing any role in the new system. It should be set as an administrative procedure rather than a political decision or a judicial action, and as such it should require lower standards of evidence to implement, unlike judicial decisions that require a specific type of evidence and political decisions that are often biased and subjective. The vetting program must consider objective, neutral criteria and just procedures. The United States Institute of Peace ('USIP') provides a useful framework for implementing an effective vetting process and suggests two essential forms of vetting review:

- *Retroactive Review*, based on screening current employees to verify their appropriateness to serve in public sectors based on past performance. Only adequate evidence can remove a certain employee based on their past abuses.
- *Prospective Appointment and Reappointment Review*, which requires current employees to re-apply for their positions and be vetted for possible involvement in past atrocities. In addition to conducting a review of qualifications of current employees, new candidates should also apply and be subject to the same vetting process.³⁴

³² Farah Waleed, 'Tripoli Conference Produces Sebha Peace Deal', *Libya Herald* (online), 20 April 2013 <<http://www.libyaherald.com/2013/04/20/tripoli-conference-produces-sebha-peace-deal/>>.

³³ United States Institute of Peace, *Transitional Justice: Information Handbook* (September 2008) <http://www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf>.

³⁴ *Ibid.*

This mechanism would be the right choice for the new Libyan government to implement, rather than adopting a completely unfair elimination mechanism such as that proposed in the Political Isolation Law no 13. While this might be common sense in many countries, this seemingly bureaucratic process never existed under Qaddafi rule and it is therefore a novelty for the current government. The people in Libya have been dreaming of a fair and transparent system of appointment to government positions, and this might be a good time to introduce it to society.

B *Lustration of Public Institutions*

It is critical for the new government to restore state institutions and make an overarching review of laws, considering that some changes reflect unconstitutional statutes. Without a deep scrutiny of these institutions, especially the judicial, security and military institutions, there will never be progress towards transitional justice and the rule of law. This process should aim at the effective vetting mechanism described above that will restore public trust in state institutions. The institutions must be built on professionalism and impartiality under judicial oversight, so that the culture of discrimination and nepotism of the Qaddafi era is eradicated. Everyone in Libya should regain the trust in state institutions that should exist to serve all of society, not only a specific class based on political, tribal or regional categorisation.

Scrutiny of the institutions and employees must be implemented within the context of the criminal prosecution and trials of those who committed criminal acts throughout their career and service to the state. But lustration must be based on collective, not individual, accountability, and political orientations must not be in place within the new administration. The scrutiny process must not be at the expense of procedural guarantees for those subject to scrutiny; in fact, they should be allowed access to a process where they can challenge the accusations and have the right to rebuttal in court.³⁵ The notion of absolute political isolation will never bring justice to society, and it will stand against all transitional justice aspects, because it is established on unfounded and unjustified collective elimination.

C *Dealing with the Victims*

One of the major methods to ensure justice in post-conflict societies is to repair the victims who suffered past violations. It is critical to repair and heal the wounds of the past in order to assist the victims to forget and forgive.³⁶ Yet, it is an arduous task to accomplish, specifically when the government is not capable of providing proper compensation. For an effective reparation mechanism, the new government needs to identify victims and their various wounds. For instance, what should be given to a mother whose child was murdered should not be the same as for a tortured person. The reparation process should be assigned to the truth commission which is more capable of assessing the needs of the victims.

³⁵ Ibid.

³⁶ Chandra Lekha Sriram and Suren Pillay (eds), *Peace Versus Justice?: The Dilemmas of Transitional Justice in Africa* (University of KwaZulu-Natal Press, 2009) 7–11.

A reparations program is a powerful mechanism for assisting victims to recover from past abuses if it is appropriately implemented. Considering that no payment can ever fully repair the torture and killing, the symbolic value of reparations, along with acknowledgement and apologies, might provide a level of healing for the victims. An additional possible caveat in legislating the reparations is that some governments may not be able to afford large payments for thousands of victims, in which case governments should implement measures that add symbolic value to the healing process.³⁷

USIP identifies four types of reparations that could be implemented alone, or in combination, depending on the availability of resources of the state:

- *Restitution*, the return of property or other measures to re-establish the conditions that existed before the violation took place.
- *Compensation*, which includes the payment of economically measurable damages, pensions, or smaller symbolic payments as an acknowledgment of one's victimisation.
- *Rehabilitation*, which may include medical and psychological care, establishment of rehabilitation centers, administrative rehabilitation (such as the dismissal of false charges or the restoration to a job from which one was dismissed for political reasons), legal and social services, and educational benefits.
- *Symbolic Measures*, which may include State apologies, construction of memorials, renaming of streets, establishment of commemoration days, dignified re-burials, and waivers for job training and educational fees.³⁸

Libyan Transitional Law no 29 addresses the compensation program, and includes types of reparation such as financial compensation, memorials, medical care, rehabilitation and social services. The law generally urges the truth commission to establish a victims' compensation department, which will have the authority to make compensation decisions that will be binding on the government.³⁹

Law no 29 gives the GNC the authority to decide when and how to implement its executing mechanism, but the GNC has not paid adequate attention to this process because of its struggle with security and other calamities in the country. Having no robust reparations program may undermine the efforts of transitional justice, because victims' contributions in building sustainable peace in society are highly critical.⁴⁰

D *Criminal Prosecution*

States, in general, are obliged by international law to prosecute individuals who commit crimes over the course of a conflict. It sends a robust social message that criminal acts will not be

³⁷ Ibid.

³⁸ United States Institute of Peace, above n 33.

³⁹ Law no 29 of 2013 on Transitional Justice, above n 21, art 23.

⁴⁰ United States Institute of Peace, above n 33.

tolerated in the future. Prosecution is the most typical form for holding perpetrators accountable, as it restores the rule of law in the states in order to avoid retaliation from the people. States are also challenged to ensure fair and impartial trials for perpetrators in which the accused are given the right to challenge the accusations and provided lawyers to represent and defend them in the courts.⁴¹

For Libya to have an effective prosecution program, it needs to ensure impartial and fair trials within an efficient court system. Law of Judiciary no 6 of 1974 guarantees multiple degrees of litigation so that the accused can enjoy the right to challenge the resolution of the first phase litigation.⁴² The law also guarantees the right of an accused to a lawyer to defend them and the right to rebut evidence against them. Therefore the current Libyan court system is sufficient to conduct trials for various perpetrators. Libya also has enough capable and well-experienced judges, prosecutors and lawyers, respected for their credibility and integrity, to handle the amount of crimes against humanity and war crimes committed in the country, which are generally thought of as difficult to investigate and prove in a court of law. But the main obstacle, as highlighted earlier, is that the judicial branch lacks the secure environment in which it can operate impartially and effectively. The widespread use of arms and militant groups is preventing the judges and prosecutors to function without the fear of being killed or kidnapped. Given this fact, the government must first and foremost ensure the rule of law and security in Libyan society in order to reactivate the judiciary and start the truth commission program, for the sake of implementing a dynamic and efficient transitional justice system.

E *Truth Commissions*

USIP Transitional Justice research outlines a group of criteria that truth commission mandates, in general, should consider, including its:

- objectives
- legal authority to interview witnesses and collect testimony, including in some cases the power to compel such testimony
- types of violations the commission will investigate
- time period to be investigated
- time granted to the commission to complete its work
- authority to issue recommendations.⁴³

The truth commission mechanism currently provided by the Libyan legislature added another mission for the commission to conduct the role of the reconciliation mechanism.⁴⁴ As noted above, the tribal aspect of society should be utilised as an active agent for relinquishing the past hatred that still lingers between the communities. Tribal leaders, using their trustworthiness and credibility in society, as well as using indigenous conflict resolution mechanisms, can play a critical role in calling for tolerance and unity among the divided communities in efforts to build a

⁴¹ Ibid.

⁴² قانون نظام القضاء رقم 6 لسنة 1974 [Law of Judiciary no 6 of 1974] (Libya) art 11.

⁴³ United States Institute of Peace, above n 33.

⁴⁴ Law no 29 of 2013 on Transitional Justice, above no 21, art 7.

prosperous future for the new Libya. Although Law no 29 does not explicitly emphasise the role of tribal figures as commissioners in the truth commission, it references that the truth commission should consider engaging ‘the wise men’. In the cultural context, this means the highly regarded people in the communities, who are often tribal and religious leaders. Therefore, the legislature acknowledged the importance of Libyan traditional approaches in solving disputes.

At the time of writing this article, a Libyan truth commission had not been established. In the mean time, the National Dialogue Preparatory Commission (‘NDPC’) was founded in August 2013 by a group of 13 neutral volunteers mandated and funded by the Libyan government. The task of this commission is to establish national unity and dialogue between all people without distinction.⁴⁵ All people, including tribal and religious figures, are invited to participate in the dialogue when the commission’s team tours all over the country to cover as many societal components as possible. The ultimate objective of the dialogue is to reach an overarching representation of all layers of Libyan society in order to develop a national charter to be written by representatives from participating regions. The charter will be the foundation for a more comprehensive constitution and transitional justice process. The commission’s initiative is considered an indirect reconciliation mechanism as it paves the ground to achieve transitional justice and reconciliation through people’s involvement in an initial, direct and constructive dialogue to settle their differences.⁴⁶

Supported by the United Nations Technical Assistance Team and various Libyan civil society organisations, the NDPC has successfully completed the first phase of its task, which was to conduct the national tours. Presently, the NDPC is in the process of selecting a representative group of 300 delegates to participate in drafting a national charter. The second phase of the dialogue will be finalised within a minimum period of three months, and will be focused on significant national issues such as security and transitional justice.⁴⁷ The NDPC has been working for less than a year and its efforts in laying the groundwork for effective national dialogue, despite consistent logistical challenges, have already received much praise from the international community.⁴⁸

X SECURITY CHALLENGES AND THE NEED FOR PEACEFUL TRANSFORMATION IN LIBYA

Throughout Libya, people have generally expressed high hopes in the future of their country and are sensing slow but gradual improvements, and believe positive developments could be possible. But in order to achieve effective transitional justice mechanisms and long-term stability, and for security to take place, the developments will depend on a paradigm shift among the people. A dramatic regime change in a society that was governed by a dictator for over 40 years caused unprecedented challenges for peaceful transformation, and the elected government continues to operate under severe domestic and international pressure in order to maintain and

⁴⁵ National Dialogue Preparatory Commission, *Mandate and Objectives* (2013) <<http://ndpc.ly/commission-en/>>.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

establish a long-term structure for democracy and justice. One of the critical elements upon which the entire process of justice depends is ensuring security in the country. Given the wide spread increase of arms and militia groups unafraid to use them, the process of disarmament, demobilisation and reintegration ('DDR') is seen as critically interconnected with the transitional justice mechanism.

A *Disarmament, Demobilisation and Reintegration Program within Transitional Justice*

As noted in the earlier analysis of Libya, some of the armed groups worked in opposition to, and with an aim to overthrow, the ruling state government, while some engaged against other armed groups within the same state borders. Presently, many armed groups continue to threaten the security of the country and act as enforcers of legislature by parking their armed vehicles outside Ministries and various State buildings, demanding that certain laws are passed.⁴⁹ Researchers on non-state armed groups unanimously agree that, regardless of their intended goals, they all pose an undeniable threat to security and peace and most of them are successful in mass recruitment.⁵⁰

The transitional authorities in Libya are met with unprecedented challenges in managing the large number of armed groups throughout the country. The transitional government itself was, by and large, composed of many revolutionaries who either defected early from the Qaddafi regime, or were later appointed as leaders of the various opposition groups. Some of the initial tactics that the government chose to use in dealing with armed groups allowed them to join the interior or the defence ministries, and included them in the various public service positions.⁵¹ This allowed some of the former armed group members to engage in proper political and public policy training and education, as part of the early reintegration process. The ongoing challenge within the reintegration program is the lack of outreach to communities still driven by armed group ideologies. Therefore, a more comprehensive and inclusionary reintegration program is needed in order to transform former fighters into responsible citizens, allowing them to be a part of the non-violent state building discourse.

As noted in the United Nations Disarmament, Demobilization and Reintegration ('UNDDR') program, one of the key elements for improving security is reintegration, as the former fighters need to be reintegrated back into their communities as civilians.⁵² It is imperative to reactivate their roles in society to enable them to constructively engage in rebuilding the country. As such, the government should increase better job opportunities for the unemployed former fighters and, in the case of youth who participated in armed groups, allow for an increase in educational and vocational opportunities. This is a critical element for the success of the transitional justice mechanism in Libya.

⁴⁹ 'Libya Fighters Surround Foreign Ministry', *Aljazeera* (online), 28 April 2013 <<http://www.aljazeera.com/news/africa/2013/04/2013428102159904364.html>>.

⁵⁰ Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge University Press, 2007) 136–181.

⁵¹ Kadlec, above n 4, 4.

⁵² Peacebuilding Support Office, '2012 Annual Report' (Report, United Nations Peacebuilding Support Office, 2012) <<http://www.un.org/en/peacebuilding/pbso/pdf/2012PBSO-AnnualReport-Final.pdf>>.

The vast availability of the former regime's abandoned ammunition poses a critical challenge for national security in Libya. Stockpiles of unregulated and unsecured arsenals are still scattered all over the state, posing a high threat if acquired by criminal hands. Many of the unregulated arms have been used during the revolution and are still unaccounted for.⁵³ Furthermore, the transitional authority, with assistance from the international community, needs to implement stricter measures in managing the arms smuggling across Libya's borders. The international demining experts have reported that the spread of weapons in Libya has surpassed the levels noted in other post conflicts states.⁵⁴ A disarmament campaign should be launched with the assistance of the international community. The transitional authorities could compensate those groups still holding onto their weapons. Stricter border control could be implemented in order to capture criminal smuggling of arms to neighboring countries.

XI THE ROLE OF ISLAM IN THE RECONCILIATION PROCESS

Given that Libyan society is 97 per cent Muslim,⁵⁵ the role of Islam can and should play an important role in the reconciliation process. Recent political events show that much of the conflict narrative against Islam stems from large misunderstandings and misuse of the religion by non-Muslims, as well as Muslims, or by misinterpreting religious texts to fit the needs of various political powers within the Muslim world. But one of the critical aspects of Islam that tends to be overlooked when discussing either conflict or peace in Islam is its inherent value of *Sulha* (or 'settlement') and *Musalaha* (or 'reconciliation').

The importance of these two frameworks as inherent values within Islam suggests that Muslim countries are capable of implementing effective conflict resolution mechanisms to fit the needs of their communities during the process of reconciliation and peacebuilding. *Sulha* is a structure for resolving conflicts among the Arab tribes that predates Islam. *Sulha* emerged from a verse of the Quran that states '[t]he believers are nothing else than brothers, so make reconciliation between your brothers, and fear Allah, that you may receive mercy',⁵⁶ as a method for settling disputes in the absence of a legal system within the Arab tribes. This practice carried on for centuries and was incorporated into the core of Islam. *Musalaha* is reached through the step-by-step process of *Sulha*, which was practised by both Muslim and Christian Arabs during the pre-Islamic tribal times. Jandt notes:

The *Sulha* ritual stresses the close link between the psychological and political dimensions of communal life through its recognition that injuries between individuals and groups will fester and expand if not acknowledged, repaired, forgiven and transcended.⁵⁷

⁵³ Nicolette Boehland and Bonnie Docherty, 'Report Finds Qaddafi's Weapons Poses Threat to Civilians' (Press Release, 2 August 2012) <<http://civiliansinconflict.org/resources/pr/report-finds-qaddafis-weapons-poses-threat-to-civilians>>.

⁵⁴ Ibid.

⁵⁵ CIA, *The World Factbook: Libya* (2013) <<https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html>>.

⁵⁶ 10 آية القرآن الكريم، سورة الحجرات، آية 10 [Quran, Chapter 49, verse 10].

⁵⁷ Fred E Jandt, *Intercultural Communication: A Global Reader* (Sage Publications, 2003) 271.

Islamic Law (*'Sharia'*) later defined the purpose of *Sulha* as 'the principle to end conflict and hostility among the Muslims so that they may conduct their relationships in peace and amity'.⁵⁸ There are a number of Islamic countries where *Sulha* is integrated into the judicial systems (eg Jordan) and some countries where *Sulha* is not a part of the formal judicial system but it is widely practised (eg Lebanon, Palestine).⁵⁹ Such private modes of conflict control and reduction are practised in areas not controlled by the state. Therefore customary and traditional steps are taken to restore justice. Sometimes, both private and official justice are invoked simultaneously in fostering reconciliation.⁶⁰

The most recent report from USIP on the work of the informal justice system in Afghanistan suggests that informal justice mechanisms, and indigenous *Shuras* and *Jirgas*, have been successful in solving conflict and disputes among the local populations. Given that few Afghans have confidence in the state's ability to deliver justice through the formal court system, the informal justice sector in Afghanistan has been successful in not only providing pervasive and effective venues for people to settle conflicts, but it has provided the people with *access* to the type of justice inherent in their cultural traditions.⁶¹

USIP researchers found that Afghan-led initiatives for justice have been more successful in increasing predictable conflict resolution, suggesting that certain types of small, flexible and context-responsive programs focused on linking the formal and informal sectors can promote more predictable access to justice indigenous to the local communities.⁶² This process could be further applied to other Muslim countries as a means to empower civil society to work towards and achieve a more participatory peace process and justice. The cultural values and traditions of the Arab-Islamic societies could be incorporated into state-to-state and intra-state diplomatic efforts, which can further facilitate legitimate peace through the processes that respect and validate religious and cultural realities. This suggests the importance of good governance of collective responsibility in the decision-making process. It further suggests that this type of consultation is the ideal way of leadership, which is the foundation of participatory democracy.

In the case of Libya, the tribal and religious leaders' involvement in settling conflicts between armed groups has been effective in multiple incidents. For example, last year the government made a decision to expel all non-state armed groups from Tripoli.⁶³ Enforcing the government's decision resulted in a direct armed clash between the state army and one of the non-state armed groups. This particular clash was resolved by tribal and religious figures from the regions that the non-state armed group came from. The earlier referenced 'wise men' practised *Sulha*, which has become an important element in the traditional practices of Libyan people to settle their

⁵⁸ Majid Khadduri, *Such in the Encyclopedia of Islam* (Brill, 1997) 845–846.

⁵⁹ Robert Terris and Vera Inoue-Terris, 'A Case Study of Third World Jurisprudence — Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society' (2002) 20(2) *Berkeley Journal of International Law* 462, 469–470.

⁶⁰ *Ibid* 490–491.

⁶¹ Noah Coburn, *Informal Justice and the International Community in Afghanistan* (17 April 2013) United States Institute of Peace
<<http://www.usip.org/publications/informal-justice-and-the-international-community-in-afghanistan>>.

⁶² *Ibid*.

⁶³ قرار المؤتمر الوطني العام رقم 27 لسنة 2013 بشأن إخلاء مدينة طرابلس من المظاهر المسلحة غير الشرعية [The General National Congress Decision no 27 of 2013 on expelling non-state armed groups from Tripoli] (Libya).

conflicts. Given the success of this incident, local and national governing bodies should continue to utilise the *Sulha* method where appropriate, and incorporate it into the mainstream transitional justice efforts.

XII CONCLUSION

One of the most dramatic political transformations in Libya brought an unprecedented challenge to a society which relied on the stability of a dictatorial regime for 42 years. Rapid disintegration of the state system, along with socio-cultural fragmentation, caused Libyan people so many grievances in such a short time. The challenge of transitioning the society from the decades of tyranny to some form of democracy after a violent revolution requires a seismic commitment by the new government, as well as every level of society, to help pave the way towards a peaceful and just country. Despite the somber reality, this paper is a humble attempt at optimistically looking at various ways in which Libya can be transformed and stabilised in order for its current and future citizens to live in peace and co-exist with one another.

The complex challenges that the present government has in securing and transforming Libya require not only international help, but a commitment from every citizen to personally engage in ensuring a peaceful and just transitional process. It is critical that the political power-grabbing be minimised, with the help of innate cultural and religious values of society. It is also imperative that outside forces such as Al-Qaeda, which continue to infiltrate the region and impose ideologies unknown to Libyan society, be eradicated.⁶⁴ Finally, the development of an effective justice system is needed to ensure transparency in society. Without it, the potential for continuous insecurity and uncertainty will continue to dominate the post-revolutionary discourse in the country. Libyan citizens are in dire need of a justice system not founded on the principles of the old regime; such a notion would require the collective paradigm shift that is necessary in order to establish fairness, transparency and the principles of democracy within society. Only under such conditions could Libya become a safe, secure and prosperous place in the region. The policy proposed in this paper reflects the author's thoughtful and genuine dedication to the country that has enormous potential to be a leading example of democratic rule within the Middle East and North African countries.

⁶⁴ Federal Research Division, 'Al-Qaeda in Libya: A Profile' (Report, Library of Congress, 2012) 2 <<https://www.fas.org/irp/world/para/aq-libya-loc.pdf>>.

‘THEY TOOK OUR FLAG!’ SHOULD NORTHERN IRELAND’S DECISION-MAKERS VIEW MNEMONIC HERITAGE EMBLEMS AS ‘CULTURAL EASEMENTS’ IN INTERNATIONAL LAW?

ALICE DIVER*

This article looks to the recent ‘removed flag’ controversies in Northern Ireland to argue that post-conflict decision-making should be underpinned by principles of international human rights law and by a checklist of fiduciary obligations for decision-makers to actively peace-keep. Useful guidance on cultural property rights is drawn upon from amongst indigenous case law on cultural easements; political decision-makers are framed as the trustees of a peace process that morally obliges them to maintain a meaningful level of community involvement and consensus and that is underpinned by post-conflict norms of tolerance and mutual respect. The article argues that long-held ‘other-side’ fears and perceptions should be afforded a meaningful level of respect, as should symbolic items of cultural heritage that ‘belong’ to newly minoritised sections of the community.

I INTRODUCTION

One of the factors inhibiting the development of a political, civic and communal commitment to dealing with the past, is a deep suspicion that opponents only want to excavate a truth which they can manufacture into ammunition with which to continue the conflict.¹

In late 2012, a series of road blocks by outraged loyalist² protesters occurred throughout Northern Ireland in response to Belfast City Council’s decision to stop the daily flying of the Union Flag

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¹ Commission for Victims and Survivors (Northern Ireland), *Dealing with the Past: Advice to Government* (June 2010) 38 [178] <http://cain.ulst.ac.uk/victims/docs/cvs/cvs_280610.pdf>.

² The term ‘loyalist’ refers here to those aspects of political, national and cultural identity that find expression in loyalty to British institutions (eg Monarchy and Military Service) and seek continued political union with the rest of the United Kingdom/Great Britain. Such ‘Britishness’ has traditionally been claimed by many members of the Protestant Unionist-Loyalist (‘PUL’) community within Northern Ireland, as demonstrated by the long-held electoral mandate of ‘Unionist’ political parties (eg the Democratic Unionist Party, the Ulster Unionist Party, the Progressive Unionist Party).

(the ‘Union Jack’) at City Hall and other government buildings throughout the province.³ Generally the protesters’ banners read ‘*They took our flag!*’, although some protesters also articulated wider fears over the perceived erosion of Protestant cultural heritage and identity. Their signs warned against the perceived ‘*ethnic cleansing of British citizens*’ and they questioned, in televised and public debates, why their human rights to parity of esteem, equality of treatment and cultural integrity, etc were being denied. The decision to remove the Union Flag was defended by nationalist⁴ politicians and based upon the changing demographics⁵ that saw nationalist politicians become the largest block on Belfast City Council (albeit without an absolute majority).⁶ The decision was also validated on the ground that the new policy conformed with the customs and policies of (the rest of) the United Kingdom, where the Union Flag flies from Government buildings on ‘designated days’ only (eg royal birthdays).⁷ In defence of the highly controversial decision, nationalist councillors also referred to Belfast City Council’s own report on the use of ‘contentious’ symbols (ie flags, displays, artefacts and memorabilia) in promoting or hindering ‘a good and harmonious environment’⁸ and to the Northern Ireland

³ See Claire McNeilly, ‘Belfast Flag Protests: We Won’t Stop Until the Flag is Back’, *Belfast Telegraph* (Online), 3 January 2013 <<http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/belfast-flag-protests-we-wont-stop-until-the-flag-is-back-16256705.html>>.

⁴ The term ‘nationalist’ refers here to those aspects of political, national and cultural identity (‘Irishness’), which seek alignment with the Republic of Ireland, rather than with Great Britain, and, perhaps, also seeks an eventual end to the partition of Ireland and a ‘United Ireland’. This has traditionally been claimed by many members of the Catholic-Nationalist community, as demonstrated by the electoral mandate of the Nationalist parties (ie *Sinn Fein*, the Social Democratic Labour Party).

⁵ The 2011 Northern Ireland Census indicated that approximately 48 per cent of the population identified themselves as British, with the remainder identifying either as Irish (28 per cent) or as Northern Irish (29 per cent): Northern Ireland Statistics and Research Agency, ‘Census 2011: Key Statistics for Northern Ireland’, *Statistics Bulletin* (11 December 2012) <http://www.nisra.gov.uk/Census/key_stats_bulletin_2011.pdf>.

⁶ Belfast City Council currently has 51 members: 24 Nationalist councillors (16 *Sinn Fein*, 8 Social Democratic Labour Party) to 21 Unionist councillors (16 Democratic Unionist Party, 3 Ulster Unionist Party, 2 Progressive Unionist Party) and 6 politically undesignated, ‘non-sectarian’ (formerly Unionist) Alliance Party councillors (who essentially hold the balance of power in such decisions). The new 60 member Council (elected on 22 May 2014 as part of local government reforms) will sit from 1 April 2015. It comprises 26 Nationalist councillors (19 *Sinn Fein*, 7 Social Democratic Labour Party), 24 Unionist councillors (13 Democratic Unionist Party, 7 Ulster Unionist Party, 3 Progressive Unionist Party, 1 Traditional Unionist Voice) and 10 undesignated members (8 Alliance Party, 1 Green Party and 1 ‘People Before Profit Alliance’). As before, these ‘non-sectarian’ parties are likely to be key to future decisions on the sharing of cultural space. See ‘Election Results 2014’ Belfast City Council <<http://www.belfastcity.gov.uk/council/Elections/results-2014.aspx>>.

⁷ See United Kingdom, *Guidance: Designated Days for Union Flag Flying* (27 February 2013) 1 <<https://www.gov.uk/designated-days-for-union-flag-flying>>. This policy refers to Government buildings. In Northern Ireland there is also a rule for Government buildings but this does not cover councils: see The Flags (Northern Ireland) Order 2000 (UK) and The Flags Regulations (Northern Ireland) (2000) (UK). The Flags and Emblems (Display) Act 1954 (Northern Ireland) was repealed by the Public Order (Northern Ireland) Order 1987.

⁸ See Belfast City Council, *Policy on the Flying of the Union Flag: Equality Impact Assessment — Final Decision Report* (November 2012) 11 <<http://minutes.belfastcity.gov.uk/documents/s66734/Flags%20EQIA%20Final%20Decision%20Report%20Appendices.pdf>> (*EQIA Final Decision Report*) on how the control of flags, displays, artefacts and memorabilia falls within the wider remit of promoting a ‘good and harmonious environment’.

Equality Commission’s publication on workplace harmony and neutrality.⁹ In sum, they argued that the Union flag’s presence had made for an uncomfortable reminder of the troubled history and politics of Northern Ireland and that the employees and visitors at City Hall would be better served by having a neutral, flag free environment, especially given the increase in the nationalist/Catholic population of Belfast.

This article suggests that the recent unrest in Northern Ireland might have been avoided had the Northern Irish decision-makers looked to the provisions of international law on cultural heritage rights for guidance. The article proposes a ‘peace-keeper’ checklist that summarises the application of such an approach, which could in turn serve as a useful template for decision-makers in other post-conflict contexts by highlighting the need for a deeper understanding of the role of international law principles in those settings.

II FLAGS AS SACRED SYMBOLS OF MINORITY CULTURAL HERITAGE

Given that ‘symbols play an essential role in human culture’,¹⁰ the removal of one side’s emblems may be perceived as holding profound political, ethnic or religious significance. Brown has argued that ‘memory work’ involving ‘the use and meaning of memorials that can mark politically sensitive space’ might ‘communicate very densely the messages and tone of political actors’.¹¹ This is often highly relevant to the ‘lived political life of many groups and communities’ and also for gauging the success or otherwise of protractedly ‘fractious transitions’ in post-conflict contexts.¹²

Flags, in particular, can provoke deep emotions associated with political or cultural surrenders, lost or emergent nationhood, ancestral homelands, shared histories, and a communal sense of identity. By the same token, they can serve as uncomfortable reminders of religious and political conflict or signify national mourning, the claiming of ‘unexplored’ lands or the ceding of disputed territories. The ‘honourable seizure’ of an enemy’s flag is itself symbolic as it marks the end of war or violent conflict, or even surrender.¹³ Flag desecration might, depending upon jurisdiction, be deemed to be either a criminal offence or legitimate political dissent (ie freedom

⁹ See Northern Ireland Equality Commission (Northern Ireland), *Promoting a Good and Harmonious Working Environment* (2009)

<http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Promoting_a_good_and_harmonious_working_environment.pdf>. See also Office of the First Minister and Deputy First Minister (Northern Ireland), *Programme for Cohesion, Sharing and Integration* (2010) <www.ofmdfmi.gov.uk/reformatted_final_print_version_csi_-_26.07.10.pdf>.

¹⁰ Kabir Duggal and Shreyas Sridhar, ‘Reconciling Freedom of Expression and Flag Desecration: A Comparative Study’ (2006) 2(1) *Hanse Law Review* 141, 145. The sight of a flag can enable or provoke profound memories and emotions, especially where such an emblematic item has long been associated with nationhood, ancestry, shared histories, and a communal sense of identity. See, further, Robert Jewett and Constance Collora, ‘On Turning the Flag into a Sacred Object’ (1995) 37(4) *Journal of Church and State* 741, 741–743 for the maintenance of *pax deorum* via ritual observances and how secular symbols might be used, via a ‘language of the sacred’, to create a ‘religion of the flag’ with freedom of expression (eg flag destruction) perhaps serving to represent any ‘protest against perceived evils’.

¹¹ Kris Brown, ‘“High Resolution” Indicators in Peace-Building: The Utility of Political Memory’ (2013) 7(4) *Journal of Intervention and Statebuilding* 492, 494.

¹² Ibid 493.

¹³ See Duggal and Sridhar, above n 10, 145.

of expression).¹⁴ Flag removal might constitute cultural disrespect or it could be aimed at provoking outrage or heralding a new age of freedom and inclusiveness. Its presence could also be a reminder of past atrocities and may ‘punish’ those who resent what it represents or once stood for.¹⁵

However, assuming that the act of flag flying is categorised as a cultural custom that is essential to maintaining ancestral heritage, then it may fall within the protective remit of cultural property rights. If so then flag removal takes on a deeper significance in terms of sending political messages to ‘the other side’. Although minority communities are not necessarily always indigenous or newly-immigrant ones they may face similar issues in a post-conflict transitional period, including population shrinkage, some level of population drift towards segregated or psychologically ‘enclaved’ living areas, and a need to preserve those customs and practices underpinning their community’s identity and heritage. In relation to retaining some degree of control over disputed public ‘spaces’ (eg territories, emblems and finite resources like police time) and eliciting or maintaining some measure of public sympathy, a normative emphasis upon exclusivity of possession still tends to dominate political and legal discourse.¹⁶ Much of the jurisprudence on minority cultural heritage seems to suggest that collective group claims involving identity-relevant artefacts could be framed as rights-bearing ‘cultural easements’.¹⁷ In other words, where items and practices are grounded in communal histories or near-sacred traditions, they are more likely to be regarded as essential to the realisation of cultural heritage and identity rights. As Mezey has further observed,

as groups become strategically and emotionally committed to their ‘cultural identities,’ cultural property tends to increase intra-group conformity and intergroup intransigence in the face of cultural conflict.¹⁸

In terms of engaging with democratic processes, majority populations have often demonstrated a poor record of effecting meaningful recognition of minority cultural rights.¹⁹ Aggrieved minority groups might feel that eventual outcomes involving the loss or rationing of cultural symbols or customary activities will be based largely upon the ‘surrender’ of their unique socio-cultural identity.²⁰ Overwriting, in the sense of assimilating or eroding one side’s cultural identity, may

¹⁴ Ibid 147.

¹⁵ James E Wood, ‘Making a Nation’s Flag a Sacred Symbol’ (1989) 31 *Journal of Church and State* 375, 376.

¹⁶ See, further, Hurst Hannum, ‘The Limits of Sovereignty and Majority Rule: Minorities, Indigenous Peoples, and the Right to Autonomy’ in Ellen L Lutz, Hurst Hannum and Kathryn J Burke (eds) *New Directions In Human Rights* (University of Pennsylvania Press, 1989) 20.

¹⁷ Naomi Mezey, ‘The Paradoxes of Cultural Property’ (2007) 107 *Columbia Law Review* 2004, 2007.

¹⁸ Ibid.

¹⁹ Hannum, above n 16, 5 (albeit in terms of settler populations). See, further, Duggal and Sridhar, above n 10, 141 on how groups lacking the ‘ear’ of their own governments may have little option but to turn to ‘demonstrative means’ to give voice to their opinions.

²⁰ Ibid.

turn them into powerless 'onlookers'²¹ and force them to adopt 'a view of themselves and of the world that fits with the rights-conferring political machinery of the state'.²² On this view, grateful 'beneficiaries' of the 'minority tolerant' majority population must accept unfamiliar 'political institutions and thinking',²³ often as acquiescent observers, perhaps with little input into future decisions on their cultural heritage.

However, the notion that a sort of 'sacred trust' can arise between those who govern and the aggrieved minority community has been acknowledged via international case law on minority, indigenous cultural rights. The right to be meaningfully 'consulted with' over contentious decisions exists,²⁴ although it appears to be tied to the issue of whether irreparable harm or undue hardship might have been suffered by the affected community.²⁵ In *R v Seward*, the length of time that the contentious custom or tradition had been carried out was particularly relevant.²⁶ Where an artefact possesses some iconic or talismanic role 'in the preservation of cultural heritage'²⁷ this aspect of it might be irreversibly compromised by its misuse, for example where it has been seized or insensitively put on public display against the wishes of the minority.²⁸ Although this practice may be condemned by the courts, it is possible that this can only occur after some form of tangible harm has been suffered by the vulnerable group, as occurred in *Mohawk Bands v Glenbow-Alberta Institution*. However, cultural property losses may be

²¹ This is likely to be especially so in terms of cultural property rights, where legal arguments may have only been made *ex post facto*. See Colin Samson, 'Rights as the Reward for Simulated Cultural Sameness: The Innu in the Canadian Colonial Context' in J K Cowan et al (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, 2001) 226, 226–248

<<http://ebooks.cambridge.org/chapter.jsf?bid=CBO9780511804687&cid=CBO9780511804687A020>>. See, further, Alice Diver, "'A Just War': Protecting Indigenous Cultural Property' (2004) 6(4) *Indigenous Law Bulletin* 43, for a discussion on the links between cultural property and religious rights.

²² Samson, above n 21, 228.

²³ Ibid 241. Equally, accepting 'contrivance of sameness' may mean relinquishing a significant degree of autonomy in return for receiving some form of 'compensation' for the loss of heritage: at 242. Although the difficulties faced by the 'new minority' in Northern Ireland clearly differ from those traditionally suffered by indigenous communities in general (that is, a history of colonisation, actual or near extermination, continuing denial of a wide range of basic human rights) there are common issues in terms of perceived cultural heritage erosion, post-conflict mutuality of tolerance and the need to resolve disputes over shared spaces and items.

²⁴ See, eg, *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 art 6 (entered into force 5 September 1991); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 32.

²⁵ See Kamal Puri, 'Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action' (1995) 9 *Intellectual Property Journal* 293.

²⁶ *R v Seward* [1998] 3 CNLR 237.

