Identities in Transition

Challenges for Transitional Justice in Divided Societies

Edited by Paige Arthur

CAMBRIDGE

IDENTITIES IN TRANSITION

In many societies, histories of exclusion, racism, and nationalist violence often create divisions so deep that finding a way to deal with the atrocities of the past seems nearly impossible. These societies face difficult practical questions about how to devise new state and civil-society institutions that will respond to massive or systematic violations of human rights, recognize victims, and prevent the recurrence of abuse.

Identities in Transition: Challenges for Transitional Justice in Divided Societies brings together a rich group of international researchers and practitioners who, for the first time, examine transitional justice through an "identity" lens. They tackle ways that transitional justice can act as a means of political learning across communities; foster citizenship, trust, and recognition; and break down harmful myths and stereotypes, as steps toward meeting the difficult challenges for transitional justice in divided societies.

Paige Arthur is Deputy Director of Institutional Development at the International Center for Transitional Justice (ICTJ), where she leads ICTJ's initiatives in evaluating its impact, improving the effectiveness of its work, and knowledge management. Arthur was formerly ICTJ's Deputy Director of Research. Before coming to ICTJ, she was an editor of the journal *Ethics & International Affairs*. Arthur was also the Senior Program Officer for the Ethics in a Violent World initiative at the Carnegie Council. She is the author of *Unfinished Projects: Decolonization and the Philosophy of Jean-Paul Sartre* (2010).

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PAIGE ARTHUR

International Center for Transitional Justice

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9781107003699

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First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Identities in transition : challenges for transitional justice in divided societies / edited by Paige Arthur.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-107-00369-9
1. Transitional justice – Case studies. 2. Identity politics – Case studies. 3. Indigenous people – Case studies. I. Arthur, Paige.
JC571.I325 2010
323.11 – dc22 2010031508

ISBN 978-1-107-00369-9 Hardback

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Acknowledgments

I have been wrestling with the issue of identity for many years now, but I have not done so alone. I wish to thank all of the authors in this book for their patience and dedication to a difficult project and for their insight into the ways that identities have shaped their own societies' attempts to come to terms with the past. I would also like to thank participants in a 2008 meeting of the project who helped refine our thinking through their expert commentary: Anatole Ayissi, Seyla Benhabib, Rajeev Bhargava, Donald Horowitz, Mahmood Mamdani, and Dirk Moses.

This book would not have been possible without the help of so many colleagues at the International Center for Transitional Justice who have inspired and challenged me over the years. Special appreciation goes to my colleagues in the Research Unit, Pablo de Greiff, Roger Duthie, and Debbie Sharnak. Many interns have also provided superb assistance, including Neela Ghoshal, Maya Karwande, Alec Knight, Joanna Rice, Amy Taylor, and Megan Tierney.

At Cambridge University Press, John Berger has been a patient and supportive editor. My thanks to him.

Finally, I am deeply grateful for the support of our donors. They have understood all along how important and complex the real-world problems at the heart of this book really are. The seed money for this book was provided by the Swiss Federal Department of Foreign Affairs. A grant from the International Development Research Centre in Canada saw it through its completion.

Paige Arthur
New York City, July 2010

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Introduction: Identities in Transition

Paige Arthur

In times of transition, divided societies face difficult practical questions about how to devise new state and civil-society institutions that will diminish the potential for discrimination, conflicts over political power, and intercommunal violence.

It is unclear, however, what special approach – if any – transitional justice measures should take in these kinds of contexts. Transitional justice is a response to massive or systematic violations of human rights that aims to recognize victims and to prevent the recurrence of abuse. It is often associated with a set of measures that, taken together, work toward those two aims in ways that reinforce one another.[1] Those measures include prosecutions, especially for those most responsible for grave human rights violations; truth telling that publicly recognizes the abuse, often in the form of an official commission; massive reparations programs that provide a mix of material and symbolic benefits to victims, including official apologies; memorialization projects that educate the public and also provide a space for mourning; and reform of abusive institutions, most often security forces such as the police and military.

Transitional justice has emerged over the last two decades, building on experiences mainly in Latin America, Eastern Europe, and Africa to develop new norms at the international level, based on rights to truth, justice, reparation, and nonrepetition. Given the contexts out of which it first emerged – new democracies in the wake of dictatorships in Latin America – transitional justice has primarily been concerned with "first generation" human rights, that is, civil and political human rights violations. In particular, it has often focused on serious crimes such as massive or systematic extrajudicial killing (e.g., disappearance), arbitrary detention, rape, and torture.

* I owe thanks to Pablo de Greiff for helpful comments on this chapter.