²⁷ On the Darwinist focus of some of the older pieces of legislation see Juan Andres Fuentes, 'Protecting the Rights of Indigenous Cultures under the Current Intellectual Property System: Is It A Good Idea?' (2003) 3 *John Marshall Review of Intellectual Property Law* 88, 101

<<http://www.jmripl.com/Publications/Vol3/Issue1/fuentes.pdf>>.

²⁸ See, eg, *Mohawk Bands v Glenbow-Alberta Institution* (1988) 3 CNLR 70 Alta QB where a sacred tribal mask used in spiritual ceremonies was placed on permanent public exhibition against the wishes of the tribe and an injunction for its removal was refused on the basis that no 'irreparable harm' had apparently been suffered by the group.

irreversible.²⁹ Subsequent judicial acknowledgement is unlikely to be of comfort to the affected group, who may have no way of reinstating the cultural practice or mending the damage done. Similarly, legal protection in other contexts may depend upon the contentious activity being grounded in communal need (eg group survival).³⁰

Judicial or political reluctance to accept the harm arising from the loss of control over cultural property may reinforce the ‘distance between the discourses of people from two societies’.³¹ For the minority group, the relinquishing of decisions on cultural heritage to an elected or government appointed body might be seen as defeatist acceptance of a loss of autonomy; symbol-rationing may further marginalise aggrieved groups who may feel gradually, and perhaps irreversibly, ‘exiled’ from formerly occupied cultural spaces.³² As such, a ‘conquering’ majority can easily send out a very strong signal that its culture is somehow ‘materially and spiritually superior’ to the other.³³

As a result, decision-makers in post-conflict contexts should be extremely careful to demonstrate a high level of respect for the cultural rights of new minorities, especially as their actions might be perceived by the minority group as a sign of the ‘extinguishment’³⁴ of their heritage or identity. Meaningful equality-rights analyses and clear acknowledgement of the potential consequences of decisions that affect the minority are key to the peace process. As such, clear reasons for the proposed rationing or removal of the cultural easement should be set out in full. This is especially so where the government has agreed to accept a positive obligation to fully ‘acknowledge the sensitivity of the use of symbols and emblems for public purposes’ and to ensure that they are ‘used in a manner which promotes mutual respect rather than division’.³⁵ The following section sets out a number of relevant provisions of international law that highlight the

²⁹ See *Kitkatla Band v British Columbia (Minister of Small Business Tourism and Culture)* (2002) SCC 31 [46] (Donald J) (on the loss of culturally modified trees). The decision followed *Delgamuukw v British Columbia* [1997] 3 SCR 1010, where the Supreme Court eventually ordered the preservation of items, despite the fact that many of them had by then already been cut down and thus destroyed.

³⁰ John Borrows, ‘Frozen Rights in Canada: Constitutional Interpretation and the Trickster’ (1998) 22(1) *American Indian Law Review* 37 <<http://www.web.uvic.ca/~bthom1/Media/pdfs/abrights/rights.htm>>.

³¹ Brian Thom, ‘Rising to the Test: Meeting Lamer’s Tests for Aboriginal Rights and Title After *Delgamuukw*’ (Paper presented to Canadian Anthropology Society, Quebec City, 1999) <<http://www.web.uvic.ca/~bthom1/Media/pdfs/abrights/tests.htm>>.

³² See, further, Alexis Heraclides, *The Etiology of Succession in the Self-Determination of Minorities in International Politics* (Cass, 1991) 14 on how secession claims need territory, population and a ‘suitable relationship’ with central authority.

³³ Steven C Perkin, ‘Researching Indigenous Peoples’ Rights under International Law’ (Revised Paper Presented to Annual Meeting of the American Association of Law Libraries, 1992) <<http://intelligent-internet.info/law/ipr2.html>>.

³⁴ See Erica-Irene A Daes, *Protection of the Heritage of Indigenous People* (United Nations, 1997) 4.

³⁵ See Department of Foreign Affairs and Trade (Republic of Ireland), *The Agreement: Agreement Reached in the Multi-Party Negotiations* (1998) (‘*Belfast Agreement*’) s 24, s 6.5 (‘Rights, Safeguards and Equality of Opportunity — Economic, Social and Cultural Issues’) <<http://www.dfa.ie/uploads/documents/Anglo-Irish/agreement.pdf5>>, which states that:

All participants acknowledge the sensitivity of the use of symbols and emblems for public purposes, and the need in particular in creating the new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division. Arrangements will be made to monitor this issue and consider what action might be required.

importance of affording meaningful respect to key aspects of ‘other side’ cultural heritage and underpin the ‘peace-keeper checklist’ that is suggested in the concluding section.

III RESPECT FOR CULTURAL PROPERTY AND HERITAGE RIGHTS IN INTERNATIONAL LAW

A wide range of ‘intangible’ items and activities are included within the protective definitional remit of cultural heritage property rights. The *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (‘*Protection in Armed Conflict*’) provided an initial focus on the misappropriation of cultural property and war-time vandalism.³⁶ It widely defines cultural property as ‘movable or immovable property’ and calls for its protection via systems of ‘safeguarding’ based upon ‘respect’.³⁷ Article 1(a) highlights the importance and variety of cultural property ‘irrespective of origin or ownership’:

[Cultural property is] of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.³⁸

The Convention’s principles are generally applicable and thus not necessarily ‘limited to controlling the conduct of belligerents in time of war or civil conflict’.³⁹ It makes no distinction between those cultural objects that may be of mere regional or local interest and those that might be classed as having ‘truly international importance’⁴⁰ because all forms of cultural property have an intrinsic value and thus belong ‘to all mankind’.⁴¹ Article 4(4) may hold particular resonance for anyone who has lived through the Northern Ireland ‘Troubles’ insofar as it requires parties to

³⁶ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956) (‘*Convention for Protection in Armed Conflict*’).

³⁷ *Ibid* art 1, 2. Article 2 states that ‘[f]or the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property [emphasis added]’.

³⁸ *Ibid*. Article 1 looks also to:

- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centres containing monuments’.

³⁹ John Henry Merryman, ‘Two Ways of Thinking About Cultural Property’ (1986) 80(4) *American Journal of International Law* 831, 842.

⁴⁰ *Ibid* 837. Merryman notes, also, that objects which might seem essentially parochial in nature, or of importance to only one section of the community, may subsequently assume historical significance or gain socio-cultural importance amongst a wider audience.

⁴¹ *Convention for Protection in Armed Conflict* Preamble para 2.

refrain ‘from any act directed by way of reprisals’ against the cultural property of another.⁴² Although the removal or rationing of a flag is unlikely to be deemed illegal misappropriation, destruction or desecration, it could be argued that curtailment of the customary act of flag flying during a period of post-conflict transition is nonetheless a significant gesture made towards one side of the community that has been recently minoritised.

Such a gesture, having been made by nationalist politicians seemingly on behalf of the majority social group, could be regarded as targeted redress by the new majority for past social injustices that were carried out or quietly sanctioned by the former majority. The outcome at least sends out a fairly unequivocal message that future control over significant spaces and emotive emblems has shifted to one side of the community. In addition to this, the difficult question of ‘who actually won?’ may hang in the air close to where key symbols have been removed from (or added to) public spaces. In this sense, a flag’s absence may also signal a profoundly changed political landscape.

The issue of who can (or should) have the final say over matters of visible cultural heritage is no less significant in international law. The United Nations Educational, Scientific and Cultural Organisation’s (‘UNESCO’) *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (‘*Preventing Illicit Transfer*’)⁴³ differs in emphasis from the *Protection in Armed Conflict*. As Merryman observes, it aims to provide guidance in terms of resolving disputes, calling for the ‘retention of cultural property by source nations’.⁴⁴ The Preamble stresses that protections for cultural heritage are a ‘basic element of civilisation’.⁴⁵ It also notes that a heritage item’s ‘true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting’.⁴⁶ Finally, each nation clearly has ‘moral obligations to respect its own cultural heritage and that of all nations’.⁴⁷ The focus is not so much on preventing destruction and loss but on achieving the active repatriation of items, thus underscoring the importance of ownership and highlighting that context matters. Therefore, the way in which the item is meant to be kept or preserved merits significant consideration.

The UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (‘*Safeguarding Intangible Heritage*’) has further widened the protective remit beyond that of cultural property and symbolic objects to include those ‘practices, rituals and traditions that are defined as integral to the identity and continuity of the groups to which they belong’.⁴⁸ A decision by a majority group to end an important minority custom or to restrict the display of an ‘other

⁴² Ibid art 4(3). The provision also requires parties to ‘further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property’.

⁴³ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 232 (entered into force 24 April 1972).

⁴⁴ Merryman, above n 39, 846. See for example art 2(1) on the ‘impoverishment of cultural heritage’ and art 10 (b) on the need to ‘create and develop in the public mind a realization of the value of cultural property’.

⁴⁵ *Preventing Illicit Transfer* Preamble para 4.

⁴⁶ Ibid.

⁴⁷ Ibid Preamble para 6.

⁴⁸ *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 35 (entered into force 20 April 2006). See also Mezey, above n 17, 2012.

side’ symbol or artefact may well fall within these parameters. Although no explicit reference is made to flags, the link between the need for visibly upheld traditions and mutual, forward-looking tolerance are highlighted. Article 2(1) states that the ‘practices, representations ... objects ... [and] cultural spaces’ that ‘communities, groups and, in some cases, individuals recognise as part of their cultural heritage’ merit protection given that these may be ‘transmitted from generation to generation ... constantly recreated by communities and groups in response to their environment ... and provides them with a sense of identity and continuity’.⁴⁹

The Preamble also highlights the importance of social context, noting that:

The processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage.⁵⁰

The Convention seems grounded upon the presumption that ‘when culture engenders the deepest feelings of belonging then culture itself must in turn belong’;⁵¹ communities, rather than governments are now generally regarded as the ‘primary holders’ or controllers of their own culture.⁵² It follows that cultural heritage items and practices might be easily appropriated by ‘others’ who are keen to indicate which side of a divided community currently holds more power in terms of territorial control.

A ‘cautious approach’ to such disputes could ‘recognise costs and consequences as well as contingency and complexity of the groups to which law assigns the property right’.⁵³ However, the potentially narrow concepts of ‘property rights’ and ‘ownership’ do not always give rise to flexible solutions involving shared heritage: they may, in turn, define and limit other norms of heritage promotion.⁵⁴ Where social attitudes are engendered or influenced by narrow legal rules at a domestic level — especially where one group sees themselves as having fought against social injustices such as housing or employment inequalities, for example to claim ownership over particular items or traditions as ‘theirs’ — this could further influence public perceptions and limit political policies.⁵⁵

The UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (*Promotion of Diversity*) confirms that ‘cultural diversity is a defining characteristic of humanity’ that forms ‘a common heritage’ that ‘should be cherished and

⁴⁹ *Safeguarding Cultural Heritage* art 2(1).

⁵⁰ Ibid.

⁵¹ Mezey, above n 17, 2012. Mezey also argues that cultural heritage also often serves as a ‘foundation for a sense of human belonging’ and that notions of property and human dignity are so closely linked as to sometimes ‘bleed into each other’: at 2008.

⁵² Ibid.

⁵³ Ibid 2007.

⁵⁴ Ibid 2005. Mezey further argues that cultural property law is ‘currently unequipped’ to resolve such disputes, especially those involving ‘hybrid’ symbols (such as indigenous mascots), which have been appropriated and largely controlled by the majority population.

⁵⁵ Ibid 2026.

preserved’;⁵⁶ when ‘flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, [cultural diversity] is indispensable for peace and security’.⁵⁷ Similarly, the Preamble to the UNESCO *Recommendation on the Historic Urban Landscape* (‘*Historic Urban Landscape*’) notes that:

Historic urban areas are among the most abundant and diverse manifestations of our common cultural heritage, shaped by generations and constituting a key testimony to humankind’s endeavours and aspirations through space and time.⁵⁸

The consideration of a wider context, which informs the definition of cultural heritage rights, includes the

built environment, both historic and contemporary, its infrastructures above and below ground, its open spaces and gardens, its land use patterns and spatial organization, perceptions and visual relationships, as well as all other elements of the urban structure.⁵⁹

The consideration of a wider context also highlights the importance of ‘social and cultural practices and values, economic processes and the intangible dimensions of heritage as they might relate to cultural diversity and identity’.⁶⁰

Also included within the ‘Glossary of Definitions’ is the concept of ‘cultural significance’, which is defined as those items and customs that hold some

aesthetic, historic, scientific, social or spiritual value for past, present or future generations. Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects. Places may have a range of values for different individuals or groups.⁶¹

In terms of utilising shared contested spaces, the refusal to allow places or objects to be used as a means of cultural expression is far from conciliatory. In relation to the protection of identity via traditional customs, the UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore* (‘*Safeguarding Traditional Culture*’) highlights the variety and importance of

tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural

⁵⁶ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, opened for signature 20 October 2005, 2440 UNTS 346 (entered into force 18 March 2007) Preamble para 3.

⁵⁷ *Ibid.*

⁵⁸ United Nations Educational, Social and Cultural Organisation, *Recommendation on the Historic Urban Landscape*, UNESCO General Conference, 36th sess, UNESDOC C/RES 41 (10 November 2011).

⁵⁹ *Ibid.*

⁶⁰ *Ibid* annex I.

⁶¹ *Historic Urban Landscape* app. The definition was taken from the International Council on Monuments and Sites, *The Burra Charter: The Australian ICOMOS Charter for Places of Cultural Significance* (1999) art 1.2 <http://australia.icomos.org/wp-content/uploads/BURRA_CHARTER.pdf>.

and social identity ... Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.⁶²

The *UNESCO Universal Declaration on Cultural Diversity* (*‘Declaration on Cultural Diversity’*) provides further direction on how culture should be regarded, by confirming in its Preamble that

culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and ... it encompasses ... lifestyles, ways of living together, value systems, traditions and beliefs.⁶³

Tolerance and social consensus are essential elements of post-conflict decision-making, as is a visibly reciprocal ‘respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding’.⁶⁴ Article 2 highlights cultural pluralism as the natural successor to (mere) tolerance of cultural diversity ‘to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities’;⁶⁵ norms of ‘inclusion and participation’ should thus direct ‘policy expression to the reality of cultural diversity’ according to the Declaration.⁶⁶ Article 4 states that ‘the defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity’.⁶⁷ The need to defend cultural diversity is even more paramount when ‘the rights of persons belonging to minorities’ are involved.⁶⁸ Similarly, ‘no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’.⁶⁹ Article 5 confirms that ‘cultural rights are an integral part of human rights, which are universal, indivisible and interdependent’.⁷⁰ It also states that cultural pluralism is ‘indissociable from a democratic framework ... conducive to cultural exchange and to the flourishing of creative capacities that sustain public life’.⁷¹ Decision-makers who belong to a political party associated with the majority group in society and find themselves in control of the cultural symbols of their political opponents would do well to draw upon these provisions.

The *UNESCO Declaration of Principles on Tolerance* (*‘Declaration on Tolerance’*) provides perhaps the clearest guidance on how sensitivity might be demonstrated during an adolescent and shaky peace process to prevent relapses into violent conflict. Its Preamble states that ‘all positive measures necessary’ should be taken to ‘promote tolerance in our societies, because tolerance is not only a cherished principle, but also a necessity for peace and for the economic and social advancement of all peoples’.⁷²

⁶² United Nations Educational, Social and Cultural Organisation, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, UNESCO General Conference, 25th sess, UNESDOC C/RES 7.6 (15 November 1989).

⁶³ *UNESCO Universal Declaration on Cultural Diversity*, UNESCO General Conference, 31st sess, UNESDOC C/RES 25 (2 November 2001) Preamble para 6.

⁶⁴ *Ibid* Preamble para 8.

⁶⁵ *Ibid* art 2.

⁶⁶ *Ibid*.

⁶⁷ *Ibid* art 4.

⁶⁸ ‘and those of indigenous peoples’: *Ibid* art 4.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* art 5.

⁷¹ *Ibid* art 5.

⁷² *Declaration of Principles on Tolerance*, UN GAOR, 51st sess, UN doc A/51/201 (16 November 1995).

Article 2(1) challenges law-makers to actively enact ‘just and impartial legislation, law enforcement and judicial and administrative process’ given that ‘exclusion and marginalisation can lead to frustration, hostility and fanaticism’.⁷³

Article 1(1) is particularly apposite, defining tolerance for cultural difference as being comprised of

respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. ... [Tolerance] is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace.⁷⁴

Furthermore, the International Labour Organisation’s *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries* (‘*Indigenous Peoples in Independent Countries*’) stresses the need for meaningful consultations and community participation.⁷⁵ Article 6(1) requires governments to

- (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
- (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.⁷⁶

Article 6(2) similarly requires that:

The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.⁷⁷

The provisions on cultural heritage rights increasingly emphasise mutuality of respect,⁷⁸ cultural pluralism,⁷⁹ and forward-looking tolerance.⁸⁰ The importance of protecting cultural diversity is also repeatedly stressed,⁸¹ as is the moral obligation upon those who hold power⁸² to avoid removing or destroying items of cultural heritage as some form of post-conflict reprisal.⁸³ The

⁷³ Ibid art 2(1).

⁷⁴ Ibid art 1(1).

⁷⁵ *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

⁷⁶ Ibid art 6(1).

⁷⁷ Ibid Art 6(2).

⁷⁸ *Protection in Armed Conflict* art 2.

⁷⁹ *Declaration on Cultural Diversity* arts 2, 4.

⁸⁰ *Indigenous Peoples in Independent Countries*, art 6, *Declaration on Tolerance*, art 1 and *Safeguarding Intangible Heritage* art 2.

⁸¹ *Promotion of Diversity* Preamble and *Declaration on Cultural Diversity* arts 2, 4.

⁸² *Preventing Illicit Transfer* Preamble.

⁸³ *Protection in Armed Conflict* art 2.

key democratic principles of ‘time and goodwill’ may, on their own, fail to create the sense of ‘cultural security’⁸⁴ needed to maintain a delicate peace process. The enactment and embedding of meaningful policies on mutual tolerance and cultural pluralism requires that suitable ‘spaces’ be made available for a wide range of cultural activities — even if majority communities may not view the policies as important to protect cultural identity or the cultural practices as socially significant or historically or politically appropriate given the one-sided or contentious nature of some cultural items. A ‘flexible notion’ of cultural heritage, based upon the fundamental human rights principles of tolerance, dignity and parity of esteem, could encompass the needs of ‘the other side’ with respect to cultural practices that are long grounded in visible display and thus essential ‘cultural easements’.⁸⁵

However, even if cultures are willing to regard each other as equals, their desire to co-exist happily in an atmosphere of ‘mutual respect’⁸⁶ might overlook the fact that many legal templates for shared ownership of cultural ‘space’ are steeped in violent political conflict that denotes a harsh struggle for power, justice or basic survival through ‘generational continuity’.⁸⁷ Where a group’s cultural heritage has, to some extent, been socially or politically constructed through a struggle for power, their psychological need for emblematic displays and set rituals may develop an urgency that other groups cannot fully fathom, but their views should still form part of the complex process of finding workable resolutions.⁸⁸ On the other hand, where objects have long carried a deeply symbolic meaning, decisions over their usage and display might be best left to the community to which the objects belong given that they will be most affected by their absence.⁸⁹

However, as Levinson has argued in respect of controversial flags in the United States, an unavoidable aspect of cultural pluralism may well be that ‘different cultures are likely to have disparate, and even conflicting, notions of who counts as heroes or villains’.⁹⁰ Thus simply labelling everyone as either a ‘survivor’ or a victimiser’ is a dangerous approach,⁹¹ especially in times of post-conflict ‘peace’ and during uneasy transitional periods when issues of blame and victimhood (not to mention questions of ‘who actually won?’ or ‘did one side surrender?’) are still being discussed. Adopting an informal policy of ‘silent language’⁹² in order to frame decisions on cultural symbols as being simply about the promotion of a good and harmonious

⁸⁴ See, further, Steven Wheatley, ‘Deliberative Democracy and Minorities’ (2003) 14(3) *European Journal of International Law* 507.

⁸⁵ Mezey, above n 17, 2016.

⁸⁶ Ibid.

⁸⁷ Ibid 2012.

⁸⁸ Ibid 2019.

⁸⁹ See also Carrie Menkel-Meadow, ‘Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity’ [2006] 12 *Dispute Resolution Magazine* 18 for the need for meaningful community consensus. In an acutely divided society, one side’s sacred heritage item may be seen as a cruel reminder of past injustices or recent atrocities. See, further, James Forman Jr, ‘Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols’ (1991) 101 *Yale Law Journal* 505, 510 for how ‘discriminatory intent’ may increase a flag’s ability to act as a ‘rallying symbol’ or stand for ‘a history of resistance to change’.

⁹⁰ Sanford Levinson, ‘The Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society’ (1995) 70 *Chicago-Kent Law Review* 1079, 1081.

⁹¹ Ibid 1097.

⁹² Ibid. ‘Silent language’ is that which avoids explicit mention of past conflict or of ongoing political difficulties.

environment or enhancing the visitor experience,⁹³ as occurred in Belfast, seems equally ill-advised. This approach may easily translate into a need to completely ‘erase’⁹⁴ all signs and symbols of former regimes on the basis that their emblems are exclusively associated with injustices, racism, sectarianism, or human rights violations. Where such associations are attached to artefacts, acknowledging their contentious nature by ‘museumising’ them — as educational reminders of progress made and of the need to preserve peace for future generations — has some merit.⁹⁵ This approach allows for the rationing of the item’s visibility, but it also requires solid community consensus and acceptance by the aggrieved community that the sight of their symbol has a double-edged and divisive aspect to it that will not necessarily be acceptable to the other side.

To have power over emotive items and aspects of one’s culture is to generally be in control of one’s future and territory, especially in periods of post-conflict or transition. Decision-makers should bear this in mind, given the messages that an absent or present emotive emblem can send out. As Horn-Miller has argued in relation to indigenous issues, ‘the principles that underlie meaningful participation in consensus-based decision-making’ almost invariably tend to require much ‘respect for individual thinking and ideas’.⁹⁶ The ‘Community Decision Making Process’ that she describes allows for concerned individuals to highlight legislative gaps and to call for urgent reforms. Community input, via information gathering, dialogue and feedback, is essential so that ‘all points of view are considered’.⁹⁷ Of equal importance is the need for the wider community to have ‘trust in and knowledge of the process’.⁹⁸ A moral obligation is placed upon all parties to focus primarily upon the welfare of future generations;⁹⁹ the process draws upon the concept of seeing oneself as a care-taker for descendants by protecting culture and heritage and preserving a state of peace. It essentially

asks the community to change its way of thinking ... to go from thinking only of individual needs to considering the needs of the collective and the impacts of those decisions seven generations into the future.¹⁰⁰

Placing an over-arching emphasis upon the future would, perhaps, be somewhat at odds with one of the main strategies suggested as a means of resolving Northern Ireland’s current difficulties, which is to deal firstly with the past. The *Haass Recommendations*, which were rejected by Unionist politicians in 2013, looked closely, via community consultation processes, at ‘parades, select commemorations, and related protests; flags and emblems; and contending with the

⁹³ See *EQIA Final Decision Report*, above n 8, 93–96.

⁹⁴ Levinson, above n 90, 1087.

⁹⁵ *Ibid* 1086.

⁹⁶ Kahente Horn-Miller, ‘What Does Indigenous Participatory Democracy Look Like?’ (2013) 18(1) *Review of Constitutional Studies* 112, 112.

⁹⁷ *Ibid* 126.

⁹⁸ *Ibid* 130.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*.

past’.¹⁰¹ Despite the authors, Haass and O’Sullivan, having stressed the need for ‘equality before the law, equality of opportunity, good relations, and reconciliation’,¹⁰² political consensus for accepting the recommendations was not reached.¹⁰³ It is generally acknowledged that the flags issue remains one of the main obstacles to achieving political progress in Northern Ireland.¹⁰⁴ If the removal or enforced regulation of culturally important symbols is perceived as a type of ‘expressive conduct’¹⁰⁵ on the part of decision-makers then the responses of those affected cannot be dismissed as irrelevant or inevitable aspects of political transition. The duty to preserve peace and to implement meaningful rights to cultural integrity includes a positive obligation on decision-makers to safeguard aspects and items of heritage. Where contentious decisions have the potential to fracture an agreed peace or reverse the progress that has already been made, decision-makers should be compelled to look beyond majoritarian solutions and ground their decisions in broad-based public consensus that is underpinned by clearly reasoned policies of peace promotion. Asking the simple question ‘will this decision aid, hinder or actively jeopardise the peace process?’ may also go some way towards ensuring that sensitive decisions involving ‘other side’ cultural heritage show adequate regard for the rights of newly minoritised groups.

IV CONCLUSION

Consistent with respect for human rights, the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one’s convictions. It means that one is free to adhere to one’s own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are. It also means that one’s views are not to be imposed on others.¹⁰⁶

¹⁰¹ Haass and O’Sullivan, *Proposed Agreement: An Agreement Among the parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the past* (31 December 2013) <<http://www.northernireland.gov.uk/haass.pdf>> (‘*Haass Recommendations*’). The consultation for the report ran for six months and included several public meetings with community groups as well as approximately 600 submissions from members of the public and interested parties. It followed the Northern Irish Government’s response to the flag protests: See also Office of the First Minister and Deputy First Minister (North Ireland), *Together: Building a United Community* (2013) <<http://www.ofmfmni.gov.uk/together-building-a-united-community-strategy.pdf>> which set up an ‘[a]ll Party Group [to] consider and make recommendations on matters including parades and protests; flags, symbols, emblems and related matters; and the past’: 6. The Group was tasked with setting up ‘mechanisms to hear from the various stakeholders across our community as to how best to address these difficult and contentious issues’: 97.

¹⁰² *Ibid* 9.

¹⁰³ *Ibid*. It is perhaps noteworthy that the Consultation’s original remit included the concept of ‘dealing with’ the past, rather than merely ‘contending’ with it, as the final version of the Document re-phrases it. Whether the changed terminology represents an acknowledgement of the potentially intractable difficulties facing Northern Ireland, or a realisation that ‘dealing with’ matters does necessarily bring about an end to controversy or hostilities, remains to be seen.

¹⁰⁴ Richard N Haass and Meghan L O’Sullivan, Panel of Parties, *Statement by Richard N Haass and Meghan L O’Sullivan* (8 January 2014) <<http://panelofpartiesnie.com/s/2014-0108-NI-Statement-cptz.pdf>> (‘*NSE Statement*’) for the Statement in response to the failure to reach all-party agreement.

¹⁰⁵ Wood, above n 15, 377.

¹⁰⁶ *Declaration on Tolerance* art 1(4).

Protests over the ‘flag(s) issue’ in Northern Ireland have, at least, served to provide some indication of the health or otherwise of the peace process. Instances of civil disorder seem to represent some form of quasi-progress, insofar as unvoiced fears have been given publicity, and heated public debates have replaced the uneasy silence that can be characteristic of ended hostilities or prolonged periods of transition. Ensuring that only one side is ‘left with an army’ may be one way of reducing the chances of a return to war;¹⁰⁷ removing as many reminders of military conflict as possible from the public gaze may also represent a legitimate attempt to help communities forget or recover from recent civil wars or periods of prolonged paramilitary violence. However, the loss of a highly resonant, one-sided symbol such as the Union Flag at a relatively early stage of an already shaky peace process can provoke the opposite effect. Where a ‘flag’s force as a symbol stems from its history,’¹⁰⁸ decisions about its usage are often an indicator of which side ‘won’ in terms of political power and the control of public spaces and cultural expression. If transitional or post-conflict societies have remained sharply divided along socio-cultural lines, then the mere presence (or unpredicted absence) of items such as flags may be heavily loaded with unacceptable symbolism regarding who surrendered the most in terms of power upon reaching a peace settlement.

The law is often limited when it comes to grasping the finer ‘complexities of culture’;¹⁰⁹ the ‘preservationist rhetoric’ of many property law discourses seems to suggest an ‘endangered species’ approach towards the various dilemmas associated with protecting heritage generally.¹¹⁰ In addition, a ‘politically correct language of participation and citizenship’¹¹¹ may promote localised democracy as the best means of preventing a return to full-blown violent conflict, but it may well overlook the heightened sensitivities of communities alarmed by the prospect of losing their identity. ‘Culturally endangered’ groups may be especially prone to feelings of ‘insecurity’ and ‘low cultural status,’¹¹² especially where an apparent shrinking of ‘their share’ of communal space seems to have occurred. In other words, if contentious activities were viewed as essential easements necessary to avoid the ‘land-locking’ or erosion of one side’s cultural heritage, this might allow for a more sympathetic understanding of their importance.

It remains to be seen whether the current situation in Northern Ireland might yet be resolved by public referendum, re-partitioning, or via more, perhaps unelected, overseeing Commissions.¹¹³ The introduction of a new or neutral flag or the addition of more socially acceptable artefacts, emblems and symbols into shared public spaces (which reflect the region’s cultural diversity and changing demographic) may also be suggested as compromise options. The increasingly urgent need to find a solution to this particular problem rests firmly with those elected under a statutory obligation to engage in meaningful and equitable monitoring of the ‘impact of ... final policy in order to find out its effect on the relevant groups and sub-groups within the equality

¹⁰⁷ Michael W Doyle, ‘The John W Holmes Lecture: Building Peace’ (2007) 13 *Global Governance* 1, 1.

¹⁰⁸ Forman, above n 89, 513.

¹⁰⁹ Mezey, above n 17, 2010.

¹¹⁰ Ibid.

¹¹¹ Samson, above n 21, 228.

¹¹² Kenneth Ritzén, Centre for the Study of Islam and Christian-Muslim Relations, *Swedish Encounters with Islam* (1990).

¹¹³ The *Haass Recommendations*, above n 101, 18, included, for example, a call for the setting up of a new ‘Commission on Identity Culture and Tradition’.

categories’.¹¹⁴ They must similarly revise any policies where a ‘greater adverse impact than predicted’ has occurred;¹¹⁵ regarding equality monitoring and impact assessments, the initial focus upon the feelings and concerns of staff members and visitors at Belfast City Hall needs to be widened to include the concerns of those living in other areas of Northern Ireland who were seriously affected by the resultant ‘civil unrest’ through road blocks, violent protests by Loyalist groups, Dissident Republican bomb scares and (recently foiled) terrorist attacks.¹¹⁶

Greater adherence to the principles of indigenous case law and human rights provisions on cultural heritage could provide a ‘peace-keeper’ checklist for resuming meaningful dialogues. As trustees of a fragile peace, decision-makers could be required to:

- a) adopt a ‘caretaker-focused’ approach that highlights the potentially, profound consequences of a failed peace process for *future generations*;
- b) admit the need for the permanent, bilateral or mutual ‘ceding’ of certain shared spaces or customs for ‘the greater good’;¹¹⁷
- c) accept the existence of a moral obligation to view others’ cultural heritage as comprising items and practices worthy of protection, perhaps through a form of ‘trust’ akin to that which applies to vulnerable indigenous items or to items that are most likely to be destroyed in reprisal attacks in post-conflict settings;
- d) emphasise the need for greater awareness of how newly minoritised groups may perceive ongoing harm or future hardship by the loss of a formerly visible emblem, eg by taking its removal as a sign that they might soon be assimilated into, or driven out by, the majority culture;
- e) avoid assigning blame to victims from sections of a divided community or denying their ‘victim’ status;
- f) agree that principles of ‘military necessity’ place a higher value upon human life than on the need to preserve cultural objects;¹¹⁸
- g) address the difficult moral question of whether any degree of pleasure might be taken in seeing the ‘displeasure of others’ when it comes to reducing the visibility of a contentious symbol;¹¹⁹
- h) note that ‘human rights and culture can co-exist and thrive’¹²⁰ and that the right to peace has itself long been regarded as a near-sacred entitlement;¹²¹

¹¹⁴ As required by the *Northern Ireland Act 1998* (UK) sch 9.

¹¹⁵ *Ibid.*

¹¹⁶ On the current situation, see, further, Louise Mallinder, *Dealing with Northern Ireland’s Past: A Guide to the Haass-O’Sullivan talks* (8 May 2014) Inclusive Democracy <<http://www.opendemocracy.net/5050/louise-mallinder/dealing-with-northern-ireland%E2%80%99s-past-guide-to-haasso%E2%80%99sullivan-talks>>.

¹¹⁷ This has already happened, to some extent, for example with contentious parades generally being routed or re-routed by the ‘Northern Ireland Parades Commission’ away from areas where they might provoke protests. See, further, University of Ulster, ‘Parades and Marches – Areas where Parades and Marches have proved Contentious’ (15 January 213) CAIN Web Service <<http://cain.ulst.ac.uk/issues/parade/areas.htm>>.

¹¹⁸ Merryman, above n 39, 840. Merryman notes, also, that ‘where the cultural property in question belongs to the enemy, the equation tilts further against preservation’.

¹¹⁹ Levinson, above n 90, 1101.

¹²⁰ Susan C Breau, ‘Human Rights and Cultural Relativism: The False Dichotomy’ in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nihoff, 2007) 137.

- i) accept that ‘people, land and culture are indissolubly linked’;¹²² and
- j) embed the requirement for visible and mutual respect and tolerance towards the cultural heritage of former ‘opponents’ in law and policy.

As Funk has observed, a ‘robust and deeply rooted process’ of peace-maintenance ultimately requires that local actors are not marginalised.¹²³ Failure to gain the support of the community risks a return to a state of temporary cease-fire based upon short term deals ‘amongst elites’.¹²⁴ There is clear scope within the current Northern Ireland peace process for ‘bringing more voices to the table’¹²⁵ on the issue of cultural heritage; preventing a return to the ‘dehumanising’ effects of entrenched religious animosities¹²⁶ must be a priority for anyone tasked with protecting the ‘frail’ peace. To this effect, framing contentious symbols (and certain customs) as near-sacred items of cultural property may go some way towards resolving prolonged or heated disputes over the need to have them removed or displayed.

The practice of having ‘the few testify about issues that affect the many’¹²⁷ risks blurring the points of concern: those who voice their fears (or indeed engage in protest) may not necessarily be in a minority in terms of worrying that their cultural heritage is being eroded and those who remain quiet throughout such episodes of unrest may, nonetheless, feel very strongly that the peace process is being jeopardised by short-sighted political decision-making. In any event, simply dismissing such concerns as being irrelevant falls far short of the ideal of acceptable conflict-resolution and consensus-building for the long term. Peacebuilding is the precursor to socio-legal transition through reforms to law and policy, which send clear messages as to how justice will be achieved; where one side of the community sees ‘their’ flag (and, by extension, their identity, history and culture) being removed, they may read into this act the message that *your side was to blame for this conflict, you are no longer in control and you will no longer be given this amount of ‘cultural space’ for the display of emblems which we find offensive.*

On the other hand, framing the need for visible mnemonics as an essential aspect of the right to enjoy one’s cultural heritage may allow for a greater and more meaningful degree of community consensus, understanding and mutual tolerance.¹²⁸ Whether Northern Ireland’s decision-makers are ready to see themselves as politically neutral, future-focused trustees of a communal peace that is realised in a ‘shared cultural space’ remains unclear. Nonetheless, they must at least

¹²¹ See *Declaration on the Right of Peoples to Peace*, UN GAOR, 57th mtg, UN doc A/RES/39/11 (12 November 1984).

¹²² Will Kymlicka, *The Rights of Minority Cultures* (Oxford University Press, 1995) 194.

¹²³ Nathan C Funk, ‘Building on What’s Already There: Valuing the Local in International Peacebuilding’ (2012) 67 *International Journal* 391, 392.

¹²⁴ Katia Papagianni, ‘Mediation, Political Engagement and Peacebuilding’ (2010) 16 *Global Governance* 243, 243.

¹²⁵ Funk, above n 123, 408.

¹²⁶ Micheal Stopford, ‘Peace-keeping or Peace-enforcement: Stark Choices for Grey Areas’ (1996) 73 *Detroit Mercy Law Review* 499, 504.

¹²⁷ Menkel-Meadow, above n 89, 12.

¹²⁸ Whether such tolerance might give rise to a positive obligation on the part of decision-makers to provide visible ‘cultural spaces’ for politically contentious items is a more difficult question. Requiring former enemies to actively respect (rather than simply tolerate) a contentious emblem, which they perceive as a divisive symbol of recent conflict or a message of triumphalism, seems an unlikely method for maintaining steady progress towards a longer-term peace.

acknowledge that flags, as iconic and emotive emblems of cultural identity, can easily convey (through their presence or absence) a 'sharp political message' of control, conquest and power over disputed territories and histories.¹²⁹ A gradual (but relentless) population shift looks set to further alter the balance of power with respect to decision-making that has relevance to culture. In this context, any additional diminishing or dismissal of one side's cultural traditions by the other seems likely to be even more laden with perceived political meaning.

¹²⁹ Duggal and Sridhar, above n 10, 146.

HUMAN DIGNITY AND FREEDOM OF SPEECH IN THE POST APARTHEID STATE

SPENCER WOLFF*

*Throughout his many decades of struggle and imprisonment, Nelson Mandela clung to a demand for human dignity for all South Africans. In the wake of his passing, it might seem pertinent to ask what human dignity represents in South Africa today. Many of us would be surprised by the answer. Focusing on three recent controversies, *The Citizen 1978 Pty Ltd v McBride*,¹ *Le Roux v Dey*² and *Zuma v Goodman Gallery*,³ this article analyses how South Africa's courts and politicians have begun to promote a notion of human dignity that privileges 'Personality Rights' — the protection of reputation, honour and privacy — over freedom of expression. If human dignity was invoked under apartheid to demand the right to publicly denounce an oppressive political system, over the last decade South Africa's jurists have drawn on a line of German constitutional jurisprudence to repurpose the dignity principle to shield public figures from criticism.*

*Even more worrying, this sudden enthusiasm for 'Personality Rights' has gone hand in hand with efforts by the government to undermine constitutional protections for an independent press and judiciary. For the moment, however, South Africa's Constitutional Court ('SACC') has yet to embrace the full rigour of 'Personality' protections embodied in German law. This article contends that the towering legacy of South Africa's Truth and Reconciliation Commission ('TRC') has restrained the Court. As a body tasked with 'restor[ing] the human and civil dignity of victims "by granting them an opportunity to relate their own accounts of the violations of which they are the victim"',⁴ the TRC articulated an interpretation of human dignity that was speech-empowering instead of speech-restrictive. As this article's analysis of *McBride* shows, when directly confronted with the human dignity violations wrought by apartheid, the SACC has responded with a speech-friendly interpretation of human dignity at odds with its other precedents. Yet, with the memory and impact of the TRC rapidly fading, South Africa finds itself at a crossroads. What will become of the robust speech protections that characterised South African democracy in its initial years?*

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¹ [2011] 4 SA 191 (Constitutional Court) ('*McBride*').

² [2011] 3 SA 274 (Constitutional Court) ('*Le Roux*').

³ [2012] 17978/2012 (High Court) ('*Goodman Gallery*').

⁴ *Albutt v Centre for the Study of Violence and Reconciliation* [2010] 3 SA 293, [60] (Constitutional Court) ('*Albutt*').

I INTRODUCTION: SPEAR OF THE NATION AND SOUTH AFRICA'S CRISIS OF DIGNITY

Basically, we fight against two features which are the hallmarks of African life in South Africa and which are entrenched by legislation, which we seek to have repealed. These features are poverty and lack of human dignity.

Nelson Mandela — Statement from the Dock in the Rivonia Trial.⁵

On 29 May 2012, a massive crowd of African National Congress ('ANC') supporters marched through the streets of Johannesburg headed for the Goodman Gallery on Jan Smuts Avenue. They wore screen-printed shirts and carried placards on which were written 'President Zuma Has a Right to Human Dignity and Privacy' and 'We Say No! to Abuse of Artistic Expression'.⁶ They had gathered to decry a painting by the well-known artist, Brett Murray. The title of his controversial piece, *The Spear*, was a reference to uMkhonto weSizwe (Zulu for 'Spear of the Nation'), the military wing of the ANC launched by Nelson Mandela in 1961.⁷ In the notorious 1964 Rivonia Trial, Mandela was sentenced to life in prison for his role as its architect. Yet, *The Spear* hardly depicted a heroic struggle against oppression. Instead, taking as its model an iconic piece of Soviet realist art,⁸ Murray had placed President Jacob Zuma in a dictatorial pose with his genitalia exposed. Zuma's privies formed the putative 'Spear of the Nation'.

The political leadership of the ANC was not amused. They immediately filed an 'urgent application' for the painting to be removed. The complaint alleged 'an infringement of President Zuma's and the ANC Party's constitutional right to [human] dignity and privacy'.⁹ Shortly after the filing, on 22 May 2012, two men entered the Goodman Gallery and defaced the work with red and black paint, obscuring Zuma's face and genitalia.¹⁰ When the judges of the Gauteng High Court rejected the ANC's filing for an urgent removal the case proceeded to trial.

This was not the first time Zuma had brought proceedings. Between 2006 and 2010, Zuma personally brought dignity complaints against eight newspapers, one radio station, two cartoonists and several journalists. His most notorious lawsuit was a 5 000 000 rand¹¹ claim brought in relation to cartoons depicting his rape trial. The claim was brought in 2008 against

⁵ Nelson Mandela, 'Statement From the Dock at the Opening of the Defence Case in the Rivonia Trial' (Statement delivered at the Pretoria Supreme Court, Pretoria, 20 April 1964) <<http://www.anc.org.za/show.php?id=3430>>. In this 1964 trial, Mandela was sentenced to life in prison for his role as one of the heads of uMkhonto weSizwe, the military wing of the ANC.

⁶ Alex Crawford, 'Cheers, Jeers and Tears Over Zuma's Spear', *Sky News* (online), 25 May 2012 <<http://news.sky.com/home/world-news/article/16234886>>.

⁷ Mandela, above n 5.

⁸ Ronald Kowalski, *The Russian Revolution: 1917–1921* (Routledge, 2005) 3. 'Lenin Lived, Lenin Lives, Lenin Will Live' by Victor Ivanov.

⁹ Jacob Gedleyihlekisa Zuma and the African National Congress versus Goodman Gallery and City Press, Filing Sheet: Applicant's Replying Affidavit to the Second Respondent's Answering Affidavit, in the South Gauteng High Court, Case Number: 17978/2012, 5.

¹⁰ David Smith, 'Zuma Portrait Court Case Reopens South Africa's Wounds from Apartheid Era', *The Guardian* (online), 25 May 2012 <<http://www.theguardian.com/world/2012/may/24/spear-zuma-portrait-court-apartheid>>.

¹¹ About US\$650 000.

Zapiro, South Africa's best-known political satirist.¹² As in his filing against *The Spear*, Zuma alleged that the cartoons violated his right to dignity.¹³

The saga around *The Spear* then took a surprising twist. During the hearing, one of the judges pressed Zuma's lawyer, Gcina Malindi, on the question of racism. The judge demanded to know why Malindi's court papers had characterised the painting as akin to 'a colonial attack on the black culture of this country'.¹⁴ Malindi responded that Murray's artwork should be considered from the perspective of the country's black majority who were angered and humiliated by the painting's message.¹⁵ When the judge retorted that attempting to prevent the dissemination of the painting on the internet would 'make an ass of the law',¹⁶ Malindi lost control and 'sank into his seat in sobs that could be heard throughout the courtroom'.¹⁷

Malindi was not only a lawyer for the ANC. In a former life he had appeared as one of 22 defendants in the Delmas Treason Trial that ran from 1985 to 1988. Sentenced to five years on Robben Island, his testimony revealed a young man scarred by life under apartheid. During that trial he had broken down in tears as well.¹⁸ In a later interview Malindi said that

for some reason, the issues and the manner in which we were asked certain questions, immediately brought back terrible memories of torture and harassment ... Once again, we were at pains to explain and justify the legitimacy of the existence of the historically oppressed as well as the legitimacy of their viewpoints.¹⁹

The Spear controversy proved no simple clash between human dignity and freedom of speech. Rather, it pitted two different orders of dignity against one another. The first order, set forth in

¹² Glenda Daniels, 'The Case of Zuma Versus Zapiro', *The Media Online*, 19 December 2012 <<http://themediainline.co.za/2012/12/the-case-of-zuma-versus-zapiro/>>.

¹³ International Publishers Association, 'President Zuma Drops Lawsuit Against IPA Freedom to Publish Prize-Winner' (Press Release, 1 November 2012) <http://www.internationalpublishers.org/images/stories/IPAftpPrize/2012/1%20nov_2012_final.pdf>. In one cartoon, Zuma unbuckles his belt before a hypostasised Lady Justice, who is restrained by several other members of the ANC. In a second cartoon, a beaten Lady Justice yells, 'Fight, Sister, Fight' to the personification of free speech, held in a brace by an ANC politician before a similarly unbuckled Zuma. This case, however, was but one of three lawsuits Zuma had initiated against Shapiro, totaling 15 million rand in claims. The other two are still pending.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Donna Bryson, 'African National Congress Lawyer, Gcina Malindi, Sobs in South African Courtroom', *The Huffington Post* (online), 26 May 2012 <http://www.huffingtonpost.com/2012/05/26/african-national-congress-lawyer-gcina-malindi-courtroom_n_1547591.html>.

¹⁸ Claudia Braude, 'Spear/Smear/Tear of the Nation: Trauma and Competing Rights in Post-Apartheid South Africa' (2012) 65 *Journal of the Helen Suzman Foundation* 62, 62:

George Bizos, who also represented Malindi in the Delmas Treason Trial, recalls his client's emotional testimony in the witness stand when he described apartheid's impact on black families. Prohibited from living in the city with his family, Malindi's father could only visit them for seventy two hours at a time; and as a boy of nine, Malindi tried to prevent his father being arrested by denying who he was. 'Malindi wiped away tears with his hands' as he testified in the apartheid court, Bizos remembers.

¹⁹ Ido Lekota, 'Why We Cried in Court', *The Sowetan* (online), 25 June 2012 <<http://www.sowetanlive.co.za/columnists/2012/06/25/why-we-cried-in-court>>.

Jacob Zuma's legal claim, asserted that the principle of human dignity defends against particularised harms to an individual's reputation or honour. It maintained that human dignity protections are synonymous with those against defamation. The second order, expressed by Malindi's cry, grounded its complaint in the traumatic history of apartheid's assaults on South Africa's non-white populace. It rejected a host of denigrations that were political, legal, and, above all, representational in form.²⁰ As Malindi emphasised, '[f]or activists it was worse because your body ... was used to show [that] you are nothing; you were stripped naked'.²¹ His two emotional breakdowns, some 30 years apart, were primed by mortifying stereotypes about black sexuality and degrading rituals of forced public nudity.

Both orders of human dignity are somewhat speech-restrictive. However, even in this regard they are distinct. The second order seeks to protect a class or cohort against collective abuse (hate speech). It shields an objective core of attributes that must be accorded to all members of humanity. It protects a status instead of a stature, an objective right instead of a subjective one. The first order reading of human dignity secures an individual's reputation against slights, disparagement and criticism, even when the plaintiff is a public figure. This notion of human dignity restricts a panoply of possible speech acts, from the slanderous to the satirical. It protects an individual's stature instead of his or her status.

To add to this contrast, South Africa's TRC presumed that access to a public institutional forum in which to express one's ideas was constitutive of human dignity.²² A status-based reading of the principle can therefore *empower* speech, guaranteeing the dispossessed a right to express their views, while prohibiting language that would deny their common humanity.

Brett Murray's painting, *The Spear*, did in fact infringe upon the principle of human dignity. Not, however, according to the subjective criteria singled out by President Zuma. In his complaint, Zuma charged that the portrait 'suggests that I am a philanderer, a womanizer, and one with no respect. It is an undignified depiction of my personality'.²³ Yet, as Murray pointed out in his filing, the President's widely discussed rape trial has made his sexual escapades a matter of public interest.²⁴ Hence, rather than offending subjective standards, the painting offended the objective human dignity of an extended *class* of South Africans. It did so by reinvigorating offensive and prejudiced stereotypes about black sexuality that once formed part of an apparatus of cultural domination deployed by the racist apartheid government. When this trauma went unacknowledged by the court, Malindi lost control of his emotions.

The Spear thus mingles and confuses two modes of human dignity. As this article will discuss below, the reputational emphasis favoured by the ANC has successfully obscured and undermined a status-based and objective definition of human dignity, which could far better

²⁰ Ibid.

²¹ Ibid.

²² *Albutt* [2010] 3 SA 293, [60] (Constitutional Court). 'The Act required that the Commission help restore the human and civil dignity of victims "by granting them an opportunity to relate their own accounts of the violations of which they are the victim"'.

²³ David Smith, 'Jacob Zuma Goes to Court Over Painting Depicting His Genitals', *The Guardian* (online), 22 May 2012 <<http://www.theguardian.com/world/2012/may/21/jacob-zuma-court-painting-genitals>>.

²⁴ Brett Murray, 'Why I Painted "The Spear" on Jonathan Shapiro', *Zapiro* <<http://www.zapiro.com/Sponsored-by/Brett-Murray-Why-I-painted-the-Spear/>>.

address the traumatic legacy of apartheid. The blacking out of Zuma's face and genitalia also effaced Malindi's cry. This is a development that should sound tocsins of alarm in an era in which South Africa's political leaders are heavily promoting a stature-based reading of human dignity. Unsurprisingly, their sudden enthusiasm for dignity rights goes hand in hand with extensive efforts to challenge the constitutional protections for press freedoms that have guided the country since the end of apartheid.²⁵

South Africa, however, is not alone. As I have discussed elsewhere,²⁶ the robust constitutional protections for human dignity, enshrined in South Africa's 1996 Constitution,²⁷ were both preceded and outclassed by Germany's 1949 Constitution ('The Basic Law').²⁸ Even more, the evolution currently remolding South African jurisprudence, via which a speech-empowering and status-based interpretation of human dignity is gradually yielding to a speech-restrictive and stature-based one, transpired in (West) Germany several decades ago.²⁹

Today, the 'Rainbow Nation' finds itself at a crossroads comparable to that reached by Germany in the early 1970s. Though the two young republics house significantly different legal and cultural traditions, their constitutions accord human dignity a similarly central role. As a result, the temptation presents itself to South Africa's elites, as it did to Germany's, to use the principle to superintend the parameters of 'acceptable' speech within the young republic. That Germany's story appears on the brink of repetition in South Africa says much about the latent volatilities inherent in the concept of dignity. Dignity's darker side may indeed be the silencing of speech.

Murray's painting provides an especially potent heuristic for this theme, for it infringes upon the principle of human dignity at the same time that it emblematises its values — ie it summons up the spectre of a racist discourse tied to a traumatic past while, at the same time, offering a tonic towards spirited public debate and advocating in the name of the oppressed.

This article will begin with a brief overview of the role of human dignity within South Africa's 1996 Constitution and its relationship with Germany's dignity regime. After conducting a survey of the landmark cases linking human dignity, defamation and free speech, it will move on to a

²⁵ African National Congress, 'NGC 2010 Discussion Document — Media Diversity and Ownership' <<http://www.anc.org.za/docs/discus/2010/mediad.pdf>>. In 2010, the ANC proposed the creation of a Media Appeals Tribunal, based on the premise that freedom of the press is not an absolute right, but must be balanced against individual rights to privacy and human dignity. Though the Media Appeals Tribunal has yet to see the light of day, the recently passed Protection of Information Bill 2013 envisions up to 25 years of jail time for anyone that reveals any 'classified' information, with little to no protection for those exposing government corruption or malfeasance. The legislation was dubbed the 'Secrecy Bill' by its opponents and catalysed massive countrywide protests. In addition, hoping to hobble judicial review of its new tactics, the ANC has proposed a special panel to review the judgments of the South African Constitutional Court, with a view to assessing its 'impact on social transformation'. The panel may recommend modifying the court's powers; See also Eusebius McKaiser, 'Democracy and Its Malcontents', *The New York Times* (online) 8 March 2012 <http://latitude.blogs.nytimes.com/2012/03/08/south-africas-governing-party-resents-the-constitutional-courts-fierce-independence/?_r=0>.

²⁶ Spencer Wolff, *The Darker Sides of Dignity — Freedom of Speech in the Wake of Authoritarian Collapse* (PhD Thesis, Yale University, 2013).

²⁷ *Constitution of the Republic of South Africa Act 1996* (South Africa).

²⁸ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany].

²⁹ Wolff, above n 26.

discussion of *Le Roux v Dey* ('*Le Roux*')³⁰ and *The Citizen 1978 Pty Ltd v McBride* ('*McBride*'),³¹ two constitutional cases from 2011. Finally, it will conclude with a second look at *The Spear* controversy and consider what it augurs for the future of South African constitutional rights.

II DIGNITY IN GERMAN AND SOUTH AFRICAN CONSTITUTIONAL LAW

The ANC had good reason to repeatedly invoke human dignity to advance its political agenda. South Africa's 1996 Constitution is pervaded with references to the principle. The right is officially housed in s 10 of the Constitution, which provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. In addition, s 1 forcefully proclaims that South Africa is a republic founded on the value of 'human dignity',³² while ss 7(1), 36(1) and 39(1) all mandate that the government respect and advance human dignity.³³ For this reason, South Africa regularly features alongside Israel, Canada and India in publications examining human dignity from a comparative law perspective.³⁴ Nonetheless, Germany remains the leader in this class. Not only does its 1949 Constitution launch with the commanding art 1(1), '[h]uman dignity is untouchable', but recent German Constitutional Court decisions have also cast human dignity as the 'foundation of all fundamental rights'.³⁵ In addition, the second sentence of art 1(1), '[i]t is the duty of all state authority to respect and protect human dignity', enjoins the government to proactively intervene to assure its integrity. In global comparative terms, the German principle of human dignity is without peer.

Nonetheless, over the past 20 years the SACC has relentlessly expanded human dignity's centrality to its jurisprudential interpretation.³⁶ In *S v Makwanyane*,³⁷ the landmark case in which

³⁰ [2011] 3 SA 274 (Constitutional Court).

³¹ [2011] 4 SA 191 (Constitutional Court).

³² *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 1. This means that any constitutional amendment that might infringe the value of human dignity would have to pass heightened constitutional muster. Moreover, s 1 of the Constitution requires the assent of a two thirds supermajority of South Africa's parliament before it may be amended.

³³ Section 7(1) states that the Bill of Rights 'affirms the democratic values of human dignity, equality and freedom', s 36(1) states that fundamental rights may only be limited to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' and s 39(1) enjoins the interpreters of the Bill of Rights to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.

³⁴ See, eg, Matthias Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 370, 375; Luís Roberto Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35 *Boston College International and Comparative Law Review* 331, 337.

³⁵ Craig Smith, 'More Disagreement Over Human Dignity: Federal Constitutional Court's Most Recent Benetton Advertising Decision' (2003) 4 *German Law Journal* 533, 533. In addition, art 79(3) of the Constitution, the so-called 'Perpetuity Clause', singles out human dignity as the only fundamental right impervious to constitutional amendment. In fact, art 79 only names arts 1 and 20 (which guarantee the 'democratic' and 'social' order of the German State) as immune from amendment.

³⁶ Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 20 *Stellenbosch Law Review* 171, 171. Henk Botha, Professor of Law at the University of Stellenbosch in South Africa, has even gone so far as to call human dignity the *Leitmotiv* of all constitutional interpretation in the Republic of South Africa.

³⁷ [1995] 3 SA 391 (Constitutional Court).

the SACC invalidated the death penalty, its justices elaborated a narrative of state legitimacy founded on the figure of human dignity. In one of the Court's most ringing passages, O'Regan J held that:

Apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.³⁸

If, in Germany, human dignity served as the 'foundation of all fundamental rights',³⁹ in South Africa it was the 'cornerstone of human rights'⁴⁰ and 'a value that informs the interpretation of many, possibly all, other rights'.⁴¹

It should come as little surprise that judicial interpretation of the human dignity principle by the German and South African Constitutional Courts exhibit striking similarities. If the triumphant declaration that 'human dignity is untouchable', in art 1(1) of the Basic Law, was intended to signal a cogent repudiation of National Socialist ideology, then dignity's inclusion as a founding value of South Africa's 1996 Constitution similarly emphasised the new republic's decisive break with its racist, authoritarian past.

The parallels in the genesis of, and symbolic work performed by, 'human dignity' in the two countries have led the SACC to actively draw on German constitutional jurisprudence to substantiate its rulings. As Ackermann J wrote in a concurring opinion in the landmark defamation case, *Du Plessis v De Klerk*:

I do believe that the German Basic Law was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and Constitution warranted. The GBL was no less powerful a response to totalitarianism, the degradation of human dignity and the denial of freedom and equality than our Constitution. Few things make this clearer than Art 1(1) of the GBL.⁴²

The majority opinion in *Du Plessis v De Klerk* not only relies on landmark German human dignity decisions,⁴³ but Justice Ackermann's concurrence hints at the deep influence of the German Basic Law on the drafters of the South African Constitution.⁴⁴

³⁸ Ibid [144].

³⁹ Bundesverfassungsgericht [German Constitutional Court], 1 BvR 1476, 10 October 1995 reported in (1995) 93 BVerfG 266, 293.

⁴⁰ *Christian Education South Africa v Minister of Education* [2000] 4 SA 757, 797 (Constitutional Court).

⁴¹ *Dawood v Minister of Home Affairs* [2000] 3 SA 936, [35] (Constitutional Court).

⁴² *Du Plessis v De Klerk* [1996] 3 SA 850, [92] (Constitutional Court).

⁴³ Ibid [40], [103].

⁴⁴ Ibid [106]; See also Hanri Mostert, 'Does German Law Still Matter? A Few Remarks About the Relevance of Foreign Law in General and German Law in Particular in South African Legal Development with Regard to the Issue of Constructive Expropriation' (2002) 3(9) *German Law Journal* <<http://www.germanlawjournal.com/index.php?pageID=11&artID=183>>; See also J C Van der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (Birbeck Law Press, 2005).

As one might therefore imagine, the contours that the SACC has given to the concept of human dignity closely approximate those drawn by the German Constitutional Court. As the SACC would make clear in its leading case on free speech and defamation, *Khumalo v Holomisa* ('*Khumalo*'),⁴⁵ much like in Germany, personal reputation falls under the aegis of human dignity:

The value of human dignity in our Constitution ... includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements ... No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution.⁴⁶

The Zuma-led ANC has exploited the consubstantiality of 'reputation, *dignitas* and privacy' — ie of one's objective human worth and subjective social value — to promote an uncritical conflation of the right to human dignity with a right to personal honour. This bid to swap human dignity as status with human dignity as stature has been abetted by the South African courts' German-inflected jurisprudence. With the retirement of the towering first class of Constitutional Court justices — the highly progressive Chaskalson Court⁴⁷ — the SACC is undergoing a conservative transition. How Zuma's newly appointed judges, Zondo J (2012) and Madlanga J (August 2013), will rule when it comes time to balance dignity against free speech is anyone's guess.

Of course, Germany and South Africa are hardly identical. The justices of the Rainbow Nation face a uniquely heterogeneous population whose makeup has led them to construe human dignity in quite novel ways.⁴⁸ The most important of these is the marrying of human dignity to the indigenous African concept of ubuntu.⁴⁹ Generally translated as 'a person is a person through other people', ubuntu makes forceful claims about the ethical demands of living within a tightly bound community.

⁴⁵ [2002] 5 SA 401 (Constitutional Court) ('*Khumalo*').

⁴⁶ *Ibid* [27].

⁴⁷ Theunis Roux, *The Politics of Principle: The First South African Constitutional Court* (Cambridge University Press, 2013) 2. The court is named after Arthur Chaskalson, who acted as Chief Justice from 1995–2005. As Theunis Roux describes it, the Chaskalson Court 'built an unrivalled reputation in the comparative constitutional law community for technically accomplished and morally enlightened decision-making'.

⁴⁸ Botha, above n 36, 213. For instance, in a series of cases, they have understood the principle to mandate 'respect for the multiple and divergent cultures, religions, sexual orientations, family formations, worldviews and narratives which constitute each individual as unique, and precludes the conflation of equality with the homogenisation of beliefs and behaviour'; See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] 1 SA 6 (Constitutional Court); See also *Minister of Home Affairs v Fourie* [2006] 1 SA 524 (Constitutional Court); See also *MEC for Education: KwaZulu-Natal v Pillay* [2008] 1 SA 474 (Constitutional Court). In addition, given the vast inequalities that have resulted from the economic predations and institutionalised inequalities fostered by apartheid, the Court similarly held, in the renowned case of *Government of the Republic of South Africa v Grootboom* [2001] 1 SA 46 (Constitutional Court), that human dignity obliged the State to ensure a minimum of adequate housing for its citizens.

⁴⁹ See, eg, *S v Makwanyane* [1995] 3 SA 391, [308] (Constitutional Court); *Hoffmann v South African Airways* [2000] 1 SA 1 (Constitutional Court); *Port Elizabeth Municipality v Various Occupiers* [2005] 1 SA 217 (Constitutional Court); *Dikoko v Mokhatla* [2006] 6 SA 235 (Constitutional Court).

In *S v Makwanyane*, the SACC took pains to define the term, since it played a major role in the invalidation of the death penalty:

Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in ubuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities ... Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.⁵⁰

Like human dignity, ubuntu is plastic in nature. It houses big ideas that gain definition through specific historical and cultural narratives. In this regard, ubuntu has gained its clearest contours through the TRC. The African principle was included in the 1993 interim Constitution only as part of an epilogue,⁵¹ the express purpose of which ‘was to provide a basis for amnesty and the formation of a Truth and Reconciliation Commission’.⁵² Ubuntu thus draws its significance from the most narrative-heavy ‘legal’ body in memory, and its symbiotic relationship with human dignity may offer a prophylactic against the expansion of a speech-restrictive, reputational politics in South Africa.

Moreover, human dignity’s link to ubuntu situates it at the crux of ongoing public debates about the legacy of past oppression. Black South Africans may now command the nation’s political branches, but most economic and cultural institutions continue to be vested in white hands. The public sphere is fraught with quarrels over the meaning of ‘reconciliation’ (and whether it implies reparations), over entrenched racism in the media and over the ‘just’ social parameters of the new republic.

The incredible diversity that has lent South Africa the moniker ‘The Rainbow Nation’ has also ensured the lack of an elite consensus that could close the book on the past. This has so far stymied efforts to recruit human dignity to effectively manage political controversies, especially those that intersect with the legacy of apartheid. Yet, the ground slowly appears to be shifting. No case brought all these issues to the fore more surely than the 2011 controversy of *McBride*.⁵³

⁵⁰ *S v Makwanyane* [1995] 3 SA 391, [308] (Constitutional Court).

⁵¹ *Constitution of the Republic of South Africa Act 200 of 1993* (South Africa). ‘The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past’.

⁵² Drucilla Cornell and Nyoko Muvangua (eds), *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press, 2012), 7.

⁵³ [2011] 4 SA 191 (Constitutional Court).

III *THE CITIZEN V MCBRIDE*

In the latter half of 2003, Robert McBride, a former ANC activist and cadre member of ‘Spear of the Nation’ (or ‘uMkhonto weSizwe’), was tipped for Police Chief of Ekurhuleni, one of South Africa’s largest municipalities. In response, *The Citizen*, a tabloid-style national newspaper, ran a series of editorials vehemently criticising his nomination.⁵⁴ *The Citizen* particularly impugned McBride’s leading role in the ANC’s notorious car bombing of Magoo’s Bar during the armed struggle against apartheid.⁵⁵ The 1986 attack resulted in three civilian deaths and scores of injuries. In the foreword to the report of the TRC, Archbishop Desmond Tutu included this attack in his tally of apartheid’s most dreadful acts, stating that ‘[a]ll South Africans know that our recent history is littered with some horrendous occurrences. The Sharpeville and Langa killings, the Soweto uprising, the Church Street bombing, Magoo’s Bar, [and] the Wimpy Bar bombing’.⁵⁶

As the main architect of the attack, McBride was sentenced to death, along with several other accomplices.⁵⁷ However, in 1991, not long after the unbanning of the ANC, he was reprieved.⁵⁸ A year later he was released.⁵⁹ In 1997, McBride applied for amnesty under the *Promotion of National Unity and Reconciliation Act 1995* (South Africa) for the murders and associated crimes. In 2001, McBride was granted amnesty.⁶⁰

The Citizen branded McBride a ‘murderer’ and declared him unfit for the job of Police Chief.⁶¹ Its editorials were toothy. Beyond mooted his role in the car bombing, they also pointed to McBride’s 1998 arrest and detention in Mozambique on suspicion of gun-running.⁶² One of the editorials even went so far as to claim that McBride was not contrite for his acts, stating ‘[f]orgiveness presupposes contrition. McBride still thinks he did a great thing as a “soldier”, blowing up a civilian bar. *He’s not contrite*. Neither are Winnie or Boesak. They are not asking for forgiveness’.⁶³

In response to the articles, then President Thabo Mbeki published an open letter on the *ANC Today* website, entitled ‘We Will Not Abandon Reconciliation’. He argued that *The Citizen* was:

urging our country to reopen the wounds of the past ... Because it feels free to denounce Mr McBride as a criminal — ‘make no mistake, that’s what he is’ — it opens the way for the rest of us to follow its example. We too have ample opportunity to denounce thousands as criminals. The serious question we must ask is — whose interests does ‘The Citizen’ serve?⁶⁴

⁵⁴ *McBride* [2011] 4 SA 191, [4] (Constitutional Court).

⁵⁵ *Ibid* [3]–[4].

⁵⁶ Truth and Reconciliation Commission of South Africa, *Report* (1998–2003) vol 1 ch 1 <<http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>>.

⁵⁷ *McBride* [2011] 4 SA 191, [3] (Constitutional Court).

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid* [11].

⁶² *Ibid* [3].

⁶³ *Ibid* [11] [emphasis altered].

⁶⁴ Staff Reporter, ‘Mbeki Hauls *The Citizen* Over the Coals’, *Mail & Guardian* (online), 17 October 2003 <<http://mg.co.za/article/2003-10-17-mbeki-hauls-the-citizen-over-coals>>.

Mbeki's article had the desired effect. McBride was appointed head of the metro police of Ekurhuleni.⁶⁵ Despite his apparent triumph in the crucible of public opinion, he brought suit against the newspaper, claiming 'damages totalling R3.6 million for defamation and for impairment of dignity'.⁶⁶

Before analysing *McBride*, this article will cast a glance over the antecedent constitutional jurisprudence on freedom of expression and defamation in South Africa, so as to better understand why McBride believed he would succeed in his claim.

A *The Limits of Free Speech in South Africa*

During South Africa's first decade of democracy, freedom of expression sprouted wings. Not only did the new Constitution offer robust protections for the principle in s 16 of its Bill of Rights — '[e]veryone has the right to freedom of expression'⁶⁷ — the SACC also wrote in expansive, often soaring language about free speech's invaluable contribution to a healthy society. 'Freedom of expression', the Court declared in *South African National Defence Union v Minister of Defence*,⁶⁸ 'lies at the heart of a democracy. It is valuable for many reasons, including ... its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally'.⁶⁹ Or, as Mokgoro J observed in *Case v Minister of Safety and Security*,

freedom of expression is one of a 'web of mutually supporting rights' in the Constitution ... The corollary of the freedom of expression and its related rights is tolerance by society of different views ... In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.⁷⁰

The Court's lofty words on the value of tolerance were meant as solemn counsel to a newly democratic citizenry still acquiring political literacy. They were also a pointed rebuke to a history of ubiquitous censorship under apartheid. While in power, the Afrikaans National Party ruthlessly curtailed press freedoms. Anti-apartheid writers and journalists were jailed, openly

⁶⁵ *McBride* [2011] 4 SA 191, [17] (Constitutional Court).

⁶⁶ *Ibid* [5].

⁶⁷ *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2. Section 16 reads in full:

- (1) Everyone has the right to freedom of expression, which includes — (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to — (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

⁶⁸ [1999] 4 SA 469 (Constitutional Court).

⁶⁹ *Ibid* [7]–[8].

⁷⁰ *South African National Defence Union v Minister of Defence* [1999] 4 SA 469, [8] (Constitutional Court) (O'Regan J). Here, O'Regan J is commenting on the reasoning of Mokgoro J in *Case v Minister of Safety and Security* [1996] 3 SA 617.

assassinated or made to ‘disappear’.⁷¹ The apartheid state orchestrated a comprehensive regime of censorship, backed up by an unconstrained threat of violence.

Even after 1990, when South Africa could be said to have entered an era of *glasnost* — with the unbanning of the ANC and the relaxing of state supervision over the public sphere — the legal regimes that ‘guaranteed’ press freedoms remained those birthed in the apartheid era. They offered maximum protection for an individual’s ‘reputation’ or ‘dignity’ as a pretext for chilling media revelations about government wrongdoing in the event that brute force was unavailable. For instance, the leading pre-constitutional precedent, *Neethling v Du Preez* (‘*Neethling*’),⁷² required press outlets to prove the truth, by a preponderance of evidence, of any defamatory statements they published.⁷³ In the affair, two newspapers, *The Weekly Mail* and the *Vrye Weekblad*, went to press with allegations that Lieutenant-General Lothar Neethling had supplied poison for the assassination of several anti-apartheid activists.⁷⁴ Neethling brought a dignity complaint and, although Dirk Coetzee, a former Captain of the South African Police Service, testified to the truth of the allegations, the judge awarded extensive damages.⁷⁵ The *Vrye Weekblad*, one of the few Afrikaans newspapers with a record of courageously confronting the apartheid government, went bankrupt.⁷⁶

Under South African common law, the elements of defamation are the wrongful and intentional publication of a defamatory statement concerning a plaintiff.⁷⁷ Since any publication of a defamatory statement is assumed to be both wrongful and intentional, a prima facie showing of defamation is surprisingly easy to make. By rejecting a defence of ‘fair information on a matter of public interest’,⁷⁸ *Neethling* conferred maximum protection on a plaintiff’s reputation at the expense of the press.

In the decision’s wake, no editor could risk publishing an affirmation of misconduct that could not be substantiated. Confidential sources were taboo. The *Neethling* precedent stood until 1998 when the Supreme Court of Appeal,⁷⁹ in *National Media Ltd v Bogoshi* (‘*Bogoshi*’),⁸⁰ introduced a reasonability test for publication,⁸¹ with special protections accorded to political speech.⁸² Yet, within the dicta of *Bogoshi* lay the seeds for future restrictions on freedom of speech. In the

⁷¹ Peter B McDonald, *The Literature Police: Apartheid Censorship and Its Cultural Consequences* (Oxford University Press, 2009).

⁷² [1994] 1 SA 708 (Supreme Court of Appeal) (‘*Neethling*’).

⁷³ Ibid 225–235. Unless, of course, the party could raise the defence of ‘qualified privileged based on the existence of a duty on the part of the newspaper to publish the defamatory matter and a reciprocal interest on the part of its readers to have the matter communicated to them’.

⁷⁴ Staff Reporter, ‘Police General Should Be Charged With Murder, Says Max Du Preez’, *South African Press Association* (online), 17 September 1997 <<http://www.justice.gov.za/trc/media/1997/9709/s970917g.htm>>.

⁷⁵ *Neethling* [1994] 1 SA 708, 6, 251 (Supreme Court of Appeal).

⁷⁶ Staff Reporter, ‘Police General Should Be Charged With Murder, Says Max Du Preez’, *South African Press Association* (online), 17 September 1997 <<http://www.justice.gov.za/trc/media/1997/9709/s970917g.htm>>.

⁷⁷ *Khumalo* [2002] 5 SA 401, [18] (Constitutional Court).