[1] On this issue see, Pablo de Greiff, "Theorizing Transitional Justice," in *Transitional Justice*, ed. Melissa Williams and Rosemary Nagy, *Nomos* XLX (forthcoming).

Transitional justice currently operates in many contexts that are quite different from the classical Latin American cases that so strongly shaped the field.

In places like the Kurdistan Regional Government (KRG) in Northern Iraq, for example, where identity played a strong role in the state-led violation of human rights, and where identity politics is alive and well, we see some key differences. The relationship between the KRG and the rest of Iraq is complicated. Iraq is a federation, and the KRG has considerable independence. Kurdish is spoken there, and its own flag is flown. Many states in the region, including Turkey and Iran, are threatened by potential statehood for the Kurds. Violence between Kurds and Arabs in disputed territories in the south of Iraq – such as Kirkuk, which had been "Arabized" over a period of decades – has been escalating in recent years.

Since the fall of Saddam in 2003, space has opened up to pursue a limited range of transitional justice activities. The Kurdish Regional Government has a Minister of Martyrs and Anfal Affairs, a position created in 2006 that has been charged with providing reparations to survivors of Saddam Hussein's genocidal Anfal campaign of 1987–1989, in which more than 100,000 people were killed and thousands of villages were destroyed in an effort to Arabize the region – a tough task, since no registry of victims currently exists. A handful of the victims did receive reparations from the central Iraqi government, since they had taken direct part in the Anfal trial conducted by the Iraqi High Tribunal (IHT). In June 2007, the IHT convicted three high-ranking Iraqi leaders, including Ali Hassan Al-Majid, known as "Chemical" Ali, of genocide. Saddam would have stood trial but had already been executed by that time. They were sentenced to death. The trial was important to the KRG, which provided evidence and sent lawyers to Baghdad, where the IHT was located.

In this case, the familiar concept of a state apologizing to victims is problematic. In the KRG, the regime's violence is viewed as an attempt by Arabs to dominate Kurds; thus, the notion that a Kurdish president should apologize seems, to some, absurd. As another example, the issue of who should pay for reparations takes on different sorts of political stakes. Some Kurds reject the idea that Kurds themselves should be responsible for reparations, since the Kurdish people are collectively the principal victims of the abuse being repaired. Moreover, these negotiations take place within a state that is attempting to become a viable federation. The structure of the political institutions themselves and power struggles within them are affecting discussions about the shape that transitional justice can and should take.

Thus, many of the countries in which transitional justice practitioners work are not only societies coming to terms with past human rights violations – they are also societies coming to terms with ethnic, religious, or linguistic divisions that may have been at the root of the violations themselves. South Africa after apartheid, Burundi and Guatemala after genocide, and Iraq after dictatorship are all cases in which political redress in the forms of new constitutional arrangements, electoral systems, guarantees of minority rights, or preferential policies has been sought in addition to redress for mass atrocity, with varying degrees of success. However, although identity

conflicts and identity-based grievances form a significant part of postconflict and postauthoritarian contexts, there is no body of knowledge that analyzes what the relationship between these measures and more familiar transitional justice initiatives – including truth telling, prosecutions, reparations programs, memorialization, and a range of institutional reforms – might be.

This gap is a crucial one both for transitional justice practitioners and for those advising on political reforms in divided societies. Although research on the causes and consequences of identity-based conflicts, as well as political remedies for them, has been accumulating for the past decade, transitional justice efforts in Bosnia and Herzegovina, Iraq, and other postconflict countries have been overwhelmed, sometimes to the point of paralysis, by identity-based divisions.

This book is a first step toward trying to close this gap. The good news is that there is already a well-established literature on identity for those in the transitional justice field to draw on. Moreover, there are a number of key cases – Germany, South Africa, the Balkans – where enough time has passed that we can start to evaluate the myriad ways that identity may have affected transitional justice measures and their outcomes. The literature is so large, however, and the issues so deep and varied – from constitutional and electoral design to cultural heritage and education – that any research agenda is likely to be piecemeal and, on its own, unsatisfying.

Given these constraints, the aim of this book is to clarify some of the ways that identity presents new challenges for transitional justice efforts, and offer preliminary suggestions for how these efforts might be adapted to meet those challenges. It includes six chapters on transitional justice measures, most of which are comparative in scope, written by transitional justice experts from around the world. These studies look at identity as a factor in truth-telling efforts, massive reparations programs, security system reform, memory projects, and domestic and international prosecutions. They are intentionally rich in empirical detail, following a set of guidelines that were standardized as far as possible across the studies.