⁷⁸ *Neethling* [1994] 1 SA 708, 234 (Supreme Court of Appeal). The Court additionally refused reduce personality protections for public figures (politicians, etc).

⁷⁹ This is South Africa’s final court of appeal, except in constitutional matters.

⁸⁰ [1998] 4 SA 1196 (Supreme Court of Appeal) (‘*Bogoshi*’).

⁸¹ Ibid. The case held that if the article was ‘reasonable to publish’ according to the ‘particular facts ... at the time’, it would not be held defamatory.

⁸² Ibid 1226–27.

democratic era, the Constitutional Court began to invoke a language of dignity that was entirely absent in the pre-constitutional *Neethling* decision.⁸³ Four years later, when the SACC finally considered its most important defamation case, the justices would deputise the principle of human dignity as the principal guardian against excesses of speech.

The controversy in *Khumalo*⁸⁴ sprang from a publication in the *Sunday Mail* that alleged a certain Bantu Holomisa was involved with a gang of bank robbers. Holomisa, the head of a major political party, responded with a dignity complaint.⁸⁵ However, before the High Court could rule, the *Sunday Mail* sought an exception to the common law rule of defamation before the Constitutional Court. The paper claimed that a public figure, defending on matters of public interest, must prove the falsity of the statement in question.⁸⁶

The SACC's opinion began with a veritable homage to the media's capacity to 'strengthen and invigorate [South Africa's] fledgling democracy'.⁸⁷ It even went on to claim that freedom of speech 'is constitutive of the dignity and autonomy of human beings'.⁸⁸ However, when it came time to decide the case on its facts, the judges quickly changed their tune. Writing for a unanimous Court, O'Regan J concluded that 'although freedom of expression is fundamental to our democratic society, it is not a paramount value'.⁸⁹ As the Court went on to underscore, human dignity is a *foundational* value.⁹⁰ Moreover, since the law of defamation safeguards 'the legitimate interest individuals have in their reputation ... [it] is one of the aspects of our law which supports the protection of the value of human dignity'.⁹¹ *Khumalo* thus fully assimilated the common law definition of defamation into the constitutional armature of human dignity. The Court concluded (correctly in this author's mind) that it would 'clearly put plaintiffs at risk' if public figures, who had been defamed, would 'never succeed unless they [could] establish that a defamatory statement was false'.⁹² However, by integrating the private attributes that determine one's social stature into the categorical status of the 'human', the judges set the stage for a slew of battles over free speech.

Hindsight is 20-20, and both the *McBride* and the *Spear of the Nation* controversies offer easy evidence of this retrospective assessment. Nonetheless, the fire took some time to light and the major South African decisions on freedom of expression in the decade leading up to *McBride* were decidedly mixed. While the Constitutional Court ploughed ahead, carving out a passage for the expansive carriage of free speech, the lower courts forcefully restricted public expression.

⁸³ Ibid 1213, 1214, 1237–8.

⁸⁴ [2002] 5 SA 401 (Constitutional Court).

⁸⁵ Ibid [7].

⁸⁶ Ibid [2].

⁸⁷ Ibid [24].

⁸⁸ Ibid [21].

⁸⁹ Ibid [25].

⁹⁰ Ibid [26]–[28]. See also *Dawood v Minister of Home Affairs* [2000] 3 SA 936 (Constitutional Court), which provides a similar interpretation.

⁹¹ *Khumalo* [2002] 5 SA 401, [28] (Constitutional Court).

⁹² Ibid [44].

As a 2009 document put out by the South African Democratic Alliance noted:

Over the last decade the right to freedom of speech has been rigorously upheld by the higher courts but in lower courts and tribunals freedom of expression invariably loses out to dignity and equality. It seems that although there is symbolic deference to free speech, there is a growing quasi-legal tendency to erode its importance.⁹³

Only a few years after *Khumalo* human dignity first battered the ship of press freedoms. In 2005, the Johannesburg High Court enjoined one of South Africa's major weeklies, the *Mail & Guardian*, from running an 'Oilgate' exposé.⁹⁴ The articles alleged that a South African company, Imvume Management, had embezzled money from an Iraqi oil company run by Sandi Majali, and had redistributed it in the form of kickbacks to various ANC members shortly before the 2004 elections.⁹⁵

Although the publication weighed in the public interest, involving high-level officials and evidence of widespread corruption, the plaintiffs argued that the article was tainted because the *Mail & Guardian* had illegally accessed Majali's bank accounts.⁹⁶ The newspaper corroborated its allegations through several other sources. However, when the *Mail & Guardian* refused to reveal the original source of its information, the judge, citing the dignity and privacy of Sandi Majali, handed down a gag order.⁹⁷ Protecting free speech, the judge wrote, was

cold comfort to someone whose privacy has been invaded and whose reputation is in tatters ... The harm to reputation cannot always be restored, especially where a public figure is involved.⁹⁸

Though the truth of the information was not in dispute, the right to dignity and privacy nevertheless trumped the public interest. The decision was more speech-restrictive than *Neethling*,⁹⁹ and its resonances seemed dire. The newspaper noted that:

This is the first time since the apartheid state's banning of the *Mail & Guardian* under emergency regulations in the late 1980s that the paper has been muzzled. It is the first time

⁹³ Victoria Bronstein, 'What You Can and Can't Say in South Africa', *Freedom of Expression Institute* (online) 19 August 2009 <http://www.da.org.za/docs/548/Censorshipvictoriabronstein_document.pdf>. This article pretends to no overarching theory of why the South African lower courts have shown themselves more solicitous to dignitarian rights than their constitutional brethren. Of course, most of the apartheid-era judges continued to occupy their posts after the advent of democracy, and their judicial culture was stamped by an authoritarian regime which had made extensive appeals to honour and dignity. This was then compounded by the appointment of a new crop of judges, who had started their careers within the apartheid era 'homelands', where the jurisprudence was influenced by traditional African cultures that put a premium on 'respect' and 'authority'. That none of these values translate easily to a democratic culture of political contestation and debate, especially in a country as ethnically, economically and historically riven as South Africa, goes without saying.

⁹⁴ *The Public Prosecutor v Mail and Guardian* [2011] 4 SA 420, [37] (Supreme Court of Appeal).

⁹⁵ Staff Reporter, 'Oilgate: We've Been Gagged', *Mail & Guardian* (online), 26 May 2005 <<http://mg.co.za/article/2005-05-26-oilgate-weve-been-gagged>>.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ [1994] 1 SA 708 (Supreme Court of Appeal). In *Neethling*, the truth of the allegations had been the central matter in the dispute.

since the mid-Eighties that the newspaper once again features blacked-out text to illustrate that it has effectively been banned.¹⁰⁰

Around the same time that the Johannesburg High Court imposed the first media ‘blackout’ since the end of apartheid,¹⁰¹ the Constitutional Court endorsed a rather half-hearted stand towards free speech. In *Laugh It Off Promotions CC v South African Breweries International* (*‘Laugh It Off’*),¹⁰² a student-run outfit printed T-shirts that satirically condemned the exploitation of black labourers in South African Breweries’ factories.¹⁰³ The company brought a complaint for trademark infringement and secured an order of interdiction from the Johannesburg High Court.¹⁰⁴ The order was then upheld by the Supreme Court of Appeal (‘SCA’).¹⁰⁵ Laugh It Off Promotions responded with a constitutional complaint, arguing that trademark law does not oust the right to freedom of expression.¹⁰⁶ The Constitutional Court agreed, in fact if not in principle, holding that ‘[i]n an open democracy valuable expressive acts in public ought not to be lightly trampled upon by marginal detriment or harm unrelated to the commercial value that vests in the mark itself’.¹⁰⁷

These were hardly the stirring words about free speech’s central role in democracy that had stamped the Court’s early decisions. Even worse, the verdict seemed to suggest that, had the commercial harm been more substantial, the satirical T-shirts could have been banned. At least one of the judges sensed the gathering storm. Sachs J took the occasion to write a stirring concurrence that to this day represents a high watermark in free speech jurisprudence.

¹⁰⁰ Staff Reporter, ‘Oilgate: We’ve Been Gagged’, *Mail & Guardian* (online), 26 May 2005 <<http://mg.co.za/article/2005-05-26-oilgate-weve-been-gagged>>. The history behind the blacked-out text is long. During the apartheid era, newspapers had to apply for registration if they published more than 11 times a year. The government at the time also enforced regulations controlling what newspapers could and could not publish — especially articles against the apartheid system; See also Karen Zamora, ‘South Africa’ on *Free Speech and Free Press Around the World* (2012) <<http://freespeechfreepress.wordpress.com/south-africa/>>:

Newspapers were not allowed to quote banned organizations or people, report on conditions inside prisons or about security forces. During the 1980s, two states of emergency were declared and newspaper censorship regulations were tightened. News outlets were prohibited from reporting on any demonstrations, activities against the apartheid system or any laws. Newspapers protested by printing full black pages or paragraphs of printed articles were blacked out. Many newspapers only lasted several more issues after their protests, but others are still in publication today. Those who were able to continue publication had a larger readership and were able to survive through advertisements and distribution. The government tried to shut them down by banning certain issues, which caused financial hardship to these newspapers. At the same time the anti-apartheid groups started setting up smaller papers of their own.

¹⁰¹ Unfortunately, the dispute never reached the Constitutional Court. An opposition party known as Freedom Front Plus presented the same information before Parliament that the *Mail & Guardian* had wished to publish. Under South African law, political groups making representations in Parliament are not subjected to legal action for the content of their statements. Since all the information was now in the public domain, the *Mail & Guardian* was able to print the article.

¹⁰² [2006] 1 SA 144 (Constitutional Court) (*‘Laugh It Off’*).

¹⁰³ *Ibid* [9].

¹⁰⁴ *Ibid* [12].

¹⁰⁵ *Ibid* [21]–[25].

¹⁰⁶ *Ibid* [13]. ‘The purpose of copyright and trademark laws in an open and democratic society is not to shut out critical expression or to throttle artistic and other expressive acts in a manner that gives way to inordinate brand sway’.

¹⁰⁷ *Ibid* [56].

‘Laughter too has its context’, Sachs J wrote:

What has been relevant in the present matter is that the context was one of laughter being used as a means of challenging economic power, resisting ideological hegemony and *advancing human dignity*. ... A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. ... It is an elixir of constitutional health.¹⁰⁸

A former freedom fighter,¹⁰⁹ Sachs J retired in 2009 alongside O’Regan and Mokgoro JJ.¹¹⁰ They were the last of the Court’s original judges to give up their seats. Two years later the SACC, comprising judicial officers appointed either by Thabo Mbeki or Jacob Zuma¹¹¹ handed down a decision entitled *Le Roux v Dey*.¹¹² The ruling pared back many of the positions endorsed by Sachs J in *Laugh It Off*.¹¹³ It seemed that the dignity jurisprudence of the lower civil courts had finally begun to filter up into the august realm of constitutional adjudication. One month after *Le Roux*,¹¹⁴ an identical Court ruled in *McBride*.¹¹⁵ The two decisions appear to offer contradictory road maps to South Africa’s future. They leave those of us interested in that future standing at a fork in the road.

B *The Woes of Le Roux*

The controversy in *Le Roux*¹¹⁶ began when a 15-year-old student crudely pasted photos of the principal and deputy principal of his high school onto an image of nude body builders. After the sophomoric ‘clipart’ made the rounds at the school, two other students posted it on the school notice board where it remained for half an hour.¹¹⁷ The school authorities disciplined the three students. Forced to sit detention for five consecutive Fridays, the students were also banned from school leadership positions. When Dr Dey brought criminal charges against them, they were further sentenced to clean animal cages at the Pretoria Zoo.¹¹⁸ Dr Dey then brought an additional dignity complaint before the High Court of Johannesburg, for which he demanded the astonishing sum of 600 000 rand in damages.¹¹⁹ As in countless other cases, both the High Court of Johannesburg and the SCA showed themselves solicitous to dignity claims. The High Court

¹⁰⁸ Ibid [108]–[109] [emphasis added].

¹⁰⁹ South African History Online, *Judge Albert Louis ‘Albie’ Sachs* <<http://www.sahistory.org.za/people/judge-albert-louis-albie-sachs>>. Perhaps the most iconic of all the constitutional justices, he lost his arm in 1988 when South African security agents placed a bomb in his car in Mozambique.

¹¹⁰ Judiciary, *Retirement of CC Justices: Tribute on Behalf of the Constitutional Court of SA* (2009) <<http://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp04-05.pdf>>.

¹¹¹ With the exception of Yacoob J, who was Mandela’s final appointment when Didcott J suddenly passed away in 1998.

¹¹² [2011] 3 SA 274 (Constitutional Court).

¹¹³ [2006] 1 SA 144 (Constitutional Court).

¹¹⁴ [2011] 3 SA 274 (Constitutional Court).

¹¹⁵ [2011] 4 SA 191 (Constitutional Court).

¹¹⁶ [2011] 3 SA 274 (Constitutional Court).

¹¹⁷ Ibid [17].

¹¹⁸ Ibid [18]–[20].

¹¹⁹ Around US\$90 000.

awarded 45 000 rand in damages.¹²⁰ Although it fell short of Dr Dey's demands, it was still a tidy sum. The SCA upheld this verdict.¹²¹

To formulate their constitutional defence, the defendants relied on *Laugh It Off*.¹²² Specifically, they invoked a child's 'right' to satirical and subversive expression.¹²³ The governing opinion, written by Brand AJ and joined by 8 of the 11 judges, rejected this claim. Reducing Dr Dey's award to 25 000 rand plus partial costs,¹²⁴ the Court promoted a definition of dignity/defamation that cast a surprisingly wide net over all manner of social expression.

The judges first noted that defamation controversies tend to arise when a person has been labelled 'guilty of dishonest, immoral or otherwise dishonorable conduct'.¹²⁵ However, they argued that defamation encompasses a far more capacious category, suggesting:

It also includes statements which are likely to humiliate or belittle the plaintiff ... Everyday experience demonstrates that *a caricature or cartoon* can be more devastating to the image of the victim than, say, an accusation of dishonesty.¹²⁶

Though no one would mistake the student's crude pastiche for fact,¹²⁷ the Constitutional Court found that 'the reasonable observer would infer some association between the two teachers, on the one hand, and the situation described in the picture, on the other'.¹²⁸ As Brand AJ remarked, 'that renders the picture difficult to distinguish from a *caricature or a cartoon*: in all these cases it is obvious that the person identified is not an actual depiction of that person, but that there is some association between that person and what the picture conveys'.¹²⁹

As to the fact that this was a schoolboy prank, the majority conceded that 'the reasonable observer would accept that teachers are often the butt of jokes by their learners and that these jokes must not be taken too seriously. *Yet*, there is a line that may not be crossed. That must be so because teachers are entitled to protection of their dignity and reputation; no less than to the protection of their bodily integrity'.¹³⁰ The line, as drawn by the Court, was any statement in which 'there is an element of *contumelia* in the joke, that is, when it is insulting or degrading'.¹³¹

¹²⁰ Around US\$6500.

¹²¹ *Le Roux* [2011] 3 SA 274, [25] (Constitutional Court).

¹²² [2006] 1 SA 144 (Constitutional Court).

¹²³ *Le Roux* [2011] 3 SA 274, [29] (Constitutional Court).

¹²⁴ *Ibid* [206].

¹²⁵ *Ibid* [91].

¹²⁶ *Ibid* [emphasis added].

¹²⁷ *Ibid* [164]. As Cameron J notes in his concurrence:

the heads are misaligned with the bodies, and wrongly sized; the two faces are different in size; the cut and paste job is evident from the edging of the inset; and indeed Dr Dey's face is pasted over the remnants of the hair of the person in the original: he is invested with a fuzzy halo of another's hair.

¹²⁸ *Ibid* [103].

¹²⁹ *Ibid* [emphasis added].

¹³⁰ *Ibid* [117]–[118] [emphasis added].

¹³¹ *Ibid* [113].

Although the Court provided a number of exceptions to this rule,¹³² it subsequently proceeded to drastically lower the threshold, not only for defamatory speech, but for dignity violations as well.

1 *Dignity versus Defamation*

In a concurring opinion written by Froneman and Cameron JJ, the spirit and legal reasoning of which the nine-judge majority affirmed, the SACC elaborated a novel constitutional contradistinction between reputational rights and dignity rights. Clarifying that in South African common law the category of dignity is not coterminous with defamation, Froneman and Cameron JJ explained:

The one reflects inwardly, the other outwardly. In dignity claims, the injured interest is self-esteem, or the injured person's feelings. In defamation, it is public esteem or reputation. ... It is in our view plain that ... an affront [could] not damage a person's reputation, while at the same time concluding that, objectively seen, the injury to that person's feelings was palpable and reasonably felt, and hence actionable.¹³³

Both reputation and dignity, the Court assured, were shielded by the constitutional principle of human dignity. However, whereas defamation required a cognisable injury to a person's standing in the community, a dignity claim only required an affront to one's pride. The verdict in *Le Roux* thus seized on a public good and privatised it. This public good had drawn its importance from a history of objective status discrimination where '[b]lack people were refused respect and dignity and thereby the dignity of all South Africans was diminished'.¹³⁴ Henceforth it would safeguard subjective slights to a person's self-perceived stature. It was a monumental bait-and-switch.

Whereas both governing opinions concurred on the quantum of damages and both recognised a dignity violation, Froneman and Cameron JJ disagreed that the prank was a defamatory act. Holding that there had been no other reported case in South Africa of schoolchildren defaming their schoolteachers, Froneman and Cameron JJ wrote:

Every generation of schoolchildren includes individuals who try to make fun of their teachers ... Some of their peers may laugh at their jokes ... But for none of them, we suggest, would the jokes ... imply that the teacher is ... diminished by the attempted joke, ridicule or subversion of authority.¹³⁵

Given that the offending image in *Le Roux* was only distributed at the school and that its inept nature indicated its 'childish origins',¹³⁶ the assertion of reputational injury simply did not stand up to scrutiny. Nonetheless, nine of the 11 judges recognised a dignity violation on the basis of Froneman and Cameron JJ's reasoning. The Court noted that Dr Dey experienced the prank as 'a deep affront to his personal dignity'.¹³⁷ It moreover found that 'a reasonable person in Dr Dey's

¹³² Ibid [126]: 'fair comment, privileged occasion, and justifiable publication'.

¹³³ Ibid [179].

¹³⁴ *S v Makwanyane* [1995] 3 SA 391, [329] (Constitutional Court).

¹³⁵ *Le Roux* [2011] 3 SA 274, [158] (Constitutional Court).

¹³⁶ Ibid [159].

¹³⁷ Ibid [174].

position ... is understandably affronted by being depicted in, or aligned to, a naked, indecent and probably lewd picture'.¹³⁸ Dr Dey's 'wounded feelings'¹³⁹ were hence legally actionable.

Froneman and Cameron JJ's finding of a dignity injury, independent of any reputational harm, boded poorly for artworks like Murray's *The Spear* or Zapiro's satirical cartoons. If a mix of indecency and hypersensitivity could trigger a human dignity violation, it could render political satire all but taboo. The dissent, authored by Yacoob J and joined by Skweyiya J, makes this very case. Both had been anti-apartheid 'freedom fighters',¹⁴⁰ and the dissent is bathed in the history of this struggle. 'Before our Constitution came into effect', Yacoob J writes:

thought control was the order of the day ... Having regard to our recent past, freedom of expression is no less important than it is in the United States of America.¹⁴¹ It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way.¹⁴²

If the new coterie of judges was willing to indulge a vindictive deputy principal in a sophomoric row with several children, how much would they yield when it came time to chasten venal politicians looking for strategic tools to quell merited criticism? Faced with a Court that seemed to have forgotten the lessons of South Africa's authoritarian past, Yacoob J suggested a new framework from which to interpret human dignity:

I would commend the rule that people claiming damages consequent upon attacks on their dignity will succeed only if ... the injury is sufficiently serious to limit freedom of expression or any other right in the Constitution. ... In this case, even if Dr Dey was hurt to some extent ... The expression did not amount to an attack on Dr Dey's sense of *equal self-worth* ... Most importantly, the expression was by a relatively powerless child in relation to the exercise of authority by a more powerful older man.¹⁴³

By urging that dignity violations should succeed only if 'the injury is sufficiently serious to limit freedom of expression or any other right in the Constitution', Yacoob J mobilises dignity in favour of the right to speak. He claims that South Africa's democracy, like *Le Roux*, is still in 'the process of growth and development'.¹⁴⁴ Its speech should be cultivated, not disciplined. Moreover, such a reading of dignity honoured the principle's roots as a repudiation of

¹³⁸ Ibid [190].

¹³⁹ Ibid [174].

¹⁴⁰ In another historical twist, Yacoob J was one of the lawyers that defended Gcina Malindi in the Delmas Treason Trials.

¹⁴¹ Yacoob J likely had in mind the majority opinion from *Du Plessis v Klerk* [1996] 3 SA 850, [58] (Constitutional Court), in which the Court held that:

in cases of defamation, courts have tried to strike a balance between the protection of reputation and the right of free expression. Presumably ... a court would wish to take account of the fact that our Constitution, like that of Germany but unlike that of the United States, expressly recognises the right to dignity and to personal privacy, and might find guidance in the German cases to which I have referred as well as in the American cases.

¹⁴² *Le Roux* [2011] 3 SA 274, [72] (Constitutional Court).

¹⁴³ Ibid [73] [emphasis added].

¹⁴⁴ Ibid.

apartheid.¹⁴⁵ If human dignity was meant to rebalance the playing field between the oppressors and the oppressed, then, as Yacoob J writes, ‘I would regard the violation of the dignity of a relatively powerless and vulnerable person by a powerful, strong person in authority as more serious than the allegedly wrongful conduct involved here’.¹⁴⁶

He therefore endorses a doctrine of human dignity that does not protect ‘self-esteem’, but, rather, shields a ‘sense of equal self-worth’.¹⁴⁷ As Yacoob J underscores, important constitutional values may be at stake but the right to ‘reputation’ (*fama*) is not one of them. Human dignity, he urges, should no longer shield individuals against defamation, nor tend to their slighted feelings of pride. There was the common law for that.¹⁴⁸

C *Here Comes McBride*

One month later an identical Court handed down its decision in *McBride*.¹⁴⁹ As the majority explains in the lead in to its decision, the case turned ‘on the effect of amnesty granted under the *Promotion of National Unity and Reconciliation Act* ... The statute provides that once a person convicted of an offence with a political objective has been granted amnesty, any entry or record of the conviction shall be deemed to be expunged from all official documents and — “the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place”’.¹⁵⁰

Cameron J then asserted:

The main question before this Court is whether a person convicted of murder, but granted amnesty for the offence, can later be called a ‘criminal’ and a ‘murderer’ in comment opposing his appointment to a public position. The case thus cuts deeply into charged issues about the meaning of the legislative and social compact that ended apartheid, and the extent

¹⁴⁵ *Albutt* [2010] 3 SA 293, [60] (Constitutional Court). It also pays heed to the TRC’s efforts to ‘restore dignity’ to its victims by providing them with a forum in which to express themselves.

¹⁴⁶ *Le Roux* [2011] 3 SA 274, [46] (Constitutional Court).

¹⁴⁷ *Ibid* [73].

¹⁴⁸ One fascinating and hopeful footnote to the ruling in *Le Roux* [2011] 3 SA 274, [202] (Constitutional Court), was the fact that the majority of the Court ordered the students to apologise to Dr Dey as well. The majority argued that:

Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other’s dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.

This ruling demonstrates how the rituals of reconciliation *via communication*, established by the TRC, have been assimilated into both the legal and cultural architecture of South African society. This may provide a platform for resistance against overly speech-restrictive readings of dignity.

¹⁴⁹ [2011] 4 SA 191 (Constitutional Court).

¹⁵⁰ *Ibid* [1].

to which our Constitution guarantees freedom of expression, including freedom of the press and other media. ... It concerns also Mr McBride's right to dignity and reputation.¹⁵¹

The affair would not only resituate the very questions of human dignity, defamation and free speech considered in *Le Roux* into a decidedly political context. It would also illuminate them within the dramatic light of South Africa's history and the national drama of truth and reconciliation.

1 McBride and the Civil Courts

In the first instance, the South Gauteng High Court (Johannesburg) found that the articles and editorials were defamatory. The judge held that the discussion as to McBride's suitability for Police Chief was not in the public interest, since his past conviction was no longer relevant in light of his successful amnesty application.¹⁵² The High Court wrote that 'the effect of amnesty cannot "be willy-nilly limited and circumscribed" ... Thus read, the provision expunged Mr McBride's conviction for murder "for all purposes"'.¹⁵³ *The Citizen's* articles were held to have impaired McBride's human dignity. Of the 'damages totaling R3.6 million for defamation and for impairment of dignity'¹⁵⁴ that McBride had demanded, the High Court awarded 200 000 rand. On appeal, the SCA reduced the award to 150 000 rand.¹⁵⁵ It nonetheless concurred that it was impermissible to label McBride a murderer.¹⁵⁶ Writing for the majority of the SCA, Streicher JA held that those who received amnesty 'should be considered not to have committed the offences ... so that they could be reintegrated into society'.¹⁵⁷ The publications about McBride were consequently false.¹⁵⁸

The Citizen submitted a constitutional challenge invoking its right to freedom of expression.¹⁵⁹ Although *Khumalo* formed the governing precedent, the Court's recent reputation-heavy ruling in *Le Roux* boded poorly. Certainly, *McBride* turned on a matter of political speech as opposed to a boyhood prank. However, the deeds for which *The Citizen* was lambasting McBride had occurred 17 years earlier and were carried out in a de facto state of civil war. The question that hovered over the case was whether, 'despite amnesty, McBride's conviction for murder [could] indefinitely be flung in his face'.¹⁶⁰

The matter held wide implications for the countless individuals who had committed criminal acts for which they later received amnesty. The Court's ruling would set in place a discursive framework for a society in which victims and murderers lived alongside one another. Was it best

¹⁵¹ Ibid [2], [7].

¹⁵² Ibid [22]–[23].

¹⁵³ Ibid [22].

¹⁵⁴ Ibid [5].

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid [28].

¹⁵⁸ Ibid.

¹⁵⁹ Ibid [35]–[38].

¹⁶⁰ Ibid [79].

to enforce a culture of civility and to ‘close the book’ on the past, as McBride argued?¹⁶¹ What would this mean for the victims? Conversely, what might be the potential damage to national unity ‘should the media be allowed to unrelentingly rake up the past?’¹⁶²

For the moment, free speech’s fortress held and the majority opinion, written by Cameron J, struck a decidedly different tone from *Le Roux*. Indeed, a comparison of the two cases offers a veritable study in contrast. When the Court was forced to balance personal reputation against satirical speech, the principle of human dignity became a cudgel of intolerance, ready to punish even marginal slights to a person’s self-esteem. However, when the same judges were tasked to reanalyse reputation and speech rights within the loaded history of reconciliation, the principle of human dignity tended much closer to that emblem of communicative dignity, enabler of the voiceless and the weak, invoked by Yacoob J in his dissent in *Le Roux*.

Nonetheless, whereas *Le Roux* was decided 9:2, the *McBride* controversy split the Court 5:2:1 (with only eight judges ruling). Also, McBride once again won the case, though not because the newspaper had branded him a ‘murderer’. Five judges found against *The Citizen* for claiming that McBride was not contrite.¹⁶³ A two-judge partial dissent held that the remarks about McBride’s alleged gun-running were also defamatory.¹⁶⁴ Mogoeng J’s lone dissent found for McBride on all counts.¹⁶⁵

More importantly yet, both dissents manifested an obdurate defence of personal reputation against the public interest. This was nowhere more palpable than in Mogoeng J’s opinion, to which this section will now turn. Mogoeng J introduces a radical new reading into the realm of South African constitutional law. To substantiate his position that calling Robert McBride a ‘murderer’ violated his human dignity, Mogoeng J invokes none other than the traditional African principle of ubuntu.

2 *Ubuntu as Honour*

Zuma’s appointment of Justice Mogoeng in 2009, and his subsequent elevation of Mogoeng J to the position of Chief Justice in 2011, were heavily criticised in the press.¹⁶⁶ Mogoeng J has been noted for his ‘deference’ to executive power¹⁶⁷ and his opinion offers a window into the legal

¹⁶¹ Ibid [39]:

One of the principal objectives of the Act was to facilitate as complete a picture as possible of the causes, nature and extent of gross human rights violations committed during the conflicts of the past. Once the truth of the past has been exposed, the intention is to ‘close the book’ on that past. This allows perpetrators to start their lives anew without being labelled forever.

¹⁶² W De Klerk, ‘*The Citizen v McBride* 2011 4 SA 191 (CC): Defamation — The Defence of “Fair” Comment and Media Defendants’ (2011) 27 *De Jure* 447.

¹⁶³ *McBride* [2011] 4 SA 191, [136] (Constitutional Court).

¹⁶⁴ Ibid [203]–[206].

¹⁶⁵ Ibid [245].

¹⁶⁶ Pierre De Vos, ‘On the Appointment of a Chief Justice’ on Pierre De Vos, *Constitutionally Speaking* (29 July 2011) <<http://constitutionallyspeaking.co.za/on-the-appointment-of-a-chief-justice/>>.

¹⁶⁷ Ibid. Constitutional scholar, Pierre De Vos, mooted both these concerns in his piece on the occasion of Mogoeng J’s appointment as new Chief Justice.

strategies being deployed by an ANC Party that has shown itself increasingly hostile to media autonomy and public criticism.

Mogoeng J begins his dissent by invoking the epilogue to the 1993 interim Constitution, which created the TRC: ‘Black and white South Africans ... [must] embrace, “a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization”’.¹⁶⁸ According to Mogoeng J, these words show that the truths revealed by the TRC ‘were not intended to lay the foundation for the endless vilification of South Africans who grossly violated human rights ... in the name of freedom of expression’.¹⁶⁹

Within the context of the case, this would suggest that describing McBride as a murderer should be impermissible. However, Mogoeng J casts a much wider net.¹⁷⁰ He enlists ubuntu to demand South Africa’s return to a mythologised traditional order characterised by universal cordiality and respect:

Botho or ubuntu is the embodiment of a set of values and moral principles which informed the peaceful co-existence of the African people in this country ... Language was used in moderation and foul language was frowned upon by the overwhelming majority. A forgiving and generous spirit, the readiness to embrace and apply restorative justice, as well as a *courteous interaction* with others, were instilled even in the young ones in the ordinary course of daily discourse.¹⁷¹

Justice Mogoeng’s prelapsarian take on indigenous African culture was not his own giddy invention. Heavily parlayed during the Truth and Reconciliation hearings in order to lend a historical heft to the practice of restorative justice, this ‘romanticised’ vision has been roundly attacked for denying the conflict inherent in a pluralistic society.¹⁷² Such an ubuntu-inflected reading of human dignity would push the SACC into the business of dictating etiquette or, as Yacoob J termed it in his dissent to *Le Roux*, ‘thought control’.¹⁷³

Within Mogoeng J’s ideal society, people would ‘express themselves on the gross violation of the rights of their loved ones’¹⁷⁴ in a restrained and courteous fashion, and human dignity would be the constitutional principle empowered to chaperone such expression. ‘What is impermissible’, Mogoeng J writes:

is the use of truth revealed to insult, demonise and run down the dignity of self-confessed human rights violators. ... human dignity must colour the spectacles through which we view defamatory publications, particularly those which are inextricably linked to our painful past. And so should our rich values, like ubuntu.¹⁷⁵

¹⁶⁸

Ibid.

¹⁶⁹

McBride [2011] 4 SA 191, [218] (Constitutional Court). ‘No wonder the drafters of our interim Constitution deemed it meet [sic] to cite ubuntu as one of the ingredients essential to the healing of our country’.

¹⁷⁰

Ibid.

¹⁷¹

Ibid [217] [emphasis added].

¹⁷²

Richard A Wilson, *The Politics of Truth and Reconciliation: Legitimizing the Post-Apartheid State* (Cambridge Studies in Law and Society, 2001).

¹⁷³

Le Roux [2011] 3 SA 274, [72] (Constitutional Court).

¹⁷⁴

McBride [2011] 4 SA 191, [220] (Constitutional Court).

¹⁷⁵

Ibid [220], [243].

Similar to the ANC's denunciations of Murray's *The Spear*, Mogoeng J's 'defence' of human dignity conflates two distinct and opposing strands — that of status and that of stature. This is nowhere more evident than at the end of his dissent where he writes:

Black South Africans have been subjected to untold indignities for centuries. It is partly for this reason that the value of human dignity and the right of all to have their dignity respected and protected features so prominently in our Constitution. This right ... should not be relegated to near insignificance at the appearance of the right to freedom of expression.¹⁷⁶

Like the Court in *Le Roux*, Mogoeng J conceptualises human dignity as at odds with free speech. He thereby neglects a long history of apartheid censorship, which was fundamentally intended to deprive the black majority of any political voice to contest the bodily 'indignities' daily inflicted upon them. Ironically enough, the very 'courteous interaction' and 'moderate' language he now wishes to enforce was foisted upon black citizens under apartheid as part of their highly scripted interactions with 'superior' white citizens.

The irony compounds for, as with *The Spear*, the controversy considered in *McBride* may in fact have given rise to a human dignity violation other than the one recognised by the Court. In Thabo Mbeki's essay, cited earlier, he notes the deplorable role played by *The Citizen* as the unofficial spokesperson of the National Party under apartheid.¹⁷⁷ The only English language newspaper to lend its support to the racist government, the newspaper's financing was later discovered to have come from a slush fund set up by the Department of Defence.¹⁷⁸ Given *The Citizen's* past and the admittedly calumnious language of some of the editorials, one of which describes the bombing as an act of 'human scum',¹⁷⁹ it is at least conceivable that its campaign against McBride was actuated by racial 'malice'.¹⁸⁰

However, by taking a stand for a society-wide norm of 'courteous interaction' and 'moderate language', and by grounding human dignity in a right to chivalrous treatment as opposed to the 'sense of equal self-worth' proposed by Yacoob J, Mogoeng J undermines the particular in his reach for the general. Indeed, were his reading of human dignity ever to become constitutional doctrine then the relatives of those tormented to death by the apartheid secret police would no longer be permitted to refer to the perpetrators as 'murderers'.

¹⁷⁶ Ibid [241].

¹⁷⁷ Staff Reporter, 'Mbeki Hauls *The Citizen* Over the Coals', *Mail & Guardian* (online), 17 October 2003 <<http://mg.co.za/article/2003-10-17-mbeki-hauls-the-citizen-over-coals>>.

¹⁷⁸ Ibid.

¹⁷⁹ *McBride* [2011] 4 SA 191, [238] (Constitutional Court). Though, here too, Mogoeng J toys with the facts, arguing that *The Citizen* referred to McBride himself as 'human scum'.

¹⁸⁰ Ibid [195]. As Mogoeng J claims, and Ngcobo CJ and Khampepe J suspect

Mr Williams did not concern himself with checking the statements he made relating to McBride's contrition against the public record or provide any facts at all upon which his statement regarding contrition was based. This, taken together with the language and tone in the articles, which, in some instances, amounted to a personal attack that appears to have been designed to stigmatise Mr McBride for actions taken in the struggle against apartheid for which he has since received amnesty, comes very close to justifying an inference of malice.

3 *'Dignity' in the Light of History*

In their concurring opinion in *Le Roux*,¹⁸¹ Froneman and Cameron JJ reformulated human dignity as a right to self-esteem (*'dignitas'*), independent of any injury to reputation or a deeper 'sense of equal worth'. They thereby endorsed a doctrinal stance guaranteed to embolden litigation around insult and to chill polemic debate in South Africa for decades to come. Yet, in *McBride*, when tasked to rule on human dignity in the context of national reconciliation, Cameron J produced a speech-friendly ruling worthy of the American Supreme Court.

The contrast between the two opinions delivered by Cameron J, and between the opinions of Cameron J and Mogoeng J in *McBride*, provides the most compelling evidence that the TRC's linking of human dignity to rituals of storytelling and expression may help stave off the principle's slow evolution towards reputational priorities, even despite the manifold forces in South African politics campaigning for this goal.

The clouded equities of the *McBride* controversy only favour this interpretation. Powerful arguments weighed on the side of the plaintiff. The acts had occurred nearly two decades prior and were part of a justifiable struggle against a brutal regime. It was not clear that *The Citizen* should prevail. Yet, the TRC's unprecedented decision to place victims rather than perpetrators at the centre of its juridical process¹⁸² accomplished the rare feat of drawing the Court's gaze to the victims' dignity instead of merely McBride's. The majority opinion thus consecrates special attention to a joint amicus curiae filed by the relatives of individuals murdered by apartheid security police. The amicus curiae claimed that:

the ruling will have a significant effect on their ability to speak out freely about the crimes committed against their family members, and about the wrongdoers who received amnesty. Ms Mbizana and Mr Mxenge contend that freedom of expression is constitutive of dignity: to deny persons in their position the right to speak the truth without fear of being sued for defamation strips them of their dignity.¹⁸³

Unlike in *Le Roux*, where Cameron J ignored dignity's speech-empowering possibilities, here he is moved by this argument:

The amici whose family members were killed make a plangent point ... They assert primarily a subjective and expressive entitlement, one that *springs from their dignity as siblings and children*. ... to continue to call the unlawful intentional killing of their loved

¹⁸¹ [2011] 3 SA 274 (Constitutional Court).

¹⁸² *Albutt* [2010] 3 SA 293, [60] (Constitutional Court). As the Court wrote in *Albutt*,

[w]hat is plain from what I have said above is that the victims of gross human rights violations were at the centre of the TRC process. As the TRC observed:

One of the unique features of the Act was that it provided guiding principles on how the Commission should deal with victims. These principles constituted the essence of the Commission's commitment to restorative justice. The Act required that the Commission help restore the human and civil dignity of victims 'by granting them an opportunity to relate their own accounts of the violations of which they are the victim'. Through the public unburdening of their grief — which would have been impossible within the context of an adversarial search for objective and corroborative evidence — those who were violated received public recognition that they had been wronged.

¹⁸³ *McBride* [2011] 4 SA 191, [45] (Constitutional Court).

ones ‘murder’, and those who perpetrated the killings ‘murderers’. The literal reading urged by Mr McBride would render these descriptions false, and impose legally enforced inhibition on those expressing them. This cannot be correct.¹⁸⁴

Cameron J’s recognition of a ‘subjective and expressive entitlement’, which springs from the victims’ ‘dignity’, offers a constitutional architecture in which dignity and expression might collude instead of colliding. In what appears to be a pointed rebuke to Mogoeng J’s vision of a courtly South Africa, Cameron J rhetorically asks whether public discourse about the reconciliation process and its meaning have ended. He responds by saying:

The answer must be No. A more supple approach is to accept that the meaning of reconciliation is still unfolding, and that the fragilities of its meaning cannot be prescribed by law: and hence the best chance for successful reconciliation lies in fostering open public discussion. In this, boundaries should be set not by assessing the reasonableness or good taste of the content of debate.¹⁸⁵

This includes barbed and even rancorous commentary. An important rationale for the defence of protected or ‘fair’ comment, Cameron J writes, ‘is to ensure that divergent views are aired in public and subjected to scrutiny and debate. ... [I]f views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth finding’.¹⁸⁶

The question before the Court was how to set the parameters of debate for a citizenry united by statehood but torn apart by a history of racial violence. The mottled morality of Robert McBride, both murderer and freedom fighter, and of *The Citizen*, now organ of a democratic public but one-time mouthpiece for the apartheid government, spoke to the frayed and complex ethical landscape facing the judges. Confronted with these appreciable stakes, Cameron J’s voice in *McBride* could not sound less like his voice in *Le Roux*. Cautioning his countrymen that ‘public discussion of political issues has if anything become more heated and intense since the advent of democracy’,¹⁸⁷ Cameron J opines that ‘fair comment’ is a misnomer.¹⁸⁸ Fair comment, he writes, ‘need not be “fair or just at all” ... Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true’.¹⁸⁹ It was a studied expansion of free speech rights in the Republic of South Africa. Cameron J went on to insist that ‘fair comment’ should be renamed ‘protected comment’. This, he believes, would better remind those interpreting constitutional rights that ‘the Court may not prescribe what people may or should say’.¹⁹⁰

¹⁸⁴ Ibid [59] (emphasis added).

¹⁸⁵ Ibid [75].

¹⁸⁶ Ibid [82].

¹⁸⁷ Ibid [100].

¹⁸⁸ Ibid [81].

¹⁸⁹ Ibid [83].

¹⁹⁰ Ibid [86].

IV CONCLUSION

The role of the cartoonist is to knock the high and mighty off their pedestals. To be irreverent; to be a sceptic and not to be sycophantic; cartoons can be powerful and not all are funny.¹⁹¹

Zapiro (Jonathan Shapiro)

McBride was something of a *rara avis* in the recent jurisprudence of the SACC. By forcing the Court to situate the principle of human dignity in relation to apartheid's human rights violations, the majority endorsed a more sizeable expressive component to human dignity than ever before. Similar language is absent from landmark cases like *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa*,¹⁹² *Du Toit v Minister for Safety and Security*,¹⁹³ and *Albutt v Centre for the Study of Violence and Reconciliation*,¹⁹⁴ in which the Court similarly grappled with the meaning of amnesty and reconciliation but was not tasked with articulating human dignity. Moreover, in benchmark decisions like *Khumalo*, which considered both 'freedom of expression' and 'human dignity', the two principles are strategically set at odds.

Of course, Cameron J's magnificent stance in favour of participatory democracy failed to sway either Ngcobo CJ or Khampepe J. Though they hardly promote a societal vision as extreme as Mogoeng J's decorous arcadia, they continue to espouse human dignity's capacity to superintend the etiquette of public debate. Chief Justice Ngcobo writes:

By insisting that a comment must be fair, the common law demands that the comment be fair having regard to the right to human dignity. The comment must be relevant to the matter commented upon and it must not be actuated by malice. ... In my view, the requirement of fair comment is consistent with the need to respect and protect dignity. ... I do not, therefore, share the view expressed by Cameron J that the word 'fair' is misleading.¹⁹⁵

Ngcobo CJ and Khampepe J (along with Mogoeng J) therefore held that *The Citizen's* language about 'McBride's dubious flirtation with gun-runners' violated McBride's human dignity.¹⁹⁶ Overall, Ngcobo CJ's dissent cleaves much closer to the reputational stance adopted by the nine judges in *Le Roux*. It is pure speculation, but had *McBride* come before the full court, the scales might have tipped in the other direction. In fact, for all the governing decision's rousing language about the expressive rights of the victims and the integrity of their memory, these sentiments are couched in a very specific context: the meaning of the 'for all purposes' clause in the *Promotion of Unity and National Reconciliation Act 1995* (South Africa).

¹⁹¹ Jonathan Shapiro (Zapiro) cited in Glenda Daniels, 'The Case of Zuma Versus Zapiro', *The Media Online*, 19 December 2012 <<http://themedialonline.co.za/2012/12/the-case-of-zuma-versus-zapiro/>>.

¹⁹² [1996] 4 SA 672 (Constitutional Court).

¹⁹³ [2009] 12 BCLR 1171 (Constitutional Court).

¹⁹⁴ [2010] 3 SA 293 (Constitutional Court).

¹⁹⁵ *McBride* [2011] 4 SA 191, [157]–[158] (Constitutional Court).

¹⁹⁶ *Ibid* [199]–[203]. Nonetheless, Ngcobo CJ does not go so far as to rule that calling McBride a murderer violates the canons of 'fair comment'. As a former prisoner of the apartheid government, he likely felt the impact of Desmond Tutu's words, cited in the majority opinion: 'The notion of letting bygones be bygones was inimical to the ethos of the transition, since amnesia would have resulted in further victimization of victims by denying their awful experiences'.

In this respect, *McBride* sets South Africa at a fork in the road. The future alone will tell whether this decision signals a newly combative stance on the part of the Court in favour of public debate or if it will be remembered as the swan song of a communicatively grounded notion of human dignity. South Africa's lower courts, for instance, continue to ape the SACC's more recalcitrant judges. Only a few months after *McBride*, Julius Malema, the leader of the Youth League of the ANC, was found guilty of hate speech by the Johannesburg Equality Court for singing the anti-apartheid struggle song, 'Dubula Ibhunu' or 'Shoot the Boer'.¹⁹⁷ As constitutional scholar Pierre De Vos writes, both on this score and that of *The Spear*:

The problem is that the law is a rather blunt instrument with which to mediate this clash between widely differing values, ideas and principles. ... The Afriforum's hate speech case against Julius Malema is a case in point where a body turned to the court to fight what was essentially a political battle about who gets to decide what is acceptable speech in our democracy.¹⁹⁸

'Dubula Ibhunu' was a chant that had been sung at countless ANC rallies for decades. The verdict evidenced a growing cultural intolerance for divisive language and an unfortunately legalistic approach towards socially contentious issues that would normally be submitted to the crucible of public debate. The ANC's proposed Media Appeals Tribunal and its recently passed *Protection of Information Act 2013* (South Africa) (dubbed the 'Secrecy Bill') offer similar dispiriting signs of a waning forbearance and broad-mindedness on the part of the nation's political and legal elite. For a party seeking to bootstrap social consensus, human dignity offers but one more cynical weapon in a growing arsenal of 'thought control'.

This brings us back to Gcina Malindi's crying collapse in his argument before the High Court of Johannesburg. Nothing has been more emblematic of the exponential expansion of 'Personality Rights' than President Zuma's multiple dignity suits against satirists like Brett Murray and Zapiro. An overly muscular regime of 'Personality Rights' is destructive for participatory democracy. It chills free expression and silences topics of public concern. However, an ancillary and equally worrisome matter is that the political revamping of human dignity into an Achilles' shield for the individual's ego¹⁹⁹ may conspire to obscure actual human dignity violations. In this regard, Malindi's cry offers an extraordinary intervention into a case myopically focused on the person of President Zuma. Though the President's complaint mentions some of the historical indignities suffered by black South Africans, it makes no motion on behalf of them. The structure of the legal proceedings thus silenced a painful legacy of oppression to which Malindi responded.

Unfortunately, as De Vos has written, 'the law is a blunt instrument'.²⁰⁰ Malindi's cry provoked the adjournment of the proceedings. Shortly thereafter the Goodman Gallery took down the painting and the suit was dropped.²⁰¹ This is a shame. It would have been enlightening to see

¹⁹⁷ *Afri-Forum v Malema* [2011] 6 SA 240 (Equality Court).

¹⁹⁸ Pierre De Vos, 'Unpacking the Legal Arguments in the Spear case' on Pierre De Vos, *Constitutionally Speaking* (24 May 2012) <<http://constitutionallyspeaking.co.za/unpacking-the-legal-arguments-in-the-spear-case/>>.

¹⁹⁹ Achilles may have had a weak tendon, but he also sported an unbreakable shield.

²⁰⁰ De Vos, above n 166.

²⁰¹ Smith, above n 10.

how, or if, the Court might have responded to the events of that day. Nonetheless, Malindi's semantic collapse offers an eloquent argument that the right to speak is constitutive of human dignity, that structures of dominance, whether racist, economic or authoritarian, impede certain categories of human beings from making their voices heard. Human dignity is meant to shield against this sort of dominance. It is meant to guarantee all actors an equal voice in the body politic.

The TRC's procedures of narrative empowerment no longer form an active part of South African law. Human dignity/ubuntu may be the sole caretaker of its legacy. Yet, Malindi's collapse into silence provides perfect evidence of how a reputational reading of the principle of human dignity can in fact do violence to *human* dignity.

CAN THE BOLIVARIAN EXPERIMENT IMPLEMENT TRANSITIONAL JUSTICE IN VENEZUELA?

RODRIGO ACUÑA AND ESTELA VALVERDE*

Transitional justice in Latin America emerged in relation to accountability for human rights abuses at the period of transition to democracy from dictatorship. Venezuela was often considered an exception since it generally avoided the prolonged military dictatorships, which gripped the region during much of the Cold War. Under closer scrutiny though, Venezuela has had a history of violent politics but with little accountability. The Caracazo stands out as the worst case of repression, which became a politically symbolic event for President Hugo Chávez as it addresses both aspects of the Bolivarian Experiment: redressing inequality and implementing the rule of law. This paper looks at the advances and contradictions Venezuela has done in transitional justice during the Bolivarian experiment (1999–present). Transitional justice is relevant to the Bolivarian experiment because justice emerges as part of establishing a new rule of law by implementing state institutional reforms in the constitutional, judicial, police and prison systems.

I TRANSITIONAL JUSTICE UNDER THE BOLIVARIAN EXPERIMENT

With the death of the late Venezuelan President Hugo Chávez Frías in early March 2013, and the recent violence initiated by student protests in February 2014, Venezuela has again received a high level of international attention. Repeatedly overshadowed by the brutal dictatorships in Latin America during the Cold War, and often praised as a ‘stable’ or ‘exceptional democracy’, academia began to turn its attention towards one of the world’s largest oil states in late 1998, with the election of Chávez.¹ Standing on a broad populist program, Chávez, who, as a Lieutenant Colonel attempted to carry out a military coup in February 1992, won the 1998 elections on the basis of a broad anti-business sentiment.²

The Fifth Republic, as envisioned by Chávez and the popular sectors that became the base of the government’s backing, would support the ideas of the Bolivarian revolution — what we in this

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¹ For a critique of the ‘exceptional democracy’ perspective see Steve Ellner, *Rethinking Venezuelan Politics: Class, Conflict, and the Chávez Phenomenon* (Lynne Rienner Publishers, 2008) 1–4.

² Leslie C Gates, *Electing Chávez: The Business of Anti-Neoliberal Politics in Venezuela* (University of Pittsburgh Press, 2010) 14–58.

paper call the ‘Bolivarian Experiment’.³ A complex process, the Bolivarian Experiment has thus worked along the lines of holding regular (and highly monitored) multi-party elections, a mixed economy with some strategic nationalisations and where the state is seen to have social responsibilities for its citizens’ well-being in access to education, health and housing among other things so as to pursue their happiness.⁴ Access to justice is one of the most important factors in the achievement of this aim, and it is by looking at the different processes and reforms that are needed for this aim that we would like to centre our attention.

Transitional justice as a young discipline has gone through different developmental stages and reviews. Having stemmed after World War II from the universal judicial attempt to bring to justice the perpetrators of the Holocaust, it started as a legal attempt to review and penalise injustices committed in the past. After the many episodes of human rights abuses committed in Latin America, Eastern Europe and Africa, the term’s definition has widened to encompass a more inclusive mission of bringing back or instituting the rule of law in these regions. Bell et al, in their review of the term, define it much more accurately for our times:

Meaningful societal change (of which accountability is likely to be a key part) requires the overhaul of political, legal and social institutions. Most notably, in a policy context, the United Nations Secretary-General has recognised an organic relationship between ‘transitional justice’ and the rule of law (United Nations Secretary-General, 2004). This recognition has vital policy implications, signalling both the broad institutional appropriation of the term ‘transitional justice’, as well as the fact that it is fast becoming a by-word for a bundle of transformative efforts, mostly of a legal nature.⁵

Thus, to be able to achieve an overall view of how transitional justice has been progressing under the Bolivarian Experiment we need to have a global look at different aspects of this equation.

Chávez came to redress social inequality and to implement a new rule of law. Both elements are intrinsically related: you have to have a legal system in which people’s rights are realisable. While a part of the Chávez government agenda, transitional justice has often moved at a slow pace. In the first few years of the Chávez administration (1999–2013), this delay was primarily

³ Some of the first observers to write on the nature of this new Bolivarianism were Steve Ellner and Richard Gott. See Steve Ellner, ‘The Assault on Benefits in Venezuela’ (1999) 32(4) *NACLA: Report on the Americas* 29–33; Steve Ellner, ‘The Contrasting Variants of the Populism of Hugo Chávez and Alberto Fujimori’ (2003) 35 *Journal of Latin American Studies* 139 and Richard Gott, *In the Shadow of the Liberator: Hugo Chávez and the Transformation of Venezuela* (Verso, 2001).

⁴ While a revolution in a more classical manner has certainly been taking place in Venezuela, in the sense that a shift in power has taken place from traditional elites to sectors of the working poor, the working class and middle class, we believe this process is very much experimental within a broad leftist ideological framework. While still encompassing elements of representative democracy such as regular multi-party elections, the support of community councils has very much been more akin to the ideas of a participatory democracy. For some literature on this complex process, see Gregory Wilpert, *Changing Venezuela by Taking Power: The History and Policies of the Chávez Government* (Verso, 2007); David Smilde and Daniel Hellinger, *Venezuela’s Bolivarian Democracy: Participation, Politics and Culture under Chávez* (Duke University Press, 2011); George Ciccariello-Maher, *We Created Chávez: A People’s History of the Venezuelan Revolution* (Duke University Press, 2013).

⁵ Christine Bell, C Campbell and F Ni Aolpin, ‘Transitional Justice: (Re)conceptualising the Field’ (2007) 3(2) *International Journal of Law in Context* 81. For a genealogy of the term, see Ruti G Teitel, ‘Transitional Justice Genealogy’ (2000) 16 *Harvard Human Rights Journal* 69.

due to the fact that Fifth Republican institutions were not completely functioning while the opposition also still controlled key state and judicial institutions. Although in recent years this situation has changed in favour of the government's reforms and at times new forms of centralisation, accusations of a re-politicisation of the bureaucracy and the judiciary have been made against the government. The administration, for its part, both under Chávez and the incumbent President Nicolás Maduro (2013–present), has claimed that its legitimacy and reforms have repeatedly been challenged in a non-democratic manner, pointing to cases like the April 2002 military coup that briefly ousted Chávez.

In this paper we would like to concentrate on three aspects of transitional justice mechanisms implemented in Venezuela during the last decades: constitutional, judicial and police and prison reforms aimed to bring the rule of law to this society.

II CONSTITUTIONAL REFORMS

Shortly after assuming office, Chávez entered into conflict with the opposition constituted by traditionally powerful and established political figures with strong connections to the private sector. At the core of this initial dispute lay the fact that Chávez refused to provide opposition figures with key government positions.⁶ Surviving this initial criticism, after a wide process of consultation with sections of Venezuela's society, the newly elected government redrafted the country's constitution in 1999 and renamed the country the Bolivarian Republic of Venezuela. The Congress (composed of the Chamber of Deputies and a Senate) was dissolved and substituted by a National Assembly.⁷ This major legal act initiated a period of transition between the Fourth Republic (1958–1998), where the most substantial amount of human rights violations took place, and the Fifth Republic.

The 1999 Constitution breaks away with Montesquieu's tripartite theory of powers — Legislature, Executive and Judiciary — and establishes a fourth power: Citizen Power (*Ministerio Público*). It is worth noting here that this is not a new institution but a newly interpreted function of the *Ministerio Público*, which was inspired originally by Simón Bolívar in 1830 and implemented under a different form in the Constitution of 1901.⁸

Article 285 created this new *Ministerio Público* in charge of guaranteeing citizens' rights as well as respecting international agreements. Its office is under the authority of the Attorney General (*Fiscal General*) and it contributes to the state's criminal law policies. The *Ministerio Público* is executed through the Moral Counsel (*Consejo Moral Republicano*) constituted by the Ombudsman (*Defensor del Pueblo*) and the Comptroller General (*Controlador General de la República*) and it gives functional, financial and administrative independence and autonomy to

⁶ In many Latin American countries, ministries often comprise members of opposition political parties if the ruling party feels the need to make special concessions to traditional economic and political elites to remain in office.

⁷ For analysis of the 1961 Constitution and the country's other important institutions see Lynn Kelly, 'Venezuelan Constitutional Forms and Realities' in John D Martz and David J Myers (eds), *Venezuela: The Democratic Experience* (Praeger, revised ed, 1986) 32. *Constitución de la Republica Bolivariana de Venezuela* (1999) [*Constitution of the Bolivarian Republic of Venezuela*].

⁸ For more details, see the official site of the *Ministerio Público*: <<http://www.mp.gob.ve/web/guest/mp>>.

all institutions it comprises as each represent a branch of the National Citizen Power (*'Poder Público Nacional'*) according to art 273 of the 1999 Constitution.⁹

Articles 273 and 280–283 of the 1999 Constitution created the legal figure of the People's Ombudsman (*'Defensor del Pueblo'*) with the charter of defending people's rights against the state. 'The *Defensor* has human rights education and law reform mandates, and is constitutionally required to protect the rights of indigenous peoples'.¹⁰ This new breed of Ombudsman has been controversial, accused of being partisan and refusing to collaborate with international organisations such as the United Nations and the Organisation of American States.¹¹ However, despite its criticisms we shall see the Ombudsman's effective intervention in several transitional justice cases below. The *Ministerio Público* has been criticised for having politicised its functions and to rule in favour of the government in many instances. The last criticism arose from its defence of the government's figures against the Human Rights Watch accusation of human rights abuses.¹²

The 1999 Constitution has best exemplified as a key and contentious aspect of transitional justice in Venezuela and has been criticised as concentrating 'state power, state centralisation, extreme presidentialism' and promoting an 'extensive state participation in the economy'.¹³ These criticisms, of course, overlook the mechanisms of the 1961 Constitution and the concentration of powers, which previously existed in the executive. According to Lynn:

The powers of the president under the 1961 constitution are significant. The president is commander of the armed forces, can call special sessions of the Congress, and appoints all cabinet ministers and governors. He can also declare a state of siege and temporarily order the restriction or suspension of constitutional guarantees. Perhaps as important, the president is constitutionally empowered through his ministers to adopt all necessary regulations to bring laws into effect. Such regulations are neither subject to the approval of Congress nor to the courts. Under such circumstances the Venezuelan president could be considered virtually unfettered in his use of power.¹⁴

⁹ Ibid.

¹⁰ For a comparative analysis of the functions of the Venezuelan Ombudsman with other legal systems see Linda C Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers, 2004) 90 (note 125).

¹¹ For a summary of the opposition criticism to this figure see G Hernández Acevedo, 'The Government's Ombudsman' on *Caracas Chronicles* (26 August 2013) <<http://caracaschronicles.com/2013/08/26/the-governments-ombudsman/>>.

¹² 'Human Rights Watch denuncia repression "sistemática" en Venezuela', *BBC Mundo* (online), 5 de mayo 2014 <http://www.bbc.co.uk/mundo/ultimas_noticias/2014/05/140505_ulntot_venezuela_derechos_humanos_az.s.html>.

¹³ Allan R Brewer-Carías, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment* (Cambridge University Press, 2010) 35. Brewer-Carías concedes that as a 'member of the National Constituent Assembly', he himself 'opposed the Constitution and led a political campaign for a no vote in the referendum'. For another criticism of the 1999 Constitution, see Mario J Garcia-Serra, 'The "Enabling Law": The Demise of the Separation of Powers in Hugo Chavez's Venezuela' (2001) 32(2) *The University of Miami Inter-American Law Review* 265.

¹⁴ Kelly, above n 7, 38–39.

In contrast to the 1961 Constitution, from the perspective of others, the new charter has enhanced democracy and increased the rights and participation of the country's working poor. Hellinger, for example, writes that the 1999 Constitution

created a new branch with responsibility for protecting human rights; mandated popular participation in policy making; allowed for recall of elected officials (including the president); created possibilities for popular initiative and referendum; and mandated consultation with civil society in appointments to the judiciary, the election commission ... [and] the anticorruption branch.¹⁵

Hellinger adds that while the 1999 Constitution was made to 'promote a participatory and protagonist democracy', the new charter made 'no mention of socialism'.¹⁶ According to Amnesty International ('AI'), the new Constitution recognised 'international human rights treaties and the outlawing of enforced disappearances'. However, AI sided with the view of non-governmental human rights organisations, which argued that the charter 'increased the political power of the armed forces'.¹⁷ Within the 1999 Constitution, art 72 though allows for a recall of any elected representative, including the President. Article 72 states:

All magistrates and other offices filled by popular vote are subject to revocation. Once half of the term of office to which an official has been elected has elapsed, a number of voters constituting at least 20% of the voters registered in the pertinent circumscription may extend a petition for the calling of a referendum to revoke such official's mandate.¹⁸

In 2004 the opposition used art 72 to set up a recall referendum on Chávez's presidency, which they eventually lost. Despite controversy as to how the opposition managed to trigger the recall referendum, the final results were in the government's favour and were recognised as legitimate by the Carter Centre — run by former US President Jimmy Carter — and the Organization of American States ('OAS').¹⁹ Thus, this constitutional reform guaranteed more political accountability and redressed the balance of power between the private and public sectors of the economy, hopefully promoting more justice in the governmental processes.

While the new 1999 Constitution created a state of the art set of rules to live by, it is a long way yet to have them fully implemented. However, it is indeed an excellent step forwards in the transitional justice reforms needed to establish the rule of law in Venezuela.

¹⁵ Daniel Hellinger, *Global Security Watch* (Praeger, 2012) 22.

¹⁶ Ibid.

¹⁷ Amnesty International, *VENEZUELA 'Disappearance'/Fear for Safety* (7 March 2000) Amnesty International
<<http://www2.amnesty.se/uaonnet.nsf/dfab8d7f58eec102c1257011006466e1/98f8832c37e26c24c125689c0030f907?OpenDocument>>.

¹⁸ *Constitution of the Bolivarian Republic of Venezuela (in English Translation From the Original Legal Text)*
<<http://www.venezuelaemb.or.kr/english/ConstitutionoftheBolivarianingles.pdf>>.

¹⁹ Jennifer McCoy and Francisco Diez, *International Mediation in Venezuela* (United States Institute for Peace, 2011) 65–186.

III JUDICIARY REFORMS

During the Bolivarian Experiment several judiciary reforms have taken place, such as the re-appointment of new high court judges that were accused of bias towards this new regime. These measures were complemented by the condemnation and review of human rights violations in past events, such as the *Caracazo*; the acceptance of the rulings of the Inter-American Commission of Human Rights ('IACHR') and ultimately by the National Assembly's creation of a new Truth and Justice Commission and a Special Commission to Investigate the Murder, Disappearance, and Torture of Venezuelans.

A *Redressing the Caracazo Injustices*

Chávez makes the *Caracazo* the focus of social justice for the poor and criminal justice for repressors and as such it has become an emblematic event in the development of transitional justice in Venezuela.

The *Caracazo* was a popular revolt, fiercely repressed, that took place in 1989, nearly ten years before Chávez took power. It represents a social protest about large-scale inequality that rose from the implementation of neoliberal policies impacting on the subsidy of public transport. It was stimulated by a question of social inequality and then compounded by the fact that there was no remedy and there was impunity for those who caused the deaths and the repression. It is an emblematic event because it contains both elements of the Bolivarian Experiment: redressing social inequality and implementing the rule of law.

According to a 1993 US Department of State Report, almost five years after the *Caracazo* 'no progress was made on charges of extrajudicial killings by security forces'.²⁰ Noting the continued discrepancy between the government's figures and those of human rights groups regarding the number of people killed during the riots, it added:

At least 68 of those killed were buried anonymously in mass graves in a Caracas cemetery. Some human rights organizations accused the authorities of intentionally disposing of the bodies in unmarked graves to conceal the identity, cause and manner of death of the victims and thus protect the perpetrators from prosecution. Although the bodies were exhumed in 1991, only three have been positively identified. Approximately 300 cases regarding the 1989 killings remained under consideration in both military and civilian courts, but only 1 has been adjudicated: a police officer was found guilty in 1991 of homicide and sentenced to 1 year's imprisonment. The Committee of Family Members of Victims of the Riots ('COFAVIC') continued to seek a thorough investigation and prosecution of the cases. The Government and the courts, however, made no substantial effort to hasten proceedings.²¹

²⁰ US Department of State, *Venezuela Human Rights Practices 1993* (31 January 1994) US State Department Electronic Research Collections
<http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_ara/Venezuela.html>.

²¹ *Ibid.*

As a result of the violence and rising discontent throughout the country, state repression increased after February 1989. According to Amnesty International reports prepared in 1993 and 1996, the administrations in Caracas from the late 1980s and the 1990s utilised violence to quell dissident activists in the capital's shanty towns through arrest, torture and, in some cases, murder by security forces.²² While trade unionists and student leaders were also pursued, most victims came from the poorest segments of Venezuelan society. In the cases of other victims, extra-judicial killings took place because the police suspected their involvement in criminal activity. According to the 1993 US Department of State Report:

The Venezuelan Program for Action and Education in Human Rights ('PROVEA'), one of Venezuela's most respected human rights organizations, reported 187 extrajudicial killings from October 1992 through September 1993. At least eight of the victims were under 15 years of age. According to PROVEA, 66 of the killings were carried out by the metropolitan police, 33 by state police, 22 by the Intelligence Police ('DISIP'), 21 by the National Guard, 16 by the Judicial Technical Police ('PTJ'), 11 by the armed forces, 8 by municipal police, and 10 by other branches of the security apparatus. The perpetrators act with near impunity, as the Government rarely brings charges against them. If the perpetrators are prosecuted, sentences issued are frequently light, or, more commonly, the convictions are overturned during the appeal process. Unlike common prisoners, police charged with crimes rarely spend much time in prison.²³

Part of the reason for a lack of investigation into police human rights abuses occurred due to the lack of independence of the Institute of Forensic Medicine, whose doctors examined cases of torture but were also linked to PTJ.²⁴ Also, without a centralised national police force, tracking human rights abuses by a centralised authority was non-existent. Here is where human right NGOs such as COFAVIC, PROVEA and the *Red de Apoyo por la Justicia y la Paz*, have played a pivotal role in bringing these cases to the attention to the public and to international players such as the IACHR.²⁵

In 1998, the IACHR condemned the actions of the second Carlos Andrés Pérez administration (1989–1993) regarding the *Caracazo*. Andrés Pérez was also the first Venezuelan head of state forced to resign by the Supreme Court after having been accused of misappropriating 250 million bolivars (some US\$110 000).²⁶ The Commission referred the case to the Inter-American Court of Human Rights, which in 1999 concluded that one decade earlier the Venezuelan state had committed serious human rights violations that included extra-judicial killings.²⁷ By 2002, the Inter-American Court of Human Rights declared that the Venezuelan State must pay as

²² James Ferguson, *Venezuela in Focus: A Guide to the People Politics and Culture* (Latin America Bureau, 1994).

²³ US Department of State, *Venezuela Human Rights Practices 1993* (31 January 1994) US State Department Electronic Research Collections
<http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_ara/Venezuela.html>.

²⁴ Ibid.

²⁵ For a detailed account of the participation of NGOs in the processes of Transitional Justice see the report: Organismos Nacionales de Derechos Humanos, *PROVEA Informe Anual* (2008–09).

²⁶ Hellinger, above n 15, 27. According to Hellinger these were trumped up charges, however, 'CAP did personally benefit from corruption in other cases. Especially notorious was his connection to kickbacks stemming from the purchase of a refrigerator ship during his first administration'.

²⁷ *Caracazo v Venezuela* (2002) IACtHR Ser C 95 (Reparations and Costs)
<http://www.corteidh.or.cr/docs/casos/articulos/Seriec_95_ing.pdf>.

compensation US\$1 559 800 in pecuniary damages, US\$3 921 500 for non-pecuniary damage and pay the legal fees of the Committee of Families of the Victims of February–March 1989 (*‘Comité de Familiares de las Víctimas de los Sucesos de Febrero-Marzo de 1989’* or *‘COFAVIC’*).²⁸

In Venezuela, the Chávez administration accepted the state’s responsibility for the crimes committed during the *Caracazo*. In 2002 Foreign Minister Roy Chaderton declared that: ‘[a]lthough justice has not been done with respect to the *Caracazo*, the state is at least living up to the obligation to indemnify the families and the human rights organisations that were created to seek justice’.²⁹ Originally, an internal investigation launched after the 1989 massacre was stalled until the Chávez administration took office. Afterward though, this process proceeded slowly, as parts of the bureaucracy and the judiciary opposed the central government’s moves to hold accountable those responsible for past human rights abuses. It was not until 2004–2005, when the government purged these bureaucracies, held by AD and COPEI members or supporters, and replaced them with Chavistas or government sympathisers (another problem in itself as a new political monopoly was created), that further steps were made in transitional justice. In July 2005, the Venezuelan state itself acknowledged responsibility for the disappearance of three people after police and military forces were mobilised in the wake of heavy floods in 1999.³⁰ With the DISIP believed to have caused the disappearance of two of the victims, in the past such actions by this security body would have merited little enquiry.

In 2010, further steps were taken regarding the *Caracazo* victims. Ombudsman Gabriela Ramírez welcomed the approval by the Finance Committee of the National Assembly (*‘AN’*) to compensate the victims of the *Caracazo*. Ramírez added that, ‘[t]he truth must be known, and as a state we must not cede. If we expect justice to prevail, we cannot allow impunity in our country’.³¹ In an official ceremony the following year in February, 71 people were laid to rest in a special pantheon from what was originally a communal grave known as *‘the Plague’*.³² Present at the ceremony Attorney General Luisa Ortega Díaz told those gathered, ‘[w]e will never again allow any police officer or public servant to act as they did during the *Caracazo’*.³³ That same year in October, the National Assembly passed the Law to Punish Crimes, Disappearances, Torture, and Violations of Human Rights for Political Reasons during 1958–1998. With the recent creation in February 2013 of a new Truth and Justice Commission to investigate politically-motivated crimes including forced disappearances, torture and other human rights violations committed during those same decades, the head of the National Assembly, Diosdado

²⁸ Ibid 106–8.

²⁹ Humberto Márquez, ‘RIGHTS-VENEZUELA: Reparations for Victims of “Caracazo”’, *Inter Press Service* (online), 12 November 2003 <<http://www.ipsnews.net/2003/11/rights-venezuela-reparations-for-victims-of-caracazo/>>.

³⁰ Johan Gindin, ‘Venezuela Accepts Responsibility for 3 Disappearances in 1999’ on *Venezuelanalysis* (3 July 2005) <<https://venezuelanalysis.com/news/1228>>.

³¹ Embassy of the Bolivarian Republic of Venezuela, *Venezuelan Ombudswoman: Compensation for Victims of The Caracazo Serves as Evidence of Respect for Human Rights* (2010) <<http://venezuela-us.org/2010/05/27/compensation-for-victims-of-the-caracazo-serves-as-evidence-of-respect-for-human-rights/>>.

³² Sarah Grainger, ‘Victims of Venezuela’s Caracazo clashes reburied’, *BBC News* (online), 28 February 2011 <<http://www.bbc.com/news/world-latin-america-12593085>>.

³³ Ibid.

Cabello, was also sworn in along with 19 members to further investigate the events surrounding the *Caracazo*.³⁴

Judicial processes have moved slowly against those responsible for the *Caracazo*. In February 2009 President Chávez declared that while it was important to reclaim the *Caracazo* ‘as a historical event of fair rebellion of the poor,’ it was also necessary to pursue the ‘search of justice to find the perpetrators’.³⁵ As well as charging former Defence Minister Italo del Valle Alliegro in relation to the protests, the Attorney General’s office also charged two other high-ranking former army officials. In October that same year, the Attorney General’s Office exhumed the remains of 125 bodies believed to have been victims of the *Caracazo* in a cemetery in Caracas and by that stage the Office had also filed a request with Interpol for the arrest of the former Venezuelan President Carlos Andrés Pérez. Speaking on this issue Chávez declared that Carlos Andrés Pérez ‘is protected by the US government; he is the first one who should pay for the genocide’.³⁶ Chávez added that blame also lay at the hands of Metropolitan Mayor Antonio Ledezma — Caracas Governor in 1989 — as ‘[h]e is mostly responsible for that assault on the Venezuelan people, because he led the Metropolitan Police’.³⁷ While it always seemed unlikely that US authorities would have ever extradited such a close former ally, on 25 December 2010 Carlos Andrés Pérez died at Mercy Hospital in Miami and his remains were returned to Venezuela the next year in October.