The authors were asked, however, and indeed they all insisted, that they articulate and apply their own analytical frame, which should be reflective of the identities they found most salient in the cases under examination – whether ethnoreligious, political, gendered, and so forth, or a combination of these. Since the chapters were intended to be exploratory, we wanted to treat a range of different cases: identity in conflicts that break along ethnoreligious lines (Northern Ireland, Guatemala, the former Yugoslavia, Rwanda); identity in conflicts that break along ideological lines (Peru); identities in postauthoritarian contexts (Argentina, Germany); and, finally, a hybrid case – South Africa – which possesses both postconflict and postauthoritarian characteristics. What we discovered, as I will discuss later, is that although there are differences, there are also dynamics that cut across types of cases.

Further, the book includes chapters written by experts on identity, many of whom work outside of the transitional justice field. Narrowing the range of topics for these experts to explore was challenging, and priority was given to issues that were

identified as particularly pressing for those working in the transitional justice field: constitutions, ethnic conflict, education, indigenous peoples, and minority rights. More normative than empirical in focus, these chapters argue for ways to improve transitional justice through learning from other fields of expertise, which have been building knowledge about identity for a decade or more. They explore the two levels of justice that need to be addressed where the special political claims and durable patterns of intercommunal violence characteristic of identity conflicts are strong: justice for past mass human rights abuse, and justice for systematic institutional marginalization on the basis of one's identity.

ON IDENTITY

In the Balkans, a 2002 poll showed that the International Criminal Tribunal for the former Yugoslavia was trusted by 83 percent of the population in Kosovo versus only 8 percent of the population in Serbia.[2] In Peru, the dearth of indigenous representation among the staff of the Truth and Reconciliation Commission meant that before the first public hearing, no one had thought about the fact that indigenous women always wear hard hats, which would prevent them from using the headphones they needed to hear translations into their native Quechua. In Iraq, the executions of Saddam Hussein and his collaborators for crimes against humanity provided fuel for sectarian conflict. In Afghanistan, ethnic fragmentation and political competition have been significant impediments to security-sector reform and the implementation of other transitional justice measures. In short, identity-based grievances and conflicts among identity groups have important and varied effects in contexts where mass human rights abuses are in need of redress: on the level of perception and culture, on the microlevel of everyday interaction, and on the institutional level of politics and the rule of law.

The Salience of Identity

"Identity" in this book refers to peoples' membership in social groups – whether that membership is chosen by them or ascribed to them by others. Identity groups are probably infinite. They include ethnic, religious, and gender groups, but also subgroups within those groups: women, disabled women, minority women, minority disabled women, and so on. They are social categories that, as James Fearon and David Laitin note, rely on rules of membership that determine who is included, as well as sets of characteristics, which include beliefs, desires, moral commitments, and physical attributes.[3]

[2] International Institute for Democracy and Electoral Assistance, South East Europe Public Agenda Survey – Summary 2002; available at http://archive.idea.int/balkans/survey_summary_intl_inst.htm.

[3] James D. Fearon and David D. Laitin, "Review: Social Construction of Ethnic Identity," *International Organization* 54, no. 4 (Autumn 2000): 848.

As almost every work on identity explains, there are basically three views on how identity should be understood. The first is the primordialist view, in which identities are stable markers given through practically immutable practices of cultural reproduction. Very close to positing unchanging essences to groups, the primordialist take on identity is thoroughly discredited among social scientists. Nonetheless, it remains a popular understanding of ethnic identity, in particular among politicians and mass publics alike. The second is the rational choice, instrumentalist view, in which social identities are chosen by individuals through a process of strategic calculation, with the aim of advancing their interests. According to this view, there are incentives or disincentives for individual agents to identify as a member of any particular group, which they choose in a way that maximizes their preferences.

The third is the constructivist view, in which identities are not freely chosen by individuals, but neither are they timeless and unchanging. Instead, our identities are given through the social relationships, the everyday practices of perceiving and treating others, and the institutions in which we are embedded. As those factors change over time, so will our identities. In the construction of identities, some observers may stress the function of narrative, or stories that groups and individuals tell about themselves. Seyla Benhabib, for example, sees narratives as forms of self-representation that are also evaluative stances individuals take on their own actions.[4] Other commentators may highlight instead the ways that practices of discrimination reproduce themselves, often on the level of daily interactions. Pierre Bourdieu has argued that these practices enforce, at the symbolic level, the valuing of some groups more than others, through a system of “vision and di-vision” of groups that happens on the nonconscious level of our practical, everyday lives.[5] It should be noted, however, that many researchers meld together instrumentalist and constructivist accounts, arguing that social relations are not completely determinative, and that individuals’ strategic decision making is a factor in identity formation.