Finally, by February 2014, 112 relatives of victims of the *Caracazo* were indemnified by the State in an act at Miraflores Presidential Palace headed by Chief of Staff Hugo Cabezas, Attorney General Luisa Ortega Díaz and Ombudsman Gabriela Ramírez. Juan José Nieves, a relative of one of the victims, declared that:

Today, we are gathered here not to receive a payment, since we think our relatives are priceless. This is just a compensation given by the Government and, it’s worth mentioning it, this owes to the memory of our supreme commander Hugo Rafael Chávez Frías.³⁸

Whether these actions to indemnify the victims of the *Caracazo* will suffice in the next few years remains to be seen.

B *Redressing Other Past State Crimes*

Worth mentioning here is that the Attorney General’s Office notes that, during the 1960s, the 1970s and the 1980s, 756 people were murdered or disappeared by state security forces.³⁹ In

³⁴ Tamara Pearson, ‘Large Rally Remembers Venezuela’s Caracazo, While Opposition Students Protest’ on *Venezuelanalysis* (27 February 2013) <<http://venezuelanalysis.com/news/7953>>.

³⁵ Alicia De La Rosa Chávez, ‘The Government is in Debt to the Caracazo Victims’, *El Universal* (online), 27 February 2009 <http://www.eluniversal.com/2009/02/27/en_pol_art_chavez:-the-governme_27A2237975>.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ ‘El Caracazo victims indemnified by the Executive’, *AVN* (online), 27 February 2014 <<http://www.avn.info.ve/contenido/caracazo-victims-indemnified-executive>>.

³⁹ James Suggett, ‘Venezuela Advances Investigations of Fourth Republic Massacres’ on *Venezuelanalysis*, (1 October 2009) <<http://venezuelanalysis.com/news/4830>>.

2005 the National Assembly of Venezuela created the Special Commission to Investigate the Murder, Disappearance, and Torture of Venezuelans, another important institutional reform that was unfortunately abandoned. According to Ciccariello-Maher, after only five months the commission was dissolved amid budget issues, however, it did carry out ‘significant research into the crimes of the era’.⁴⁰ By 2006, the Attorney General’s Office reopened the case of the Yumare Massacre — where nine members of the revolutionary group *Punto Cero* were executed by the DISIP⁴¹ with charges brought against 29 participants. Ten arrest warrants were also filed, including an extradition request against Henry López Sisco — head of the DISIP at the time and believed to be living in Costa Rica.⁴² The Attorney General’s Office has made less progress in relation to a massacre in the eastern state of Anzoátegui of 23 political activists of the armed guerrilla Americo Silva Front in October 1982.⁴³ According to PROVEA, retired military man Roger Cordero Lara, who participated in the massacre, is now a member of the United Socialist Party of Venezuela (‘PSUV’) and a deputy of the National Assembly for Guárico. Due to his newly found status, PROVEA claims that authorities have become reluctant to pursue Cordero Lara for his past alleged crime.⁴⁴

Likewise, after the Venezuelan Supreme Court approved the extradition from the United States of Posada Carriles in May 2005, few observers expected the former head of the DISIP to face a court in Venezuela. In September that year, a US immigration judge ruled that Posada Carriles could not be extradited to Venezuela given that he faced the possibility of torture. In an angry response from Caracas, the Chávez government declared that this decision once again highlighted Washington’s ‘double standard in its so-called war on terrorism’.⁴⁵

As the above cases highlight, while many positive steps have been taken to enquire into previous state crimes under the Bolivarian Experiment, the process has been slow and by no means conclusive. With the judiciary and the armed forces long closely related or connected to the established political parties, they remain reluctant to investigate their own actions during the initial years of the Chávez administration. After the April 2002 US-backed military coup occurred, which briefly ousted President Chávez, an even more striking example of this was

⁴⁰ Ciccariello-Maher, above n 4.

⁴¹ Ibid 75.

⁴² Ibid.

⁴³ At the time of the massacre the Venezuelan President, Luis Herrera Campins, stated that the battle was ‘one of the most serious encounters with guerrillas’: ‘Venezuela Units Fight Rebels’, *New York Times*, 4 October 1982.

⁴⁴ Rafael Uzcátegui, a member of Provea states that ‘Cordero appears on the case file and he has never denied his involvement ... We are witnessing a support to impunity and very little willingness to administer justice in regard to these crimes’: Oscar Medina, ‘Parliamentary Immunity to a Certain Extent’, *El Universal* (online), 9 November 2013 <<http://english.eluniversal.com/nacional-y-politica/131109/parliamentary-immunity-to-a-certain-extent>>.

⁴⁵ ‘No Deportation for Cuban Militant’, *BBC News* (online), 28 September 2005 <<http://news.bbc.co.uk/2/hi/americas/4289136.stm>>.

obvious.⁴⁶ Despite evidence to the contrary that a violent takeover against the Chávez administration had taken place, in August that same year the Supreme Court ruled by a slim margin that the incident was not a coup d'état, but rather a 'power vacuum'.⁴⁷ In a similar manner, Hellinger notes that while most Latin American governments were condemning the coup in Caracas as events unfolded, the IACHR's 'status as an honest broker was compromised in the eyes of supporters of Chávez when it failed, like the United States, to immediately condemn the 48-hour coup of 2002'.⁴⁸ This led Chávez to withdraw Venezuela from the IACHR, a controversial move at the time.

In May 2004, after the administration assigned new judges and prosecutors, the Supreme Court's Constitutional Chamber overturned the decision and ruled that Chavez's recusal as President was unconstitutional while the culprit military officers for the takeover should face justice. When the judiciary was criticised for being pro-Chávez, instead of impartial, the administration defended the new appointments as a response to the previous judges' lack of impartiality. In 2008 the US-based Human Rights Watch ('HRW') organisation published a long report on Venezuela and, amongst other issues, strongly criticised Caracas for its actions against the judiciary.⁴⁹ Noting that political discrimination within state institutions had long existed in Venezuela, the HRW report argued that while the Chávez administration had 'managed to uproot the established system of political discrimination, it has replaced it with new forms of discrimination against real and perceived political opponents'.⁵⁰

Widely cited by critics of the Chávez government, the HRW report did not go uncontested. As Hellinger observed, more than 100 Latin American area studies scholars criticised the lead author of the report — José Miguel Vivanco — for 'sloppy scholarship, especially for overreliance on a hostile opposition media and for political bias'.⁵¹ Another observer noted that while HRW claimed that the stacking of new judges meant that the court system had lost its

⁴⁶ Ellner, above n 1, 198–9. On these developments, Ellner writes:

The Bush administration supported the April 2002 coup on different fronts. During the weeks prior to April 11, administration officials and those tied to the government-financed National Endowment for Democracy ('NED') met with numerous Venezuelan opposition leaders in Washington without in any way attempting to discourage them from carrying out the coup. The CIA knew of the details of their plans, which included (in the words of one document dated April 6 that the agency sent to the State Department) efforts 'to try to exploit unrest stemming from opposition and demonstrations' to serve as the justification for the coup and the arrest of Chávez along with ten government officials.

Ellner adds:

The day after Chávez's removal, White House Press Secretary Ari Fleischer justified the coup by referring to the April 11 shootings: 'We know that the action encouraged by the Chávez government provoked this crisis'. The statement was deceptive because the White House had known that the coup was in the making at least several days prior to April 11.

⁴⁷ Brian A Nelson, *The Silence and the Scorpion: The Coup and the Making of Modern Venezuela* (Nation Books, 2009) 269.

⁴⁸ Hellinger, above n 15, 34.

⁴⁹ Human Rights Watch, *A Decade Under Chávez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela* (2008) <<http://www.hrw.org/reports/2008/09/18/decade-under-ch-vez>>.

⁵⁰ Ibid.

⁵¹ Hellinger, above n 15, 34.

independence, ‘the report itself cites countless court decisions that have gone against Chávez or his supporters’.⁵² The criticisms of the IACHR and HRW are both significant, given they are the human rights groups that have leverage internationally to gain judgments against their governments.

In another turn of events, on 18 November 2004, Danilo Anderson — the leading state prosecutor against those involved in the April 2002 coup — was assassinated through the use of C4 explosives soon before he was due to indict 400 people for their involvement in the takeover. Although eventually six Metropolitan Police officers with connections to the opposition were sentenced to 30 years prison for their shootings of protestors, with the aim of blaming the government, most high-level military and political participants, including Pedro Carmona — the self-appointed head of state during 11–13 April 2002 — never stood trial.⁵³ On December 2007, Chávez issued a presidential pardon for more than 60 individuals that signed the Carmona Decree that originally aimed to give legal legitimacy to the coup.⁵⁴

IV POLICE AND STATE SECURITY REFORMS

While the Bolivarian Experiment under both Chávez and Maduro has seen the promotion of army officers and judges supportive of its political agenda, reforms of the state security, the police and the prison system have occurred, albeit slowly at times. In 2005, the government fired the head of the DISIP and undertook a process of restructuring the intelligence body by reducing its personnel from 6000 to 3000 while declaring it would no longer be involved in fighting organised crime.⁵⁵ The latter decision was made in light of revelations that a high profile Colombian drug dealer, José María Corredor Ibagué — also known as ‘*El Boyaco*’ — bribed DISIP agents in the amount of ‘between one and two million dollars’.⁵⁶ In 2009, the government renamed the DISIP the *Servicio Bolivariano de Inteligencia Nacional* (‘Bolivarian National Intelligence Service’ or ‘SEBIN’) and proceeded to restructure it.

Other reforms worth mentioning in the context of advancing transitional justice mechanisms have also taken place. In 2006, the administration in Caracas oversaw a nation-wide consultation with local police forces and community organisations. Two years later, in April 2008, the National Assembly adopted the *Organic Law of the Police Service and the National Police* that established a new model of law enforcement, which prohibited the police from carrying live ammunition at protests and strikes while emphasising the need to respect human rights.⁵⁷ In 2009, the National Police Academy was created to train Venezuela’s new centralised police force

⁵² Gregory Wilpert, ‘Smoke and Mirrors: An Analysis of Human Rights Watch’s Report on Venezuela’ on *Venezuelanalysis* (18 October 2008) <<http://venezuelanalysis.com/analysis/3882>>.

⁵³ Tamara Pearson, ‘Nine Police Found Guilty of April 2002 Venezuelan Coup Deaths’ on *Venezuelanalysis* (6 April 2009) <<http://venezuelanalysis.com/news/4354>>.

⁵⁴ Ian James, ‘Chavez Pardons Accused Coup Backers’, *USA Today* (online), 31 December 2007 <http://usatoday30.usatoday.com/news/topstories/2007-12-31-1482318110_x.htm>.

⁵⁵ Sarah Wagner and Gregory Wilpert, ‘Venezuela’s Intelligence Service To Be Restructured’ on *Venezuelanalysis* (17 July 2005) <<http://venezuelanalysis.com/print/1198>>.

⁵⁶ *Ibid.*

⁵⁷ Pablo Fernández Blanco, Maryluz Guillén and James Suggett, ‘Human Rights and Police Reform in Venezuela: A Venezuelan Perspective’ on *Venezuelanalysis* (3 April 2009) <<http://venezuelanalysis.com/analysis/4349>>.

known as the Bolivarian National Police ('PNB'). By late 2011, over 100 of these new officers were expelled due to corruption while the PNB developed athletic and cultural community programs which benefited some 21 000 children.⁵⁸ Prior to these reforms, every state governor and mayor had their own police force — a total of 135 police forces — with the Judicial Technical Police and Metropolitan Police numbering 6000 and 8000 respectively, which made the implementation of national security almost a myth.⁵⁹

While transitional justice has continued to move slowly in Venezuela, in the last few years it has constantly been reported, according to non-government sources, that crime has been on the increase. Used as a political issue, further challenges to the government's legitimacy have been made by the most radical sections of the opposition while certain judicial cases, which have attracted internal media attention, have become highly politicised.⁶⁰ The fact that in 2004 the government stopped publishing statistics on the number of murder rates has not helped its case.⁶¹ According to Lemoine, the homicide rate for 2008 stood at 48 citizens per 100 000 citizens while, by 2013, an NGO known as the *Venezuelan Violence Observatory* reported that 24 763 killings took place pushing up the homicide rate to 79 per 100 000.⁶²

While the government has continued to invest in the expansion of the PNB, the issue of crime has become so pertinent that in January 2014 observers claimed that a remilitarisation of the police force was taking place, 'with military officers placed at the head of the National Security

⁵⁸ Rodrigo Acuña, 'The Captain of a Sinking Ship?', *New Matilda* (online), 10 October 2011 <<https://newmatilda.com/2011/10/10/captain-sinking-ship>>.

⁵⁹ Michael Humphrey and Estela Valverde, 'Hope and Fear in Venezuela: Violence, Citizen Insecurity, and Competing Neoliberal and Socialist Urban Imaginaries' in Luis Fernando Angosto-Ferrández (eds) *Democracy, Revolution and Geopolitics in Latin America: Venezuela and the International Politics of Discontent* (Routledge, 2014) 161.

⁶⁰ One of the most notable cases of Presidential interference with the judiciary came in during the trial of Judge María Lourdes Afiuni who was accused of corruption after the release of businessman Eligio Cedeño, who later fled to the United States. With Chávez denouncing her as a 'bandit', he also called for her to be given a sentence of 30-years imprisonment. Writing on the matter in Human Rights Watch, *Venezuela: Chávez's Authoritarian Legacy: Dramatic Concentration of Power and Open Disregard for Basic Human Rights* (2013) <<http://www.hrw.org/news/2013/03/05/venezuela-chavez-s-authoritarian-legacy>>, the HRW states that:

Although Afiuni's ruling complied with a recommendation by United Nations human rights monitors — and was consistent with Venezuelan law, she was promptly arrested and ordered to stand trial by a provisional judge who had publicly pledged his loyalty to Chávez. ('I give my life for the Revolution', he wrote on the website of the president's political party. 'I would never betray this process, and much less my Commander'.) Afiuni spent more than a year in pretrial detention, in deplorable conditions, together with convicted prisoners — including many she herself had sentenced — who repeatedly threatened her with death. In the face of growing criticism from international human rights bodies, Afiuni was moved to house arrest in February 2011. After long delays, her trial opened in November 2012. Afiuni has refused to appear, arguing that she would not receive a fair trial, but the proceedings have continued in her absence.

⁶¹ Humphrey and Valverde, above n 59, 162.

⁶² Maurice Lemoine, 'Venezuela Murder Mystery', *Le Monde Diplomatique* (online), August 2010 <<http://mondediplo.com/2010/08/07/venezuela>>; 'Venezuela's Homicide Rate Quadruples in Fifteen Years, NGO Reports', *Associated Press* (online), 26 December 2013 <<http://bigstory.ap.org/article/venezuelas-homicide-rate-rises-ngos-report-says>>.

University ('UNES') and the National Police ('PNB'). They added that '[t]hese changes amount to a setback to citizen security reforms that have attempted to separate the military and the police since 2008'.⁶³ These developments have also taken place with a background of corruption within the military and smuggling rings which hoard or sell subsidised government products in Colombia.⁶⁴ Similarly, the government does have real security issues when, for example, in 2004, 116 Colombian paramilitaries were discovered in a farm outside Caracas with plans to 'destabilise Venezuela's government and assassinate its head of state'.⁶⁵ With rising crime and further alleged activities by right-wing Colombian paramilitaries, President Maduro, in late 2013, called for an expansion of the country's voluntary militia.⁶⁶ Numbering close to 130,000, Maduro told the media he hopes to have 500 000 volunteers by 2015, and double that number by 2019.⁶⁷

Under these circumstances, governments can and do use real security threats to their advantage. On the other hand, by February 2014 the world was once again reminded how sections of the Venezuelan opposition were willing to use non-democratic methods to challenge the government. After losing the April 2013 presidential elections by a close margin, and seeing the government significantly increase its vote in the December 2013 municipal elections, opposition leader Leopoldo López called on indefinite 'students' street demonstrations until the government resigned.⁶⁸ While many of these protests were peaceful, others were extremely violent and saw assaults on government buildings, the burning of public buses and attacks on the PBN and the National Guard which were called onto the streets.⁶⁹ By mid-March authorities in the state of Carabobo arrested three paramilitary groups (some with C4 explosives and military-grade firearms) while at the end of the month 34 people had died, 460 were reported wounded and

⁶³ Rebecca Hanson and David Smilde, 'Will Venezuela's Citizen Security Reform Continue Despite Re-militarization?', *Insight Crime: Organized Crime in the Americas* (online), 12 February 2014 <<http://www.insightcrime.org/news-analysis/will-venezuelas-citizen-security-reform-continue-despite-re-militarization>>.

⁶⁴ Daniela Castro, 'Maduro Launches Civil-Military Force on Venezuela Border', *Insight Crime: Organized Crime in the Americas* (online), 29 August 2013 <<http://www.insightcrime.org/news-briefs/maduro-launches-civil-military-force-on-venezuela-border>>.

⁶⁵ According to Lemoine, in 2007 seven more paramilitaries were arrested in the La Vega district: Lemoine, above n 62.

⁶⁶ 'Venezuela Arrests Colombians over Maduro Assassination Plot', *BBC News* (online), 10 June 2013 <<http://www.bbc.com/news/world-latin-america-22850494>>.

⁶⁷ Ryan Mallett-Outtrim, 'Venezuela's Maduro Calls for More Police Reform, Expansion of Militias' on *Venezuelanalysis* (24 October 2013) <<http://venezuelanalysis.com/news/10119>>.

⁶⁸ Luis Fernando Angosto-Ferrández and Rodrigo Acuña, 'Don't Write off Maduro: Why Venezuela is not Another Ukraine', *The Conversation* (online), 24 March 2014 <<http://theconversation.com/dont-write-off-maduro-why-venezuela-is-not-another-ukraine-24657>>.

⁶⁹ Writing at the time and highly critical of the Maduro administration, Smilde noted that the government position was not 'particularly vulnerable' and 'it would make no sense in such a context for the government to organise violence against a modest student march (with a turnout of around 10 000 it was much bigger than recent protests, but by no means large by Venezuelan standards)'. In David Smilde, 'Who Was Responsible for Yesterday's Violence in Venezuela?' on *Venezuelan Politics and Human Rights* (13 February 2014) <<http://venezuelablog.tumblr.com/post/76591076425/who-was-responsible-for-yesterdays-violence-in>>, Smilde added that:

Leopoldo López's calls for peaceful mobilisation are disingenuous when his acts seem to be intentionally creating the conditions for unintended violence. He is effectively putting student protestors in the line of fire to further what he sees as the interests of the country.

1044 people, of whom — contrary to the opposition's claim — only 418 were students, were arrested.⁷⁰

At the end of March, the government also arrested 21 members of the security services for alleged abuses (which included killings) and sacked the head of SEBIN while the Attorney General's Office created a commission where people could report human rights violations by the authorities.⁷¹ With López arrested and charged for inciting violence, the issue of the protests and surrounding violence was discussed at both the OAS and the Union of South American Nations ('UNASUR').⁷²

While UNASUR backed the Maduro government's version of events, in early March, a similar outcome occurred at the OAS with only Panama and the Obama administration in Washington objecting. One report noted that:

The OAS approved a declaration that rejected violence and called for justice for the 21 people the government says have died in street protests since 12 February. The declaration offered 'full support' for a government peace initiative that the opposition has refused to join until dozens of jailed protesters and an opposition leader are freed. Twenty-nine countries voted in favor of the declaration after 15 hours of debate spread over two days.⁷³

On April 1, the *New York Times* published an open-editorial by President Maduro titled 'Venezuela: A Call for Peace'. Defending the country's participatory democracy and drawing further attention to the violence by some of the protesters, he wrote that:

Antigovernment protesters have physically attacked and damaged health care clinics, burned down a university in Táchira State and thrown Molotov cocktails and rocks at buses. They have also targeted other public institutions by throwing rocks and torches at the offices of the Supreme Court, the public telephone company CANTV and the attorney general's office. These violent actions have caused many millions of dollars' worth of damage. This is why the protests have received no support in poor and working-class neighborhoods. The

⁷⁰ Ibid; Mark Weisbrot, 'The Truth about Venezuela: a Revolt of the Well-off, not a 'Terror Campaign'', *The Guardian* (online), 21 March 2014 <<http://www.theguardian.com/commentisfree/2014/mar/20/venezuela-revolt-truth-not-terror-campaign>>.

⁷¹ Ibid; Ewan Robertson, 'Venezuelan Intelligence Official Arrested in Connection with 12 February Violence in Caracas' on *Venezuelanalysis* (17 February 2014) <<http://venezuelanalysis.com/news/10357>>.

⁷² George Ciccariello-Maher, '#LaSalida? Venezuela at a Crossroads', *The Nation* (online), 22 February 2014, <<http://www.thenation.com/article/178496/lasalida-venezuela-crossroads#>>. Commenting on the funding from the US that the most radical elements of the opposition have received, Ciccariello-Maher observed that:

The political party in which both López and Capriles cut their teeth — Primero Justicia — emerged at the intersection of corruption and foreign intervention: López would later be barred from public office for allegedly receiving funds from his mother, a state oil executive. Less deniable is the FOIA revelation that the party received significant injections of funding from US government ancillaries like the National Endowment for Democracy, USAID, and the International Republican Institute. López is no stranger to street violence, nor does he flinch at taking the extra-institutional route: during the 2002 coup — of which he has said he is 'proud' — he led witch hunts to root out and arrest Chavista ministers amid a violent opposition mob.

⁷³ Associated Press, 'Venezuela Divisions Deepen as Protest over Food Shortages is Halted', *Guardian* (online), 9 March 2014 <<http://www.theguardian.com/world/2014/mar/09/venezuela-protest-food-shortages>>.

protesters have a single goal: the unconstitutional ouster of the democratically elected government.⁷⁴

In the future, the region will undoubtedly once again turn towards Venezuela and its judiciary to see if López will be provided with a fair and transparent trial, to find out how Maduro tackles the issues of crime and security threats and to see how the opposition decides to engage in the next electoral process.

V PRISON SYSTEM REFORM

Moving on to Venezuela's prison system, under the Fourth Republic, frequent and serious human rights violations also took place. Poor funding for prison administration and infrastructure, lack of well-trained staff members, along with high levels of corruption, were endemic. These problems were exacerbated by overcrowding and impoverished living conditions for inmates. According to one report, the annual number of deaths in prison in 1992 reached 600.⁷⁵ An important contributing factor was that during the 1990s prison riots were accompanied by extreme violence. For example, during one riot at the Barcelona prison, two bands of inmates fought each other with sticks and guns for control of the remand centre. With six inmates killed and 20 wounded, a police report noted that the bodies of the dead inmates were found decapitated.⁷⁶ In another case, this time involving a riot at the Sabaneta prison in Maracaibo on 4 January 1994, 104 prisoners were left dead and, with 80 inmates wounded, Sabaneta became known as 'the prison of death'.⁷⁷ With crime on the rise throughout the 1990s, this situation reflected broader social trends like the increase of poverty and a lack of confidence in the country's representative institutions.⁷⁸

The country's prison population in 2008 stood at 20 000, which was a substantial decrease from the all-time high of 31 400 in 1992.⁷⁹ According to art 272 of the new Constitution, 'the state will guarantee a penitentiary system that assures the rehabilitation of the inmate and respect for her or his human rights'.⁸⁰ By 2005 though, with the state's correctional facilities originally built to house 17 000 inmates, the issue of the country's appalling state of affairs in prisons was once again made evident as some 12 000 prisoners went on a hunger strike to demand better conditions.⁸¹ By 2007, conditions in Venezuela's 32 prisons remained poor, with 415 inmates killed in that year due to prison violence.⁸²

⁷⁴ Nicolás Maduro, 'Venezuela: A Call for Peace', *The New York Times* (online), 1 April 2014 <http://www.nytimes.com/2014/04/02/opinion/venezuela-a-call-for-peace.html?_r=0>.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ According to one source, from 1995 to 2003 homicide rates increased from 21 per 100 000 inhabitants to 44: Lucía Dammert, *Fear and Crime in Latin America: Redefining State-Society Relations* (Routledge, 2012) 128.

⁷⁹ James Suggett, 'Prisoner Rights Restored Following Venezuelan Supreme Court Decision' on *Venezuelanalysis* (23 April 2008) <<http://venezuelanalysis.com/news/3379>>.

⁸⁰ Ibid.

⁸¹ Ibid; 'The Fifth Circle of Hell', *The Economist* (online), 14 July 2011, <<http://www.economist.com/node/18958990>>.

⁸² Suggett, above n 79.

According to one source, from 1999 to 2011 some 5000 inmates were killed as a result of violence while awaiting or serving out their sentences.⁸³ While this same source in 2011 placed the number of prisoners at 50 000, the government gave a figure of 40 000.⁸⁴ Either way, an increase in Venezuela's prison population was taking place. According to Vice Minister of Justice and Internal Affairs, Edwin Rojas, the reason for this was due to a strengthening of the country's public safety initiatives. She stated that '[c]urrently, we have a penitentiary population of approximately 145 inmates per every 100 thousand inhabitants, displaying a growth in the prison population of 100 per cent in only two years'.⁸⁵ To the government's credit it has created a number of new initiatives in the right direction, like programs for inmates to complete their high school education. In the face of mounting criticism, the administration also created Operation Cayapa that — it claimed — by early 2012 resulted in 40 per cent of prisoners having their judicial cases processed.⁸⁶ Despite promising the construction of nine new prisons though, by that same year the government had only finished two new centres for incarceration.⁸⁷

VI CONCLUSION

In Venezuela, transitional justice procedures have been slow due to the numerous obstacles faced by the new government and the process is by no means conclusive. On the one hand, the Bolivarian Experiment that focuses on institutional reform and greater social justice has made great strides to end the repressive and exclusionary practices of the state institutions of the Fourth Republic. Transitional justice has progressed through the mechanisms of constitutional and judicial reform — including the investigations into the *Caracazo*. Other past state crimes, police and prison system reforms have also progressed, albeit somewhat slowly at times. On the other hand, after the Fifth Republic, the country has witnessed a greater concentration of power in the executive and a re-politicisation of state institutions. With the country still highly polarised after Chávez's death, as the February protests highlight, some sections of the opposition have continued to prefer an unconstitutional removal of the government rather than continue down the path of the Bolivarian Experiment.

At the same time, if we believe that the rule of law needs to be anchored in a solid social justice society, we need to also credit the government implementation of vast social programs in health, education and housing (among other areas). According to the United Nations Economic Commission on Latin America ('CEPAL'), poverty rates between 1999 and 2010 decreased by 21 per cent.⁸⁸ In 2008 the World Bank noted that 32.6 per cent of Venezuelans lived on the poverty line, while in 2012 that figure stood at 25.4 per cent.⁸⁹ In almost every facet of the

⁸³ 'The Fifth Circle of Hell', *The Economist* (online), 14 July 2011 <<http://www.economist.com/node/18958990>>.

⁸⁴ Correo del Orinoco, 'Improving Prison Conditions' on *Venezuelanalysis* (8 April 2011) <<http://venezuelanalysis.com/news/6119>>.

⁸⁵ *Ibid.*

⁸⁶ Ewan Robertson, 'Venezuela Moves Ahead with Prison Reforms' on *Venezuelanalysis* (27 January 2012) <<http://venezuelanalysis.com/news/6777>>.

⁸⁷ *Ibid.*

⁸⁸ Steve Ellner, 'The Chávez Election', *Le Monde Diplomatique* (online), 7 September 2012 <<http://mondediplo.com/2012/09/04chavez>>.

⁸⁹ El Banco Mundial, *Venezuela* (2014) <<http://datos.bancomundial.org/pais/venezuela>>.

government's policies though, highly contentious debates have taken place with the opposition that at times have spilled into the area of transitional justice. In this respect, challenges lie for both sides of the political spectrum. As former US President Jimmy Carter once told President Chávez, while '[y]our government has complied with the constitution in every test ... your public statements and animosity aggravate the divisions' within the country.⁹⁰ Regarding the opposition, even harsher criticisms need to be made because, despite a decline of AD and COPIE, and a regrouping of these traditional parties into the *Mesa de la Unidad Democrática* ('Democratic Unity Roundtable', or 'MUD'), under the Fourth Republic the traditional parties failed to build a more inclusive democracy by introducing constructive processes of transitional justice, a factor that would have paved the way for and facilitated this development under the Bolivarian Experiment. With the death of Chávez, Maduro has a difficult task to keep advancing these processes in the next years. The opposition is running a harsh campaign to discredit his government through students' protests that are manipulated by the media. Luisa Ortega Díaz, Venezuelan Attorney General, denounced openly that only 60 per cent of detainees were students, pointing out the fact that the international media was tainting the perception of these recent demonstrations to discredit and destabilise Maduro's government.⁹¹ Whether the processes of transitional justice being implemented will finally force the rule of law remains to be seen in a country where human rights abuses were the norm until so recently.

⁹⁰ McCoy and Diez, above n 19, 165.

⁹¹ 'El 60% de detenidos por violencia en Venezuela no son estudiantes' *Telesur* (online), 28 February 2014, <<http://m.telesurtv.net/articulos/2014/02/28/solo-35-de-detenidos-por-violencia-en-venezuela-son-estudiantes-5168.html>>.

TRANSITIONAL JUSTICE AND STATE CRIME

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Genocide and other crimes against humanity are not solely individual crimes. They possess a particular institutional nature that can be difficult for law to capture. Transitional justice relies on the institution of law as a companion to the political goal of enabling political transition and effecting justice in the wake of state crime. There are high expectations of law at such times, that it provide frameworks for peaceful transition, and assist in reconstruction and reconciliation. Yet law is poorly equipped to play such a role. Law's historical preoccupation is with accountability for particular individual crimes, whereas transitional justice, as a framework and practice, is focused on a broader program of institutional and social reconstruction. In this article, I suggest that if law is to be a companion to the political project of state transition, then we need to be developing new political-legal concepts to make law effective in these tasks. While we are developing new legal and political-legal bodies to deal with these crimes, such as truth commissions and international tribunals, we are developing few new legal concepts. If law is to deliver accountability for mass harms and partner transitional justice in reshaping and reconstructing a society in the wake of conflict, then new concepts and frameworks to support law in this task are necessary.

I INTRODUCTION

Addressing state crime poses particular challenges to law. State crimes involve the use and transformation of a state structure and its institutions, both civil and state. The destruction wrought is in the name of the state and part of state policy. The recognition of these acts as state crime is critical for our understanding of them and for their legal redress. This article argues that law, with its focus on individual liability, is ill-equipped to address state crime. It suggests that, if law is to be a companion in the transitional justice project of post-conflict reconstruction, new legal concepts are necessary, and offers the concept of civic liability as a useful framework for linking individual and institutional liability for state crime. Such a framework can assist in the transformative goals of transitional justice, and lay the foundations for structural change and reconstruction of a society in the wake of mass harm.

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II TRANSITIONAL JUSTICE AND LAW

In the first post-apartheid case heard by the South African Constitutional Court, the Court noted that the new Constitution:

retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expresses in its preamble the need for a ‘new order ... in which there is equality between ... people of all races’.¹

In demarcating between a former injustice and a future justice, law can be a powerful tool in delineating new normative borders for a society. In so doing, it may provide what we can understand as ‘foundational moments’ that provide new reference points, a new normative framework, for a society coming out of conflict.² These can be crude uses of law — the People’s Revolutionary Council of Kampuchea established by the incoming Vietnamese government ‘to judge the genocide crimes committed by the Pol Pot-Ieng Sary clique’³ was designed to eliminate the Khmer Rouge as a political foe in a situation of continuing civil war. It did, however, still create a record of harm. The more recent Extraordinary Chambers in the Courts of Cambodia,⁴ whose establishment was intended to mark an end to the integration of the Khmer Rouge in the Cambodian state, can be understood as a more developed rule of law response to the failure to bring the Khmer Rouge to account. Both can be understood as foundational moments.

In the legal institutions established by the state in the wake of conflict, we can observe the manner in which law plays a role in governance and nation-building. Legal processes established by the state function to strengthen the state and its governance. In the wake of state crime, at a time of political and social instability, this is most marked.⁵ Law is utilised in the project of nation building, and of establishing social order.

¹ *S v Makwanyane* [1995] SA 391.

² See Jennifer Balint, ‘Law’s Constitutive Possibilities: Reconstruction and Reconciliation in the Wake of Genocide and State Crime’ in E Christodoulidis and S Veitch (eds) *Lethe’s Law: Justice, Law and Ethics in Reconciliation* (Hart Publishing, 2001) 129. My use of the term ‘foundational moment’ has been inspired by Elizabeth Jelin’s earlier use of the term, although I apply it in different ways. Jelin wrote that in the context of political transition in Argentina, ‘[t]he trial of the military commanders was the institutional authentication of that “truth” (through the authority of the judiciary) and the foundational moment of “justice”’: Elizabeth Jelin, ‘The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina’ (1994) 21(2) *Latin American Perspectives* 38, 51.

³ Ha Van Lau, *Letter Dated 4 October 1979 from the Permanent Representative of the Socialist Republic of Vietnam to the United Nations Addressed to the Secretary-General*, UN GAOR, 3rd Committee, 34th Session, Agenda Item 84, UN Doc A/C.3/34/1 (11 October 1979).

⁴ See David Scheffer, ‘The Extraordinary Chambers in the Courts of the Cambodia’, in M Cherif Bassiouni (ed), *International Criminal Law Volume III: International Enforcement* (Martinus Nijhoff, 3rd ed, 2008) 219–255.

⁵ See Richard A Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001).

In her study of the use and role of law in political transition, Ruti Teitel identified this use of law. She showed how law and legislation are used in political transitions to complement the processes of transition. In times of political transition, she argued, the institution of law is purposefully utilised to enable a peaceful transition, to ‘enable the construction of a normative shift’.⁶ Justice, at these times, is determined in relation to previous injustice: ‘What is deemed just is contingent and informed by prior injustice’.⁷ What Teitel was outlining was the use of law in times of political upheaval and change and how, as she argues, the use of law at such times ‘play[s] an extraordinary, constitutive role in such periods’.⁸

Teitel here is focused on law, on legal responses to political change that may include criminal trials, inquiries, reparatory measures, lustration and new constitutions. She is not discussing the concept of creating post-conflict justice, rather the constitutive role of law in times of radical political change. The important question for Teitel is the role that *law* plays in times of political upheaval and political transition. We can observe a shift since the 1990s when ‘transitional justice’ as a concept was first discussed by Teitel and others, to its utilisation and meaning today.⁹ From its groundings in institutional change through law, as evidenced in East-Central European post-communist transition, transitional justice discussions are at present focused around how *justice* may be achieved in the wake of gross human rights violations. Justice is broadened to include both social and legal justice. ‘Transitional justice’, as a framework and practice, is thus focused on the contours and attainment of post-conflict justice, not solely the role law may play in the transition.

The dominant focus of transitional justice has thus shifted from a recognition of the critical normative role that law can play in times of political transition, to consideration of what justice at such times demands. The question central to transitional justice is what form transformation should take. Transitional justice discussions have been attentive to focusing less on criminal accountability and more on structural change.¹⁰ Mahmood Mamdani pointed out in his critique of the South African Truth and Reconciliation Commission (‘the Commission’) that the Commission’s focus on individual physical harms missed the broader harms of the apartheid system, ‘the colonial nature of the South African context’.¹¹ As Wendy Lambourne has argued, transitional justice has failed to be a ‘transformative justice’.¹² This has been emphasised through

⁶ Ruti G Teitel, *Transitional Justice* (Oxford University Press, 2000) 7.

⁷ Ibid 6.

⁸ Ibid 4.

⁹ For a discussion of the origins of transitional justice, see Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321.

¹⁰ See, eg, Lisa Laplante, ‘Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework’ (2008) 2 *International Journal of Transitional Justice* 331; Zaida Miller, ‘Effects of Invisibility: In Search of the “Economic” in Transitional Justice’ (2008) 2 *International Journal of Transitional Justice* 266; Isamael Muvungi, ‘Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies’ (2009) 3 *International Journal of Transitional Justice* 163; Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* (Routledge, 2012); Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press, 2002). Mani argues for the inclusion of a ‘distributive’ justice alongside a ‘legal’ and ‘rectificatory’ justice.

¹¹ Mahmood Mamdani, ‘The Truth According to the TRC’ in I Amadiume and A An-Na’im (eds) *The Politics of Memory: Truth, Healing and Social Justice* (Zed Books, 2000) 179.

¹² Wendy Lambourne, ‘Transitional Justice and Peacebuilding after Mass Violence’ (2009) 3 *International Journal of Transitional Justice* 28, 35–6.

discussions on what may make for an enduring and more holistic justice that addresses the broader contours of the harm perpetrated.

Transitional justice has also been critiqued for being too Western dominant, with Chris Cunneen observing that transitional justice ‘has tended to ignore the extent to which liberal democracies themselves might be considered in need of “post-conflict” reconciliation and restorative justice’.¹³ Outlining the absences within transitional justice has resulted in discussion around what justice, particularly in the case of colonial harm and its structural parameters, requires. Transitional justice has been challenged to consider what a structural justice may demand.¹⁴

Rosemary Nagy points out that transitional justice has become a ‘global project’, ‘a body of customary international law and normative standards’.¹⁵ As Nagy also establishes, ‘[t]he question today is not *whether* something should be done after atrocity but *how* it should be done’.¹⁶ Supported by a permanent International Criminal Court, we are beyond discussions that impunity is acceptable. As articulated by the United Nations:

The notion of ‘transitional justice’ discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.¹⁷

There are high expectations of law — that it ought contribute to reconciliation and societal reconstruction. Mandates for addressing state crime include prospects of reconciliation and post-conflict reconstruction. The preamble to the 1996 legislation establishing the domestic Rwandan criminal trials draws a link between legal accountability and reconciliation, stating ‘in order to achieve reconciliation and justice in Rwanda, it is essential that the culture of impunity be eradicated forever’.¹⁸ The El Salvador Commission on the Truth is to ‘contribute to the reconciliation of Salvadorian society’.¹⁹ The United Nations resolution supporting the establishment of a tribunal to bring individual Khmer Rouge leaders to account does this within

¹³ Chris Cunneen, ‘State Crime, the Colonial Question and Indigenous Peoples’ in Alette Smeulers and Roelof Haveman (eds) *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, 2008) 159.

¹⁴ See Jennifer Balint, Julie Evans and Nesam McMillan, ‘Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach’ (2014) 8(2) *International Journal of Transitional Justice* 194.

¹⁵ Rosemary Nagy, ‘Transitional Justice as Global Project: Critical Reflections’ (2008) 29(2) *Third World Quarterly* 275, 276.

¹⁶ *Ibid.*

¹⁷ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies — Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004) 4 [8].

¹⁸ *Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990* (Rwanda) No 08/96 (30 August 1996), preamble.

¹⁹ Report of the Commission on the Truth for El Salvador UN Doc S/25500 (1 April, 1993) annex (‘*El Salvador: Mexico Peace Agreements — Provisions Creating the Commission on Truth*’) 189.

the context of a ‘legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security’.²⁰

With expectations of law that it both ‘do justice’ and assist in reconstruction, it is necessary to rethink what law needs in order to both be a partner in transitional justice and fulfill its accountability role. Without addressing the broader institutional dimensions of state crime, these broader aims have less chance of success, and law also has less chance of reaching its accountability goal. Transitional justice — unlike law — has particular expectations of the post-conflict process. Law’s preoccupation is accountability for particular individual crimes, whereas the transitional justice project is interested in a broader program of social and institutional reconstruction. Yet without addressing the institutional dimensions of mass harm, its structural underpinnings and institutional frameworks, these broader post-conflict goals for law cannot be as successful. These are acts perpetrated ‘in the name of the state’, co-opting individuals and institutions, both state and non-state. It is in understanding the nature of state crime that we may understand the impact of political legal processes designed to address them.

III THE CONCEPT OF STATE CRIME IN LAW

The perpetration of genocide and other sustained mass harm requires the use and transformation of a state structure and its institutions. State crime involves the harnessing of state and non-state institutions, and the utilisation of a state structure towards this end.²¹ The police, army, legal system, and religious bodies are all harnessed in the name of the state. Individuals killing individuals is not what identifies this form of state crime. Entire state structures are mobilised to commit this mass harm. Accountability, thus, should not be solely individual accountability, but an institutional reckoning that is key to any full redress for state crime, as well as establishing a foundation for the future.

State crime includes both institutional perpetrators as well as institutional beneficiaries. Organisations whose position it is to protect populations are involved in their harm or are companions to or beneficiaries of this harm. As Richard Vernon has shown, these crimes are characterised by the state using its resources to target rather than protect its citizens: ‘an abuse of state power involving a systematic inversion of the jurisdictional resources of the state’.²² In the case of Rwanda, this was the state, the army and the police. In South Africa, a host of institutions, state and non-state, were both perpetrators and beneficiaries.

These are programs of mass destruction or subjugation initiated and carried out by governments or governments-in-waiting. They harness and transform institutions and are grounded in certain

²⁰ *Khmer Rouge Trials*, GA Res 57/228B, 57th sess, 85th mtg, UN Doc A/RES/57/228B (13 May 2003) annex (‘Draft Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea’) 2.

²¹ For further discussion of the concept of state crime, see Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Routledge-Cavendish 2012) ch 1; Penny Green and Tony Ward, *State Crime: Governments, Violence and Corruption* (Pluto Press, 2004); Alex Alvarez, *Genocidal Crimes* (Routledge, 2010); Dawn L Rothe, *State Criminality: The Crime of All Crimes* (Lexington Books, 2009).

²² Richard Vernon, ‘What is Crime against Humanity?’ (2002) 10(3) *The Journal of Political Philosophy* 231, 242.

ideologies and structural inequalities and histories: the Nazi Weltanschauung that sought a Greater Germany, a 'Jew-less' Reich; the Hutu power of Rwanda that sought to reclaim a Rwanda without Tutsis; the 'State of the people' of Pol Pot and the Khmer Rouge that violently oppressed all deemed 'non-Khmer'; the apartheid vision of South Africa that led to the disenfranchisement of black and other 'non-white' South Africans; the 'Ethiopia First' of Mengistu and the Dergue; the Greater Serbia of Milosevic and the Serbian state to be; the Greater Turkey and new vision of the Ottoman Empire that excluded Christian Armenians; the vision of a 'white' Australia that resulted in a genocide against Aboriginal peoples.

The destruction wrought is in the name of the state and part of state policy. It demarcates between who is deemed a citizen and who is not. The recognition of these acts as state crime is critical for our understanding of them and for their legal redress. After the genocide of the Armenians during World War I, the President of the Ottoman Senate spoke of the mass murder of the Armenians as an 'officially' sanctioned 'state' crime requiring 'some kind of intervention' by the authorities.²³ The subsequent Courts-Martial heard one witness speak of doing 'government business'.²⁴ What I suggest is that we consider these crimes by states or 'states-to-be' as particular crimes that require a considered redress. Perpetrated in the name of the state or the state-to-be, with the intention of violently fashioning a state or state-to-be in a particular and terrible image, these can be understood as crimes of state.

Law strains to address this form of crime. Judith Shklar and Hannah Arendt both questioned how a criminal trial could encompass the enormity of crimes such as the Holocaust, the genocide of European Jewry during World War II. Arendt argued that '[t]he attempt to reduce the Nazi demographic policies to the criminal concepts of murder and persecution had the result ... that the very enormity of the crimes rendered any conceivable punishment ridiculous'.²⁵ Shklar argued that crimes against humanity should be understood as an 'organised corporate enterprise', that '[o]ne is not dealing here with a handful of deviants, but with a social movement, and this makes the relationship between the causes of and responsibility for these acts exceptionally problematic'.²⁶ In so arguing, both showed the deficiencies of the individual criminal accountability model and the necessity of viewing this form of crime outside the lens of individual crime.

International criminal law, however, has no concept of state crime. Although there exists a substantial list of 'international crimes'²⁷ such as genocide and torture that incur individual criminal liability, there does not exist within international criminal law a concept of a crime of

²³ Vahakn N Dadrian, 'The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish Military Tribunal' (1994) 22 *Journal of Political and Military Sociology* 97, 110.

²⁴ Annette Höss, 'The Trial of Perpetrators by the Turkish Military Tribunals: The Case of Yozgat', in R G Hovannisian (ed), *The Armenian Genocide: History, Politics, Ethics*, (St Martin's Press, 1992) 220.

²⁵ Hannah Arendt, 'Understanding and Politics (The Difficulties of Understanding)' in H Arendt (ed) *Essays in Understanding 1930-1954* (Harcourt Brace & Company, 1994) 310.

²⁶ Judith Shklar, *Legalism* (Harvard University Press, 1964) 192.

²⁷ M Cherif Bassiouni, 'The Sources and Theory of International Criminal Law: A Theoretical Framework' in M Cherif Bassiouni (ed), *International Criminal Law Volume I Crimes* (Transnational Publishers, 2nd ed, 1999) 62. Bassiouni draws a list of twenty-five international crimes, based on the sources of international law. The list includes crimes against the person such as crimes against humanity, genocide, war crimes and torture, as well as crimes such as drug offences, bribery of foreign public officials, and theft of nuclear materials.

state. Nor are our international legal institutions equipped to address crimes of state as *state* crimes. As William Schabas has pointed out, ‘case law has tended to play down the role of State policy in international crimes’.²⁸ Further, there is no international criminal framework for bringing these crimes as *state* crimes.

The one place where states can be brought to account is the International Court of Justice, yet this is not criminal accountability, and involves a voluntary process of state compliance. Its failures as an avenue for state redress can be seen in the judgment of the case brought by Bosnia-Herzegovina against Serbia and Montenegro during the Yugoslav War, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* 1993. Here, the Court found, fourteen years after the case was first initiated, that the crimes perpetrated at Srebrenica constituted genocide. Despite this, the court found that the state of Serbia was not in fact responsible, denying any link between the mass harm perpetrated by ‘Republika Srpska’ and the leadership of the state of Serbia.²⁹ The case was only possible due to the nation-state status Bosnia-Herzegovina now holds, a result of the war in the former Yugoslavia that was the subject of the claim. States rarely bring actions against other states for actions of genocide, and victim communities are seldom in a position to bring an action for genocide. In the 1980s, a case was prepared by international NGOs and scholars to take the Khmer Rouge killings to the Court under the provisions of art IX of the *Convention on the Prevention and Punishment of the Crime of Genocide*.³⁰ No government was willing to take the case on.³¹

The 20th century saw the increased codification of acts of mass harm committed against civilians. Acts committed by state officials, in particular heads of states, formerly did not warrant criminalisation, nor were they defined as crimes, but were, if deemed necessary, to be mediated by diplomacy or force. These were defined as ‘wrongful acts of states’. The move to define such acts as crimes began only post-World War II. As Marini Spinedi noted in a discussion of international crimes of state:

The need to distinguish among internationally wrongful acts of a state a category of particularly serious wrongful acts, having regard to the importance of the obligation

²⁸ William A Schabas, ‘State Policy as an Element of International Crimes’ (2008) 98 *Journal of Criminal Law and Criminology* 953, 954.

²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 91.

³⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 11 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art IX (‘*Genocide Convention*’). Article IX of the *Genocide Convention* reads: ‘Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in art III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute’.

³¹ See David Hawk, ‘The Cambodian Genocide’ in Israel Charny (ed), *Genocide. A Critical Bibliographic Review* (Facts on File Publications, 1988) 143; Greg Stanton, ‘The Khmer Rouge Genocide and International Law’, in B Kiernan (ed), *Genocide and Democracy in Cambodia* (Yale University Southeast Asia Studies, 1993). A 200-page draft model dispute was prepared by Hurst Hannum, Director of the Procedural Aspects of International Law Institute and David Hawk, Director of Cambodian Documentation Commission; Greg Stanton’s Cambodia Genocide Project separately approached Australia to take a case to the ICJ against the Khmer Rouge exile regime, but this was refused.

breached, was asserted immediately after the end of World War II by both a Soviet author, D B Levin, and a British author, H Lauterpacht.³²

She continued:

The latter said that in the event of extremely serious breaches, the responsibility of the guilty state is not confined to the obligation to make reparations for damage caused but also includes subjection to reprisals and possibly sanctions provided for in the Charter, a responsibility in addition to the international criminal responsibility of the organs of the state that ordered or executed the wrongful act.³³

This understanding, as she continues, entailed a conception of state responsibility that would be in addition ‘to the international criminal responsibility of the organs of the State who ordered or executed the wrongful act’.³⁴ It was at this time too that the International Law Commission (‘ILC’) began considering the topic of ‘state responsibility’, deliberations which ended only in mid-November 2001.³⁵

It is in the ILC’s Draft art 19 on State Responsibility that the concept of state crime can be found. First developed in 1976,³⁶ in its final form in 1996, the article read:

1. An act of State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.³⁷

It set out four types of acts from which an international crime may result:

- (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

³² Marina Spinedi, ‘International Crimes of State: The Legislative History’ in J H Weiler, A Cassese and M Spinedi (eds), *International Crimes of State. A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (Walter de Gruyter, 1989) 340.

³³ Ibid.

³⁴ Ibid.

³⁵ The subject was one of fourteen topics originally selected by the Commission for ‘codification and progressive development’ in International Law Commission, *Yearbook of the International Law Commission* (1989) 281, cited in James Crawford, Special Rapporteur, *First Report on State Responsibility*, UN Doc A/CN.4/490 (24 April 1998) 2 [1]. It was originally confined to state responsibility for injuries to aliens and their property. The topic was reconsidered in 1962, and in 1963 it was agreed that the Commission should focus on ‘the definition of the general rules governing the international responsibility of the State’, by which, as Rapporteur James Crawford comments, was meant responsibility for wrongful acts: International Law Commission, *Yearbook of the International Law Commission* (1963) II, 228, cited in *First Report on State Responsibility* UN Doc A/CN.4/490 (24 April 1998) 4 [12].

³⁶ ‘Report of the International Law Commission on the Work of its Twenty-Eighth Session (3 May – 27 July 1976)’ [1976] I *Yearbook of the International Law Commission* 239.

³⁷ International Law Commission, *Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May–26 July 1996* UN GAOR 51st mtg, Supp No. 10 UN Doc A/51/10 (6 May–26 July) 131, art 19.

- (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
- (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
- (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.³⁸

The article distinguished between ‘internationally wrongful acts’ and ‘international crimes’.³⁹ Both acts invoke the responsibility of states. It raised the question, as discussed by Spinedi in a volume dedicated to a discussion of Draft Article 19, of the relationship between the ‘crime under international law’ committed by the individual-organ acting in its capacity as State organ, and the ‘international crime’ of the State.⁴⁰

The ILC, however, did not end up including ‘conduct constituting an international crime of the State’ as a ‘crime under international law’. The Draft Articles on *Responsibility of States for Internationally Wrongful Acts* adopted in 2001 by the ILC do not include state criminal responsibility or state crime as a principle. Rather, the Articles use the concept of wrongful act of state, beginning with the statement: ‘Every internationally wrongful act of a State entails the international responsibility of that State’.⁴¹

ILC Rapporteur James Crawford wrote of ‘state crimes’ in the context of one of the most discussed aspects of the ILC’s attempt at creating a framework for State responsibility — the distinction between ‘criminal’ and ‘delictual’ responsibility.⁴² He noted that when article 19 was adopted, it was envisaged as a full-scale regime of state criminal responsibility for such crimes as aggression, genocide, apartheid and other international crimes of state.⁴³ However, there was pressure to exclude the notion of State criminal responsibility from the Draft Articles altogether.⁴⁴ Crawford noted that taking Draft Article 19 seriously means treating such crimes with the legal consequences that morally iniquitous conduct ought to entail.⁴⁵ He wrote that this appeals to the ‘reality that State structures may be involved in wholesale criminal conduct — in

³⁸ Ibid.

³⁹ Paragraph 4 concluded: ‘Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict’: Ibid, 132, art 19.

⁴⁰ Spinedi, above n 32, 138.

⁴¹ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex (‘*Responsibility of States for Internationally Wrongful Acts*’) art 1.

⁴² James Crawford, Special Rapporteur, *First Report on State Responsibility*, UN Doc A/CN.4/490 Addendum 1 (1 May 1998) 2 [43]; See James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013).

⁴³ James Crawford, Special Rapporteur, *First Report on State Responsibility*, UN Doc A/CN.4/490 Addendum 3 (11 May 1998) 2 [76].

⁴⁴ Ibid.

⁴⁵ Ibid 7 [89].

genocide, in attempts to extinguish States and to expel or enslave their peoples'.⁴⁶ However, he recommended that although:

the recognition of the concept of 'international crimes' would represent a major stage in the development of international law. The present Draft Articles do not do justice to the concept or its implications for the international legal order, and cannot be expected to do so.⁴⁷

He suggested that '[t]he subject is one that requires separate treatment',⁴⁸ and recommended that art 19 (and consequently arts 51, 52 and 53) be excluded from the Draft Articles on State Responsibility.⁴⁹ State crime as a concept in international criminal law was subsequently abandoned.

IV LEGAL RESPONSES TO STATE CRIME

The absence of a concept of state crime in international law has meant a failure to sufficiently address these crimes of state. While 'crime against humanity', 'crime against peace' and 'war crime' are individual crimes, they are also crimes of the state. Although they possess a necessary individual dimension, they also importantly possess an institutional dimension. This has been recognised in the manner in which crimes against humanity are defined in the *Rome Statute of the International Criminal Court* ('*Rome Statute*'), although there is no concept of state crime as such. The *Rome Statute* notes that an '[a]ttack directed against any civilian population' is 'pursuant to or in furtherance of a State or organizational policy to commit such an attack'.⁵⁰ We can, I suggest, understand these systematic acts of human rights violations that result in destruction or subjugation as 'state crimes against humanity'.

There has been some innovation within international and national criminal law to capture the institutional and organisational scope of the harm perpetrated.⁵¹ At the Ottoman Courts-Martial for the genocide of the Armenians, heads of state and key executive members were grouped together in one trial, in addition to trials for ministers of the two wartime cabinets, trials for the officials who organised the deportations and the 'Special Organisation' that did the killing, and trials for provincial officials in areas in which the massacres took place.⁵² In Ethiopia, members of the former Dergue military council were on trial as a group, with individual charges.⁵³ The International Military Tribunal ('IMT') at Nuremberg declared certain institutions as criminal,

⁴⁶ Ibid.

⁴⁷ Ibid 10 [100].

⁴⁸ Ibid.

⁴⁹ Ibid 10 [101].

⁵⁰ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Art 7.2.a

⁵¹ See Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Routledge-Cavendish 2012) ch 4.

⁵² See Jennifer Balint, 'The Ottoman State Special Military Tribunal for the Genocide of the Armenians: "Doing Government Business"' in K J Heller and G Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013) 77; Vahakn N Dadrian and Taner Akçam, *Judgment at Istanbul: The Armenian Genocide Trials* (Berghahn Books, 2011).

⁵³ See Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Routledge, 2012) 119–121.

establishing a new concept of ‘group criminality’ to encapsulate the ‘common plan’ of the crimes.⁵⁴ The indictment against the 24 former Nazi officials was directed against them ‘individually and as members of any of the ... groups or organisations to which they respectively belonged’.⁵⁵ The separate United States Military Trials at Nuremberg grouped defendants into significant ‘associations’, with three additional trials held that addressed corporations that collaborated with the Nazi state.⁵⁶ The ‘joinder’ indictments at the International Criminal Tribunal for Rwanda were designed to capture the evidence gathered by the Tribunal of a structured and systematic plan of genocide, both by government and non-government institutions.⁵⁷ The International Criminal Tribunal for the Former Yugoslavia adopted the concept of ‘joint criminal enterprise’ to ensure that all individuals involved in the crime perpetrated shared liability for this crime.⁵⁸

Building on this, the permanent International Criminal Court has introduced the concept of ‘common purpose’ to the court:

that ‘a person shall be criminally responsible and liable for punishment ... if that person ... contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose’.⁵⁹

These, however, are mainly organisational tools. With the exception of the criminalisation of organisations at the IMT, the focus remains on individual criminal accountability and not institutional or state accountability. In many ways, the prevailing approach to war crimes trials and international crime in general has been ‘putting individuals on trial’. We can thus question the extent to which the approach taken has indeed been one that conceptualises international crime as acts perpetrated within the framework of a state body, within state policy, and reliant on the institutions of the state to perpetrate it. Most legal approaches to mass harm have used the institution as a tool of organisation in putting individuals on trial, rather than addressing it as such. While individuals are positioned according to their institutional role in the perpetration of state crime, there is little addressing of the institutions involved, nor the allocation of state

⁵⁴ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (signed and entered into force 8 August 1945) 82 UNTS 79 annex (‘*Charter of the International Military Tribunal*’) art 9.

⁵⁵ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, Volumes 1–42* (AMS Press, 1947) 27.

⁵⁶ *Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No 10* (Washington DC, Government Printing Office 1949–53); see also Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011).

⁵⁷ See Balint, ‘Genocide, State Crime and the Law’, above n 53, 141; See also André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals, Vol VI: The International Criminal Tribunal for Rwanda 2000–2001* (Intersentia, 2003) 134.

⁵⁸ The first reference to joint criminal enterprise and its constituent elements was provided in the *Tadic* case of the International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v Dusko Tadic* (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 82 [190]. The Appeals Chamber noted in its discussion of the concept that: ‘Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions...’

⁵⁹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25.

responsibility. Accountability rests solely with the individual, with no possibility of allocation of a wider accountability.

Recognition of the scope of state crime can be found in political-legal redress. Truth commissions and inquiries are starting to name a range of actors as responsible. The Truth and Reconciliation Commission of South Africa ('the Commission') held institutional hearings that examined the many institutions, state and non-state, that supported and sustained the apartheid system. Hearings were held on the media, business, prisons, the faith community, the legal system, political parties, the armed forces, the State Security Council and the health sector. This was in addition to the many individual testimonies that were heard.⁶⁰ In its *Report*, the Commission found for the complicity of the state and a range of institutions. For example, it found that the South African media, in failing to report adequately on gross human rights violations, 'helped sustain and prolong the existence of apartheid'.⁶¹ The *Report* concluded that 'the former state was the major violator'.⁶² In particular:

These were not isolated incidents of the work of mavericks or 'bad apples'; they were the product of a carefully orchestrated policy, designed to subjugate and kill the opponents of the state.⁶³

The Timor-Leste Commission for Reception, Truth and Reconciliation named the Indonesian state, as well as the former colonial power, Portugal, and bystander nations such as Australia and the United States, as responsible for the systematic oppression in East Timor over decades. It found that Portugal 'fell short' in 'its obligation to protect the people of Timor-Leste from harm'⁶⁴ and that 'during the Indonesian occupation successive Australian governments not only failed to respect the right of the East Timorese people to self-determination, but actively contributed to the violation of that right'.⁶⁵ Other truth commissions have also held institutional hearings, including the Commissions of Sierra Leone and Liberia.⁶⁶

What we find in truth commission processes, however, is an account of the harm perpetrated, not a finding of liability. In including an account of the role of states and institutions, government and non-government, within these processes, there is important recognition of the parameters of state crime. There is, however, no inclusion within these processes of a concept of state and institutional *liability*. The question arises as to how to include a concept of state and institutional liability within our legal proceedings and processes. How do we address the institutional dimensions of this kind of crime? In so doing, how can we develop legal-political concepts that assist both in a directed accountability for state crime, and in the transitional justice project of post-conflict reconstruction?

⁶⁰ Audrey R Chapman, 'Truth Recovery Through the TRC's Institutional Hearings Process' in Audrey R Chapman and Hugo van der Merwe (eds), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press, 2008) 169.

⁶¹ Truth and Reconciliation Commission of South Africa, *Report* (1999) vol 4, 189.

⁶² Truth and Reconciliation Commission of South Africa, *Report* (2003) vol 6, 615.

⁶³ *Ibid* 617.

⁶⁴ Timor-Leste Commission for Reception, Truth and Reconciliation, *Chega!* (2005) Part 8, 90.

⁶⁵ *Ibid* 91.

⁶⁶ Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (Graphic Packaging, 2004); Truth and Reconciliation Commission of Liberia, *Volume II: Consolidated Final Report* (Truth and Reconciliation Commission of Liberia, 2009).

Facilitating both accountability and reconstruction through law is a core challenge. Law is familiar with individual accountability, yet a broader structural reckoning is generally beyond its scope. Yet it is this recognition of the parameters of state crime, of broader institutional change, that may assist law in being a better companion to post-conflict social change. Including institutional responsibility in our legal processes, together with state responsibility, could provide a solid framework for a sustainable future. Designing responses that include an articulation of institutional and state responsibility and liability recognises these crimes as state crimes. In understanding the dimensions of state crime, we are also providing the possibility of reconstruction — of transformation of core institutions that collaborated and colluded in the crime. In so doing, we are also acknowledging the relationship between institutional and social change. I suggest that we need to develop new concepts and processes that bring accountability and reconstruction together.

What we have in international law is a consideration of genocide, crimes against humanity and war crimes as separate acts, with little explicit conceptualisation of their state nature and a dominant individual focus. This leads to misunderstanding of these kinds of crimes, with implications for accountability and prevention. If we look at the dominant modes of accountability for state crime, they are individual. And where we do have recognition of institutional actors, the result is an account of the harm, not a finding of liability. The question is how we can include *within* our legal proceedings a concept of state and institutional liability. We have developed new legal institutions to tackle crimes committed by states, in particular the truth commission. Yet we continue to grapple with the institutional dimensions of crimes such as genocide and apartheid in accountability for state crime. We have not developed new legal concepts to encapsulate this form of harm. We are still mostly focused on individual legal processes. And while addressing the individuals — the key perpetrators and instigators of these acts, and the victims and survivors — is critical, in order to fully address these kinds of crimes their institutional dimensions must be recognised. This is both if justice in terms of strict accountability or any broader reconstruction is to be achieved — goals that are increasingly put forward as central in the wake of state orchestrated harm, particularly within a transitional justice framework.

V CIVIC LIABILITY AND INSTITUTIONAL ACCOUNTABILITY

The concept of civic liability is designed both to capture the institutional parameters of state crime and to allow for a transformative accountability. Civic liability draws on the duty of care owed by core state and civil institutions to society. I suggest an integrated accountability process that contains *criminal liability* for key individuals, and *civic liability* for key institutions, both state and non-state. Civic liability tackles the role of state and non-state institutions as actors and beneficiaries of state crime.

The term ‘civic’ is a deliberate reference to the depth of care owed by our institutions to the society in which they function, and the abrogation of this civic responsibility during the perpetration of state crime. Civil society depends for its well-being upon a framework of strong institutions. The abrogation of the responsibility of such institutions to the wider civil society in

their abuse of their position and their participation in the perpetration of gross violations of human rights means that they incur a civic liability.

As a legal concept, civic liability is designed to give weight to the responsibility of institutions in the perpetration of state crime. Without the harnessing of state and civil institutions, the harm perpetrated would have been of a different dimension. This is also important because these are mostly core institutions. Some, such as the Rwandan ‘Interahamwe’, the youth military organisation established 18 months prior to the genocide to play a key role in the killing, were deliberately established for the state crime.⁶⁷ So too the ‘Special Organisation’ comprising mainly released prisoners conscripted in the perpetration of the genocide against the Armenians by the Ottoman state in World War I.⁶⁸ Most others, however, are permanent institutions such as the army, the police and the legal profession who play key roles in society in and outside of conflict. Here we can also include religious institutions or professional institutions such as the medical profession. Bringing these bodies into a process of civic liability gives recognition to their often pivotal role and provides a means of transformation for future prevention.

Civic liability is thus a way to bring institutions, both state and non-state, into an overarching framework of liability for state crime. State crime includes institutional perpetrators and institutional benefactors. Core institutions such as the police, military and executive can fail actively, by planning and participating in the crime. Religious institutions or national associations can fail passively, by collaborating in a crime, or being companion or bystander to a crime. At the business hearings of the Truth and Reconciliation Commission of South Africa, the Congress of South African Trade Unions submitted that ‘apartheid’s labour laws, pass laws, forced removals and cheap labour system were all to the advantage of the business community’.⁶⁹ The Commission in its Report outlined first, second and third-order involvement by businesses in maintaining apartheid. First-order involvement was *direct* involvement with the state in formulating oppressive policies or practices, second-order was *knowledge* of the use to which their services would be applied, and third-order was when business activities *benefited indirectly* from operating within the apartheid society.⁷⁰ In naming processes such as these institutional hearings at the South African Commission as civic liability processes we are recognising their place within a process of establishing liability for state crime.

We can learn from approaches to the crimes of corporations, in particular the Accountability Model developed for the acquittal of corporate crime by Brent Fisse and John Braithwaite.⁷¹ Public identification and legal enforcement of remedial action is central to their model. In their framework, key principles include both the importance of individual responsibility as well as the importance of holding (in their case) corporations responsible as corporations.⁷² These principles can apply equally to state crime. In the pursuance of civic liability of institutions, individual

⁶⁷ Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia University Press, 1995).

⁶⁸ Vahakn N Dadrian, ‘The Role of the Special Organisation in the Armenian Genocide during the First World War’, in P Panayi (ed), *Minorities in Wartime. National and Racial Groupings in Europe, North America and Australia during the Two World Wars* (Oxford, 1993).

⁶⁹ Truth and Reconciliation Commission of South Africa, *Report* (1999) vol 4, 24.

⁷⁰ *Ibid* 26.

⁷¹ Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 140–157.

⁷² *Ibid* 158–163.

criminal liability of individuals responsible must be maintained, yet at the same time the institutions involved, state and non-state, must be addressed as institutions.

What is critical to Fisse and Braithwaite's approach, and would be an integral part of a process of civic liability, is its combination of internal audits that are connected to legal directives.⁷³ Unlike many institutional hearings at truth commission proceedings, these institutional audits would be subject to legal directives requiring internal transformation. So, the recommendations made, for example, in the wake of the Truth and Reconciliation Commission of South Africa, would be *legally required* to be implemented. These could include the recommendations in the Report which, in relation to the business community, included strategies for the establishment of an 'economic justice' that would assist in 'achieving a strong and meaningful human rights culture in order to ensure no repetition of the past'.⁷⁴ The Report of the Commission recommended that 'a scheme be put into place to enable those who benefited from apartheid policies to contribute to the alleviation of poverty',⁷⁵ listing

a wealth tax; a once-off levy on corporate and private income; each company listed on the Johannesburg Stock Exchange to make a once-off donation of 1 percent of its market capitalization; a retrospective surcharge on corporate profits extending back to a date to be suggested; a surcharge on golden handshakes given to public servants since 1990; the suspension of all taxes on land and other material donations to formerly disadvantaged communities.⁷⁶

Other recommendations from the Commission Report included, for example, in the case of the legal hearings, 'codes of practice for police and prosecutors, increased access to legal representation, witness protection, law student education, and increased training of legal professionals'.⁷⁷ A key recommendation for the institution of law was that:

All personnel within the justice system (from clerks to judges) undergo intensive training in the values of the new South African Constitution and in the requirements of international law and standards, including the United Nations Basic Principles on the Independence of the Judiciary. Ongoing training should include sensitization to human rights principles, including gender-specific abuse and appropriate responses.⁷⁸

It is the legal follow up that is critical here. Truth commissions are not generally empowered to enforce their recommendations. As Richard Wilson notes in his discussion of truth commissions as being symbolically powerful yet institutionally weak, the 1993 *Report of the Truth Commission in El Salvador* recommended an extensive program of judicial reform.⁷⁹ Yet despite this being one of the few commissions that stipulated that recommendations would be binding, these were ignored.⁸⁰ Similarly, the biggest disappointment of the truth commission process in

⁷³ Ibid 141–2; 193–198.

⁷⁴ Truth and Reconciliation Commission of South Africa, *Report* (1999) vol 5, 308.

⁷⁵ Ibid.

⁷⁶ Ibid 319.

⁷⁷ Ibid 323–24.

⁷⁸ Ibid 324.

⁷⁹ Wilson, above n 5, 16, 29.

⁸⁰ Ibid; Onur Bakiner, 'Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society' (2014) 8 *International Journal of Transitional Justice* 6, 20.

South Africa has been the largely absent follow up of its recommendations. In 2009, Archbishop Desmond Tutu, who had chaired the Commission, wrote:

I am saddened that after all this time we are still waiting for an appropriate conclusion to the TRC process. Government's lacklustre response to many aspects of the Commission's recommendations remains a source of deep disappointment, and beneficiaries of apartheid have also failed in adequately acknowledging the generosity of their victims' forgiveness.⁸¹

In tying civic liability to an overall accountability framework for state crime that comes *within legal processes*, we are providing a way of enforcing civic liability findings and establishing this as a process of liability rather than as a fact-finding process of responsibility and of public recognition. Responsibility is turned into legal accountability. Liability can be defined as the moment in which responsibility is defined by law.

Building on this, the following procedure with regard to institutions for crimes of state is suggested, as a conceptual model to be developed:

1. *Identify* institutions and organisations as participants in state crime.
2. *Establish* a body to investigate them and their complicity therein: a commission-type process.
3. *Provide* recommendations for reform, including proposals for selected individual criminal liability, and sub-criminal types of responsibility.
4. *Monitor*, through a legally binding regulatory process, the implementation of recommendations. This last step is critical for the acquittal of civic liability.

Civic liability establishes a framework for an accountability and liability that allows for the inclusion of state and non-state institutions, together with individuals. This is a framework for the transformation and accountability of institutions that aims at a broader societal reconstruction not achievable through individual criminal convictions alone. Civic liability is connected to institutional transformation. It is a critical link between the immediate project of legal remedy and the ongoing forward-looking transitional justice project of transformation. In so doing, it has the potential to serve as a bridging concept between institutional reforms as a response to mass atrocity and institutional reforms aimed at post-conflict peacebuilding. It is a way to acknowledge the institutional and state parameters of state crimes against humanity and the importance of institutional and structural change in the wake of state crime. Further, it is an acknowledgment to victims of the harm to which they have been subject.

VI CONCLUSION

Law creates legacies and it creates records. The process of law has the power to reconstitute, to be a partner in reconstruction. Official acknowledgment can provide spaces for mourning and for justice. Being accurate about the crimes that have been perpetrated and creating accountability processes that address the full parameters of state crime is important. It is imperative that

⁸¹ Institute for Justice and Reconciliation, *Annual Report 2009* (2009) 4.

acknowledgement of state crime be brought into the history of a nation and forged into its institutions.

Law can have an impact — it is a powerful tool in drawing lines. Law matters. That is, what forms of law are used in the wake of state crime, and how these crimes are understood through law, does have an impact on prospects for reconstruction, reconciliation and prevention. In the wake of the genocide in Rwanda, Mahmood Mamdani made the observation that the answer to the question, ‘who planned the genocide?’ cannot begin with an identification of individuals.⁸² The brief response to this question, he notes, must be ‘the state power’.⁸³ Only then will the responsibility for the genocide be political, not ethnic.⁸⁴ I think this is true. Understanding these acts as state crime is important for future reconstruction and reconciliation. Legal responses that are able to incorporate both individual and institutional responsibility, and to name the crime as *state* crime, may establish a space for this.

In the process of addressing state crime, in accountability and redress, we may see law’s possibilities — as a framework for a reconstruction and a re-imagining that may be a safeguard against repetition. We need to be cautious of legal accounts that focus overtly on the individual — individual reconciliation or individual accountability — as this misses the more complete story of state-organised perpetration of mass harm, although the individual stories — of perpetration, of harm and of help — must be told too. It is necessary that the story of harm gets told in its entirety and that we consider ways of addressing state crimes against humanity for what they are. Civic liability, as a framework for institutional accountability, has the potential to create conditions for structural reform that both address the state crime perpetrated and set up conditions for a sustainable peace. In so doing, law may provide the tools to partner transitional justice in its broader transformative project.

⁸² Mahmood Mamdani, ‘From Conquest to Consent as the Basis of State Formation: Reflections on Rwanda’ (1996) 216, *New Left Review* 3, 20.

⁸³ Ibid.

⁸⁴ Ibid.

BOOK REVIEW

***THE MILOŠEVIĆ TRIAL — AN AUTOPSY*, TIMOTHY WILLIAM WATERS (ED) OXFORD UNIVERSITY PRESS, 2013, ISBN 978-0-19-979584-0**

The trial of Slobodan Milošević before the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) was in many ways an extraordinary event. Milošević was the only head of state indicted to appear before the tribunal, he represented himself at the trial and, after four years of hearings, he died before a verdict could be reached. Timothy Waters’ edited volume of essays¹ aspires to present a ‘diverse range of views’² on the ICTY’s ‘flagship trial’,³ which was ‘seen as the culmination of the tribunal’s work, an indictment of the Serbian war project, and a summation of Yugoslavia’s dissolution’.⁴ Its 28 contributors come from various professional and overlapping backgrounds. Waters, an academic lawyer who also worked at the ICTY where he helped draft the Kosovo indictment of Milošević, provides five of the book’s 34 chapters. Nine of the other contributors, one of whom was also a prosecution witness in several cases before the tribunal, worked for the ICTY in various capacities.

The book is divided into six sections, dealing with six different, but not mutually exclusive, themes. Part One, written by Waters, deals with the background material and serves as the setting for the remaining parts. Its four chapters cover the historical background to the Yugoslav conflict, the establishment of the ICTY, a brief biography of Milošević and an overview of the whole trial. In covering this material, Waters provides a generally objective account. However, although victims of the conflict are generally referred to as ‘displaced persons’, Krajina’s displaced Serbs might object to Waters’ tone in his assertion that Croatian forces ‘retook the entire Krajina, from which the Serb population fled’.⁵ Later, Waters refers to ‘the departure of most of [Croatia’s] prewar Serb minority’.⁶ Kosovo Serbs might take offence when Waters, immediately after referring to ‘displaced Kosovar Albanians’, states that as a result of Kosovar Albanian violence against them, ‘large parts of the Serb population fled or resettled’.⁷ Such descriptions leave an impression that there were few or no Serb victims of the Yugoslav wars of the 1990s. This is reinforced more dramatically in Part Three of the book, which explores the reaction to Milošević’s trial among Bosniaks, Kosovar Albanians and Croats, who are earlier

¹ T W Waters (ed), *The Milošević Trial — An Autopsy* (Oxford University Press, 2013).

² T W Waters, ‘Preface: A Trial Terminated’ in Waters above n 1, xvi.

³ Ibid xv.

⁴ Ibid xviii.

⁵ T W Waters, ‘The Context, Contested: Histories of Yugoslavia and Its Violent Dissolution’ in Waters, above n 1, 24.

⁶ Ibid 28.

⁷ T W Waters, ‘The Context, Contested: Histories of Yugoslavia and Its Violent Dissolution’ in Waters, above n 1, 29.

described by Waters as ‘the victim populations’.⁸ Apparently, Serbs who had ‘fled’ or ‘departed’ or ‘resettled’ from these areas were not ‘victim populations’. This is not to deny the importance of the chapters dealing with the Bosniaks, Kosovar Albanians and Croats. They show that the trial achieved little by way of reconciliation, a fact readily conceded by Waters when he writes that ‘[t]here is little evidence that reconciliation is occurring in the former Yugoslavia, or that individuals are converging on a common vision of the conflict, let alone that the ICTY contributed to such a process’.⁹ This is also confirmed by empirical studies which, in the case of Bosnia, demonstrate that attitudes of its three national groups have remained essentially unchanged since the eruption of the conflict in 1991. Deep historical, cultural and religious divisions remain with Bosniaks and Croats seeing the conflict as a war of aggression, and Serbs tending to see it as a civil war.¹⁰ That significant reconciliation would result from the work of the ICTY was realistically never going to occur. As Waters notes, ‘the ICTY was first and foremost a court charged with trying individuals accused of committing violations of recognized international law’¹¹ and, based upon the evidence collated in this book, the optimism of many at the time the ICTY was established that it would contribute to post-conflict reconciliation was clearly misguided.

Part Five of the book, which deals with the reaction to the trial in Serbia, is focused on the debate within Serbia’s liberal intelligentsia about the country’s recent past, responsibility for war crimes committed during the Yugoslav wars and the role of the West in Serbia’s political processes. One will find nothing in this book about the impact of the Yugoslav wars and the ICTY trials on the displaced Serbs from Bosnia, Kosovo and Croatia who found themselves as refugees in Serbia. In this respect, interviews with these people show that little, if anything, has been achieved towards reconciliation and that they are more inclined to support more overtly nationalist political parties than their Serbian hosts.¹²

Part Two of the book deals with the course of the trial with a focus on the issue of Milošević’s self-representation and the decision to join proceedings in relation to Croatia, Bosnia and Kosovo into a single trial. The aim here was to establish that the disparate events in these three indictments were all part of a single joint criminal enterprise. As Gideon Boas points out, the joinder decision of the Appeal Chamber, as well as its rulings on self-representation, created ‘a slow-acting poison’ that ‘did much to ensure the trial would outlast its subject’.¹³

Part Four of the book looks at what conclusions can be drawn from the fact that Milošević died before the trial was concluded. Chapters by Waters and Jens Meierhenrich focus on the 2004 Motion for Acquittal, which was the only pre-judgment determinative ruling of the Chamber in

⁸ Waters, above n 1, xxii.

⁹ T W Waters, ‘Dead Man’s Tale: Deriving Narrative Authority from the Terminated Milošević Trial’ in Waters, above n 1, 298.

¹⁰ See Roland Kostić, ‘Nationbuilding as an Instrument of Peace? Exploring Local Attitudes towards International Nationbuilding and Reconciliation in Bosnia and Herzegovina’ (2008) 10 *Civil Wars* 384–412.

¹¹ T W Waters, ‘The Forum: The International Criminal Tribunal for the Former Yugoslavia’ in Waters, above n 1, 35.

¹² See Mila Dragojević, *The Politics of Social Ties: Immigrants in an Ethnic Homeland* (Ashgate, 2014).

¹³ Gideon Boas, ‘Slow Poison: Joinder and the Death of Milošević’ in Waters, above n 1, 119.

the Milošević case. Waters describes it as an ‘ersatz judgment’¹⁴ that ‘has been deployed to tell a story about Milošević’s guilt or innocence and craft a final judgment in the eyes of the world’.¹⁵ These authors rightly recognise that the ruling on the Motion was not a legal judgment and cannot be seen as one establishing Milošević’s guilt. However, Meierhenrich’s argument that the judgment ‘went a long way to restoring confidence in the legitimacy of international adjudication at the ICTY’¹⁶ is one that is unlikely to resonate with those who have criticised the legitimacy of the ICTY and the manner in which it has conducted its proceedings. Their views are not represented in this volume of essays.¹⁷ Four further chapters in this part deal with the value of the evidence produced during not only the trial of Milošević, but also other trials before the tribunal. All four contributors note the obvious point that the evidence, while important, is also incomplete and that future historians must tread carefully when using it. Christian Axboe Nielsen suggests that the ICTY has produced ‘a *reasonable* first draft’ of the Yugoslav wars that is in accord with the vast scholarly literature produced to date.¹⁸ However, the supposed authority that Milošević wielded over the so-called ‘Serbian war project’, which formed the basis of the joint criminal enterprise of which the prosecution alleged Milošević was ‘architect and presiding genius’¹⁹ is questioned by Marko Prelec. Were that the case, Prelec observes, Milošević would have compelled the Bosnian Serbs to accept the Contact Group plan in 1994.²⁰

Part Six of the book deals with the legacy of the trial on the jurisprudence of the ICTY and on international criminal law more generally. Florence Hartmann’s contribution asks whether subsequent trials before the ICTY have established what Milošević’s death before a verdict in his trial precluded, namely, proof of the existence of the joint criminal enterprise that was at the heart of the prosecution’s case against Milošević. The conclusion she reaches is that:

Instead of focusing attention on those who masterminded mass violence far from the battlefield, the ICTY has turned into the leading tool to promote narrow standards of liability that shift guilt away from the leaders operating far removed from the crime base, and back onto people who made no decisions but carried out plans developed by others.²¹

Hartmann adds that ‘the Prosecution seemed more interested in securing convictions — though it hardly succeeded in that — than in lifting the veil of deception’.²²

In his Preface to this bulky tome, Waters states that, as ‘the first comprehensive cross-disciplinary assessment’ of Milošević’s trial, the book seeks to achieve the following: determine

¹⁴ Waters, ‘Dead Man’s Tale: Deriving Narrative Authority from the Terminated Milošević Trial’ in Waters, above n 1, 312.

¹⁵ Ibid 296.

¹⁶ Jens Meierhenrich, ‘Beyond the Theater of International Justice: The Rule 98bis Decision in *Milošević*’ in Waters, above n 1, 325.

¹⁷ See, eg, John Laughland, *Travesty: The Trial of Slobodan Milošević and the Corruption of International Justice* (Pluto Press, 2007).

¹⁸ Christian Axboe Nielsen, ‘Can We Salvage a History of the Yugoslav Conflicts from the *Milošević* Trial?’ in Waters, above n 1, 348.

¹⁹ Marko Prelec, ‘Body of Evidence: The Prosecution’s Construction of Milošević’ in Waters, above n 1, 359.

²⁰ Ibid 376.

²¹ Florence Hartmann, ‘Abdicated Legacy: The Prosecution’s Use of Evidence from *Milošević*’ in Waters, above n 1, 483.

²² Ibid.

the role of historical truth-telling in war crimes trials; measure the impact of trials on communities directly affected by the war; refine courtroom strategies and design of war crimes trials; and examine access to evidence by researchers, victim communities, and other courts.²³ As 'the first comprehensive cross-disciplinary assessment' of Milošević's trial, the book is a valuable contribution to the literature on the Yugoslav wars of the 1990s. Although it is not as comprehensive as it claims to be, it nevertheless is a useful and thought-provoking collection of essays that future scholars, especially those dealing with issues relating to international criminal law, will need to consult.

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²³ Waters, above n 1, xvi.

CASE NOTE

***KIOBEL V ROYAL DUTCH SHELL:* A CHALLENGE FOR TRANSITIONAL JUSTICE**

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*This case note reviews the 2013 US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co* ('*Kiobel*') with reference to its potential implications for transitional justice. It argues that the Alien Tort Statute was an innovative transitional justice mechanism that has, due to the *Kiobel* decision, been sharply curtailed. Moreover, what the Court offered by way of reasoning for its dismissal of the *Kiobel* case, and what it did not say regarding liability for corporations raise concerning issues for the prospects of non-American human rights victims seeking redress and justice in US courts.*

I INTRODUCTION: THE ALIEN TORT STATUTE AS TRANSITIONAL JUSTICE PATHWAY

The US Supreme Court's 2013 decision in *Kiobel v Royal Dutch Petroleum Co*¹ has narrowed the scope of the *Alien Tort Statute* ('ATS')² as a cause of action for foreign claimants, and restricted its use as an innovative pathway to advance transitional justice claims. Beyond the direct impact of curtailing the ATS' utility in such claims, the decision has significant implications for victims of gross human rights abuses and war crimes seeking to pursue justice through US courts.

The ATS is a 1789 US law (enacted by the first Congress) that grants US federal courts the jurisdiction to hear tort claims submitted by non-Americans for 'violations of the law of nations'.³ It lay largely dormant for two centuries, until the 1980s, when human rights advocates successfully invoked the ATS on behalf of foreign victims for abuses committed abroad by foreign governments.⁴ Following the 1995 landmark *Kadic* decision which stated that violations of the law of nations did not require state action to be actionable, a second wave of ATS

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¹ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion).

² 28 USC §1350.

³ Ibid: '[US] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.

⁴ *Filártiga v Peña-Irala*, 630 F 2d 876 (2nd Cir, 1980).

litigation commenced, this time against multinational corporations.⁵ These judgments seemingly permitted US courts to exercise universal jurisdiction in hearing civil claims alleging grave breaches of international law in which the defendants and plaintiffs were not American, and the conduct did not occur on American soil. As a result, the ATS became one of the most powerful and successful legal pathways for victims of gross human rights abuses and other war crimes around the world to pursue justice. ATS cases included claims relating to abuses in conflict zones and repressive states, such as Colombia, Sudan, Liberia, Cote d'Ivoire, Indonesia and Myanmar.⁶ In this way, the ATS had become a viable and effective transitional justice instrument.⁷

Three aspects, in particular, of these ATS cases are noteworthy from a transitional justice perspective: firstly, they are civil suits (as opposed to criminal prosecutions); secondly, they are levelled not merely against government officials but against multinational corporations; and thirdly, they are brought in US courts, not in local courts in or near the conflict-zone. These characteristics distinguish the ATS as a novel transitional justice mechanism, and combined, challenge the 'traditional' or paradigmatic models of transitional justice processes, in terms of location, type of mechanism and targets of such processes. That is, transitional justice is frequently conceptualised as involving processes proximate to the conflict zone and to the victims, criminal prosecution or truth commissions, invariably targeted at political and military leaderships as well as individual combatants.⁸ Yet civil lawsuits, such as those launched under the ATS, offer abuse victims their 'day in court', a judicial adjudication of the conduct in dispute, and potential reparations to victims for harm caused — key objectives of transitional justice.⁹

Perhaps the most prominent ATS case with transitional justice overtones was *Sarei v Rio Tinto*.¹⁰ This case revolved around the actions of Rio Tinto — one of the largest publicly listed companies in Australia, and one of the largest mining companies in the world — on the small

⁵ *Kadic v Karadzic*, 70 F 3d 232 (2nd Cir, 1995).

⁶ For a list and descriptions of prominent ATS cases lodged in US Federal Courts, see: National Foreign Trade Council, *Alien Tort Statute*, USA Engage <<http://usaengage.org/Issues/Litigation/Alien-Tort-Statute/>>.

⁷ Jeremy Sarkin and Carly Fowler, 'Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Tort Claims Act Genocide Case of the Herero of Namibia' (2008) 9 *Human Rights Review* 331; Jeremie Gilbert, 'Corporate Accountability and Indigenous Peoples: Prospects and Limitations of the US Alien Tort Claims Act' (2012) 19 *International Journal on Minority and Group Rights* 25; Eric Posner, 'Remarks on the Alien Tort Claims Act and Transitional Justice' (2004) 98 *Proceedings of the Annual Meeting (American Society of International Law)* 49, 56.

⁸ Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39; David Forsythe, 'Human Rights and Mass Atrocities: Revisiting Transitional Justice' (2011) 13 *International Studies Review* 85; United Nations Peacebuilding Commission 'What is Transitional Justice: A Backgrounder', (Background Note, February 2008) <http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf>; International Center for Transitional Justice, 'What is Transitional Justice?' (Explanatory Note, 2009) <<https://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>>.

⁹ Ibid. See also: Helen Chang Mack and Monica Segura Leonardo, 'Editorial Note: When Transitional Justice Is Not Enough' (2012) 6 *The International Journal of Transitional Justice* 175; Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press, 1998); Eric Posner and Adrian Vermeule 'Transitional Justice as Ordinary Justice' (2004) 117 *Harvard Law Review* 762.

¹⁰ *Sarei v Rio Tinto, PLC*, 221 F Supp 2d 1116 (2002). The allegations, and undisputed facts of the case, are summarised in the numerous court judgments. This is the initial court ruling in the 11 year litigation effort.

Papua New Guinean island of Bougainville, where it operated the world's largest open-pit copper mine.¹¹ Originally lodged in 2000 on behalf of thousands of Bougainvilleans, the lawsuit sought compensation from the company and its local subsidiary for their complicity in genocide, war crimes and other gross human rights abuses allegedly meted out by the Papua New Guinean police and military during Bougainville's war for independence during the 1990s.¹²

The 2001 Bougainville Peace Agreement, which brought an end to the conflict, guaranteed autonomy and eventual referendum on independence for the island.¹³ The Agreement also included provisions granting a sweeping amnesty from criminal prosecution to all parties involved in the conflict.¹⁴ Therefore, the ATS civil suit that had been filed a year earlier was one of the few legal avenues for islanders to seek legal accountability and redress.

An appeal (by Rio Tinto) to the US Supreme Court was about to be filed in this case challenging the ATS' applicability to events that occurred during a conflict on the other side of the globe, when the appellants in *Kiobel* — another long-running ATS lawsuit similarly arising from a situation of conflict and repression — had their writ of certiorari accepted.¹⁵ So it was that *Kiobel* became the vehicle for the Supreme Court to consider the limits of the ATS.

II *KIOBEL* — THE FACTS AND THE DECISION

The original claim in *Kiobel v Royal Dutch Petroleum* was filed in 2002 by the families of Dr Barinem Kiobel and 11 other Nigerian activists who were campaigning against the environmental degradation of the Niger Delta allegedly caused by the ongoing operations of global oil giants Royal Dutch Petroleum and Shell Oil, and their local Nigerian subsidiary. The claimants were seeking compensation under the ATS, alleging that the companies had, amongst

¹¹ Ibid.

¹² Ibid. See also John Braithwaite and Ray Nickson, 'Timing Truth, Reconciliation and Justice After War' (2012) 27 *Ohio State Journal of Dispute Resolution* 443; Anthony Regan, 'Autonomy and Conflict Resolution in Bougainville, Papua New Guinea' in Yash Gai and Sophia Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013) 412.

¹³ Bougainville Peace Agreement (signed 30 August 2001) <http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/bougain_20010830.pdf> Part B 'Autonomy', Part C 'Agreed Principles on Referendum'.

¹⁴ Ibid pt F, s 1, para 331.

¹⁵ Petition for writ of certiorari filed in *Sarei v Rio Tinto* on 23 November 2011. Petition for writ of certiorari filed on 6 June 2011, and granted on 17 October 2011 in *Kiobel v Royal Dutch Petroleum Co*. For a timeline of key events in the *Kiobel* litigation, see: 'Kiobel v Royal Dutch Petroleum' on *Supreme Court of the United States Blog* (2014) <<http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/>>.

other things, aided and abetted the unlawful detention, torture and extra-judicial killings of these activists (in 1995) by the Nigerian military.¹⁶

In 2010, the US Second Circuit Court of Appeals dismissed the suit, deciding that the ATS did not apply to corporations.¹⁷ The claimants petitioned the Supreme Court, requesting the Court review the question of the ATS' applicability to corporations as well as natural persons.¹⁸ Certiorari was granted, and oral hearings were held in February 2012. However, in an unusual move, a week later the Supreme Court requested additional arguments be presented (and ordered new briefs submitted) on a separate and distinct legal issue: the extent of the extra-territorial scope of the ATS.¹⁹ Re-argument in the case was held in October 2012, and it was on this question of law that the Court ultimately made its decision, handed down in April 2013.²⁰ The nine justices of the US Supreme Court were unanimous in dismissing the case. However, that unanimity belies the divergence in legal reasoning conveyed in *four* separate decisions.

In the opinion of the Court, Roberts CJ (joined by the other three 'conservative' justices Alito, Scalia and Thomas JJ) and Kennedy J wrote approvingly of a 2010 Supreme Court decision that stated that 'when a statute gives no clear indication of an extraterritorial application, it has none'.²¹ Roberts CJ declared that nothing in the text of the ATS or its drafting history, or court precedents rebuts the 'presumption against extraterritoriality'.²²

¹⁶ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion). For a summary of the facts of the case, and links to court documents and commentaries see: Business and Human Rights Resource Centre, *Kiobel case: US Supreme Court Review of Alien Tort Claims Act* (28 May 2014)

<<http://www.business-humanrights.org/Documents/SupremeCourtATCARReview>>. The group of activists included the world-renowned writer Ken Saro-Wiwa. Incidentally, an ATS claim was also filed (in 1996) on behalf of Ken Saro-Wiwa against Shell along similar lines as the *Kiobel* lawsuit. After fighting the claim for 13 years, Shell and their co-defendants settled the case in 2009 on the eve of trial. Reportedly, the settlement included a payment of \$15.5 million to the Saro-Wiwa family — a payment characterised by Shell, which continues to deny any culpability, as a 'humanitarian gesture'. See, eg, Jad Mouawad, 'Shell to Pay \$15.5 Million to Settle Nigerian Case', *New York Times*, 8 June 2009.

¹⁷ *Kiobel v Royal Dutch Petroleum*, 621 F 3d 111 (2nd Cir, 2010). This was a 2-1 split decision.

¹⁸ Petition for writ of certiorari filed on 6 June 2011 and granted on 17 October 2011. For a timeline of key events in the *Kiobel* litigation, see: 'Kiobel v. Royal Dutch Petroleum' on *Supreme Court of the United States Blog* (2014) <<http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/>>.

¹⁹ John Bellinger, 'Stop Press: Supreme Court Orders *Kiobel* Reargued to Address Extraterritoriality' on *Lawfare*, (5 March 2012) <<http://www.lawfareblog.com/2012/03/stop-press-supreme-court-orders-kiobel-reargued-to-address-extraterritoriality/>>; Lyle Denniston, 'Kiobel to be Expanded and Reargued' on *Supreme Court of the United States Blog* (5 March 2012) <<http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/>>.

²⁰ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion).

²¹ *Ibid* 4 (Roberts CJ). Citing with approval: *Morrison v National Australia Bank Ltd* 561 US ____ (2010) (US Supreme Court, Docket No. 08-1191, Decided 24 June 2011) (Slip Opinion). NAB had been sued for fraud under US securities law, relating to the 2001 multi-billion dollar write-down of the value of assets of a Florida mortgage servicing company that it had recently purchased. The Supreme Court held that US securities law does not apply to non-US securities — ie it does not apply extraterritorially, overturning a long-standing precedent to the contrary.

²² *Ibid* 7 (Roberts CJ).

Two of the justices (Scalia and Thomas JJ) of the majority also penned a concurring judgment that suggested the majority's formulation was too lax, and that any ATS cause of action 'will fall' unless the relevant action giving rise to the claim is 'domestic conduct,' that is 'within the US'.²³

The concurring opinion signed by the four 'liberal' justices (Breyer, Ginsburg, Kagan and Sotomayor JJ) rejected the majority's far-reaching denial of the ATS' extraterritorial jurisdictional scope. Instead, these justices narrowly constructed their judgment to address the facts of the case at hand, determining that 'the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction'.²⁴ Nevertheless, this minority opinion makes clear that similar scenarios and claims brought before US courts *could* 'invoke a national interest,' in particular the US's 'distinct interest in preventing the US from becoming safe harbour ... for a torturer or other common enemy of mankind' that would satisfy the ATS' jurisdictional test.²⁵

In a further twist, Kennedy J, who provided the crucial fifth vote in support of the Roberts CJ opinion, also issued a separate one page opinion that reflected his discomfort with expansive interpretations of the majority's decision. Kennedy J stated that 'a number of significant questions regarding the reach and interpretation of the [ATS]' remain unanswered, including its 'extraterritorial application [which] may require some further elaboration and explanation' in future cases.²⁶

III TRANSITIONAL JUSTICE IMPLICATIONS

In the year since it was handed down, lower courts and legal scholars have continued to parse the *Kiobel* decision and apply the ruling in different ways.²⁷ Even at this juncture, despite disagreement as to the import and interpretation of the judgment, it seems that *Kiobel's* implications for transitional justice will be wide-ranging.

Firstly, the practical and direct consequence of *Kiobel*, in terms of transitional justice, is that it will likely sharply curtail the use of the ATS as a basis for victims of human rights abuses committed in conflict zones abroad to successfully seek recompense from alleged perpetrators in US courts. By rejecting the extraterritoriality of the ATS in most circumstances, a promising transitional justice pathway has been largely foreclosed.

²³ Ibid 1 (Alito J).

²⁴ Ibid 2 (Breyer J).

²⁵ Ibid.

²⁶ Ibid 1 (Kennedy J).

²⁷ See, eg, Ingrid Wuerth, 'The Supreme Court and the Alien Tort Statute: *Kiobel* v Royal Dutch Petroleum Co'. (2013) 107 *American Journal of International Law* 601; Ralph Steinhardt, 'Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink' (2013) 107 *American Journal of International Law* 841; Vivian Grosswald and David Sloss, 'Reviving Human Rights Litigation After *Kiobel*' (2013) 107 *American Journal of International Law* 858; Elizabeth Holland, *ATS Case Developments Post-Kiobel: Interpreting the 'Touch and Concern' Standard* (13 September 2013) Corporate Social Responsibility and the Law (Published by Foley Hoag) <<http://www.csrandthelaw.com/2013/09/case-developments-post-kiobel-interpreting-the-touch-and-concern-standard/>>.

Indeed, since *Kiobel*, several long-running ATS cases have also been dismissed. Most prominently, the Supreme Court vacated and remanded the *Sarei v Rio Tinto* case to a lower court for reconsideration in light of the *Kiobel* decision.²⁸ In a succinct two paragraph decision, the Ninth Circuit's Court of Appeals agreed to 'dismissal with prejudice' of all claims against Rio Tinto, thereby ending Bouganvilleans' 13 year attempt to see justice done.²⁹ Arguably, the quick dispatch of *Sarei* is indicative of what is to come for similar ATS lawsuits alleging human rights abuses committed in foreign lands by foreign companies against foreign victims.

Whilst the fate of so-called 'foreign-cubed' cases is now bleak, nevertheless, the *Kiobel* opinions hold out the possibility that the ATS could still be an effective instrument to pursue *American* companies for gross human rights abuses and war crimes committed abroad.³⁰ *Kiobel's* majority and minority opinions and, critically, Kennedy J's concurrence, leave open the possibility that ATS cases that sufficiently 'touch and concern the territory of the United States ... with sufficient force [may] displace the presumption against extraterritorial application'.³¹ The justices did not elaborate on what fact pattern may satisfy this standard, but extrapolating from the *Kiobel* scenario it is likely that it will be a limited category of cases that satisfy the test.³² Indeed, in an ATS suit seeking damages from several multinational companies for complicity in South Africa's Apartheid regime, the claims against two *foreign* companies were dismissed as they did not satisfy the 'touch and concern' test.³³ However, the claims against two US companies (IBM and Ford) were allowed to stand.³⁴

Furthermore, Breyer J's observation that there is a clear US national interest in not providing safe harbour to war criminals, seemingly leaves open the possibility for lower courts to find that 'foreign cubed' ATS claims alleging the most heinous of atrocities may well satisfy the 'touch and concern' test posited by the *Kiobel* majority to rebut the presumption of extraterritoriality.³⁵

²⁸ Writ of certiorari accepted on 22 April 2013 — days after the *Kiobel* decision handed down. On the same day, the Supreme Court vacated the judgment and remanded the case to lower court for further consideration.

²⁹ *Sarei v Rio Tinto Plc*, 02-56256 (9th Cir, 2013). The one paragraph Court order dismissed the claim 'with prejudice' – meaning that decision is final and absolute. The substance of the claims cannot be litigated again.

³⁰ See, eg, Rich Samp, 'Supreme Court Observations: *Kiobel* v. Royal Dutch Petroleum and the Future of Alien Tort Litigation', *Forbes* (New York) 18 April 2013; Katie Reford, 'Door Still Open for Human Rights Claims After *Kiobel*' on *Supreme Court of the United States Blog* (17 April 2013)

<<http://www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/>>.

³¹ *Kiobel v Royal Dutch Petroleum Co*, 569 US ___ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 14 (Roberts CJ).

³² See, eg, Meir Feder, 'Commentary: Why the Court unanimously jettisoned thirty years of lower court precedent (and what that can tell us about how to read *Kiobel*)' on *Supreme Court of the United States Blog* (19 April 2013) <<http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/>>.

³³ *In re South African Apartheid Litigation – Order 02 MDL 1499 (SAS)*, US District Court for the Southern District of New York (Scheidlin J), 26 December 2013.

³⁴ *Ibid.* Other cases that have been quickly dismissed or curtailed in the wake of the *Kiobel* ruling by the US Supreme Court include: *Al-Shimari v CACI* and *Balintulo v Daimler AG*. However, others continue. In *Sexual Minorities of Uganda v Lively*, a Federal Court judge declined to dismiss the case, and in *Ahmed v Magan* a judge awarded a \$15 million judgment in a successful ATS action. See also: Julian Ku and John Yoo, 'The Supreme Court Unanimously Rejects Universal Jurisdiction', *Forbes* (New York) 21 April 2013.

³⁵ *Kiobel v Royal Dutch Petroleum Co*, 569 US ___ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 2 (Breyer J).

As foreseen by the justices themselves, further litigation is required to clarify what foreign conduct (and by whom) may trigger application of the ATS.³⁶

Secondly, whilst *Kiobel* has perhaps curtailed the extent to which the ATS may entertain transitional justice claims, it will not end victims' pursuit of justice for abuses committed in conflict zones abroad. To the contrary, the spate of ATS lawsuits has provided sufficient case law (and high-profile multi-million dollar settlements) to encourage victims of atrocities to explore alternative routes and mechanisms to pursue justice. The *Kiobel* decision will likely shift and diversify transitional justice litigation to different jurisdictions and different bases of claims. As Childress argues, rather than stymieing human rights litigation, *Kiobel* may presage 'a brave new world of transnational human rights litigation'.³⁷

US state courts offer the possibility to pursue claims using the common law of torts (in contrast to the *statutory* tort of the ATS). The lawyers acting for the Bougainvillean claimants in *Sarei*, for example, have indicated they will seek to do so.³⁸ Moreover, claimants may also look beyond the US to other countries with permissive legal systems. For example, several countries (including Australia) have adopted legislation that provides for universal jurisdiction over international crimes, and may be amenable to entertain victims' compensation claims against the perpetrators of such crimes.³⁹

Thirdly, the underlying rationale of the *Kiobel* judgment to refuse to recognise the extraterritoriality of the ATS is interesting to contemplate and should give transitional justice advocates some pause. All the opinions impliedly accepted the position that the US, and US courts, should not be the 'custos morum [moral custodians] of the whole world'.⁴⁰ Evidently, the US Supreme Court was reluctant to sit in judgment on the conduct of other countries' wars, or prosecute those that perpetrate atrocities and human rights in far-off countries with no obvious connection to the US. Indeed, Roberts CJ explicitly worries that that may be akin to 'unwarranted judicial interference' in foreign policy — an area of policy best left to the other branches of government.⁴¹ Roberts CJ is concerned about negative repercussion if the courts

³⁶ Ibid.

³⁷ Donald Childress, 'Kiobel Commentary: An ATS Answer With Many Questions (And the Possibility of a Brave New World of Transnational Litigation)' on *Supreme Court of the United States Blog* (18 April 2013) <<http://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation/>>. See also Donald Childress, 'The Alien Tort Statute, Federalism and the Next Wave of International Law Litigation' (2012) 100 *Georgetown Law Journal* 709.

³⁸ David Lornie, 'Class Action Suit Against Bougainville Copper Dismissed by US Court', *Papua New Guinea Post-Courier* (Port Moresby) 1 July 2013.

³⁹ Jonathan Kolieb, 'Australia: The Great Southern Land of Corporate Accountability?' (2013) 1 *Pandora's Box Law Journal* 61; Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World — 2012 Update* (2012, Amnesty International Publications); International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 'Corporate Complicity and Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path', (Commission's Report, International Commission of Jurists, 2008).

⁴⁰ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 12 (Roberts CJ) quoting approvingly from *United States v The Jeune Eugenie*, 26 F Cas 832, 847 (Story J) (Mass, 1822).

⁴¹ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 5 (Roberts CJ).

were to weigh in on such issues and, as a result, he pulls the US court system back from exercising universal jurisdiction, even for trying heinous international crimes.⁴²

This reticence defers to and reflects the arguments put forward by the US Government's amicus brief, which urged the Court to deny the extraterritoriality of the ATS, and dismiss the suit.⁴³ Curiously, this was an about-face for the Obama Administration; for the first set of submissions, the US Government's amicus brief argued in favour of the Nigerian claimants, suggesting the ATS was applicable to corporations.⁴⁴ However, when the Court requested additional submissions on the question of the extraterritoriality question, the US Government's second amicus brief urged the Court to constrain the jurisdictional scope of the ATS, as it would complicate the conduct of US foreign policy and potentially jeopardise national interests.⁴⁵ (Interestingly, the US State Department's legal advisor and Yale University Law Professor Harold Koh refused to approve or sign this second amicus brief.)⁴⁶

The distinct possibility exists that similar 'foreign policy considerations' arguments may be invoked by US state courts and other countries' courts to eschew consideration of ATS-style transitional justice claims regarding conduct in foreign countries. In the absence of robust international mechanisms (the International Criminal Court notwithstanding), and the frequent lack of viable local avenues for justice in (post-) conflict zones, the judgment in *Kiobel* raises the question: where is the appropriate locus for justice to be pursued by and for victims of wartime atrocities?

Finally, it is worthwhile to reflect on the fact that the Court did not directly answer the question of corporate liability for international crimes under the ATS — the question for which it originally granted *cert* to ponder. Yet even Roberts CJ's opinion implied, in *obiter*, that corporations could be liable under the ATS.⁴⁷ The *Kiobel* judgment will contribute to the ongoing discussion as to from whom victims of wartime atrocities should be seeking justice. More broadly, is corporate involvement in transitional justice processes to be confined merely to the defendants in civil (and criminal) cases, or does their involvement go beyond that to assist the pursuit of justice in societies recovering from conflict in different ways?

⁴² Interestingly, Roberts CJ refers to concerns over 'judicial interference' in foreign policy matters, rather than relying on well-established arguments such as sovereign immunity, public interest or political question doctrines (which have in the past been invoked to dismiss cases involving foreign affairs). See, eg, Kenneth Anderson, '*Kiobel v Royal Dutch Petroleum Co*: The Alien Tort Statute's Jurisdictional Universalism in Retreat' [2012–13] *Cato Supreme Court Review* 149; 'Alien Tort Statute — Extraterritoriality — *Kiobel v Royal Dutch Petroleum Co*' (2013) 127 *Harvard Law Review* 308.

⁴³ 'Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance' Submission in *Kiobel v Royal Dutch Petroleum Co*, No. 10-1491, June 2011.

⁴⁴ 'Brief for the United States as Amicus Curiae Supporting Petitioners', Submission in *Kiobel v Royal Dutch Petroleum Co*, No. 10-1491, December 2011.

⁴⁵ 'Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance' Submission in *Kiobel v Royal Dutch Petroleum Co*, No. 10-1491, June 2012.

⁴⁶ See cover page of both briefs for signatories. See also Alison Frankel, 'Shell: Alien Tort Statute Not Meant for International Human Rights', *Reuters* (3 August 2012) <<http://blogs.reuters.com/alison-frankel/2012/08/03/shell-alien-tort-statute-not-meant-for-international-human-rights>>.

⁴⁷ *Kiobel v Royal Dutch Petroleum Co*, 569 US ____ (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 14 (Roberts CJ).

IV CONCLUSION

ATS lawsuits arising out of abuses suffered during situations of conflict or widespread violence blazed a new path for pursuing transitional justice. In the post-*Kiobel* period, despite the likelihood that the ATS retains some viability, much of its potential for transitional justice has been severely circumscribed. The implications of this for human rights abuse victims (and their advocates) will be profound, and raises the question of whether a similarly innovative avenue to justice can be discovered elsewhere. Is it possible to unearth alternative legal mechanisms and jurisdictions that satisfy the goals of transitional justice but eschew the traditional binary choice between truth commissions and amnesties on the one hand, and criminal prosecutions on the other? And that pursue accountability for crimes committed by both governments and corporations? Only time will tell.

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