Identities are important because they are basic elements of our social life and its reproduction. Part of social life also, however, is conflict and domination. All of the characteristics that Fearon and Laitin mention as aspects of identity – beliefs, commitments, physical attributes, and so forth – can be a source of conflict or of domination, whether physical or symbolic. Domination may be effected through overt state efforts, in the case of racial separation institutionalized in the apartheid system. Or it may work through more subtle social and symbolic means, in the case of long-term marginalization of indigenous people in Peru. Resistance to domination may lead to conflict in which identities become politicized and their boundaries

4 See, for example, Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002).

5 See, for example, Pierre Bourdieu, “Social Space and Symbolic Power,” in Pierre Bourdieu, *In Other Words: Essays toward a Reflexive Sociology*, trans. Mathew Adamson (Stanford, CA: Stanford University Press, 1990).

harden. This was the case in the Balkans, where ethnoreligious identities increased in salience as a result of the war there in the 1990s. In extreme cases, as William Zartman argues, identity conflicts can develop into zero-sum games in which both parties believe there can only be one winner and one loser – there is no middle ground, and thus no room for negotiation or compromise.[6]

Each of the three views of identity already described implies a different set of policy prescriptions to the problems of conflict and domination. If one believes that identities are primordial, then policies should be designed either to keep the groups apart or to find ways to work around their differences. If, however, one is persuaded by the rational choice explanation for identity affiliations, then the problems might be addressed through shifting the available incentives and disincentives for people to hold certain identity preferences. This might be done by reshaping important state institutions and perhaps allowing a more liberal "market" for identity choices to emerge. Finally, if one believes that identities are constructed through a complex interplay of cultural reproduction (schools, media, families, and the narratives that circulate within them), everyday reinforcement (ways of perceiving and treating one's own and other groups), as well as institutional arrangements such as constitutions, then a different set of policy prescriptions arises that will cut across political and social domains.

The constructivist view is the dominant one across methodological boundaries today – including the authors in this book. It should thus come as no surprise that the authors in *Identities in Transition* emphasize multidimensional approaches to dealing with conflict and domination. There is an emphasis across the chapters on the need to find ways to empower marginalized groups as actors with social and political standing, as a step toward broader social transformation. Transitional justice can contribute to this outcome, but so can educational reforms, minority rights guarantees, new constitutional arrangements, and so on. In some cases, the authors suggest that empowerment emerges through the valuing of previously devalued identities – for example, Mayan identity in Guatemala. In others, crosscutting and civic identities are suggested as the best routes to empowerment, as has been the case in South Africa.

These varied methods for treating identity respect the fact that there are many ways for marginalized groups to take on subject positions vis-à-vis the state in order to be recognized as legitimate claimants – that is, as citizens. Their possibilities largely depend on the strategic opportunities open to them at any given time. In some cases, taking on certain identities may be empowering, in others, perhaps not. Thus, the book does not offer a consensus view on whether specific types of identities, for example ethnic identities, should always be valorized and promoted.

[6] Elizabeth A. Cole and Karen Murphy discuss this issue in Chapter 11 of this volume, "History Education Reform, Transitional Justice, and the Transformation of Identities."

It follows Donald Horowitz's assumption that "ethnicity is one of those forces that is community-building in moderation, community-destroying in excess."[7]

Which Identities?

The book focuses on identity-based abuse in which ethnoreligious communities have been targeted. In some cases, the abuse bears a direct relation to the main fault lines of conflict. This was the case in Guatemala, where the chapter on truth telling by Madeleine Fullard and Nicky Rousseau discusses the Commission for Historical Clarification's determination that state-led violence constituted genocidal acts against the indigenous population. In others cases, ethnoreligious identity was peripheral – and thus perhaps more likely to be overlooked. Elizabeth Jelin's chapter on memory projects thus discusses how the Jewish community in Argentina dealt with the special harms that Jews had suffered under the military dictatorship. Interestingly, Ruth Rubio-Marín, Julie Guillerot, and Claudia Paz y Paz Bailey's chapter on reparations straddles the divide: they focus on the cases of Guatemala, where the ethnic dimension to the conflict was palpable, and Peru, where the conflict was mainly ideological but had severe consequences for indigenous Andean and Amazonian peoples there.

The focus on ethnoreligious identities is not, however, an exclusive one. The chapters on truth telling, security system reform, reparations, and international prosecutions deal with identity in South Africa, Guatemala, Peru, Northern Ireland, Rwanda, and the former Yugoslavia. In spite of the obvious ethnic or ethnoreligious cleavages in all of these places, none of the studies omits discussion of other identities, such as gender, class, and political affiliation. Jelin's chapter on memory projects consciously treats all of these identities together. Christiane Wilke looks mainly at political identity in her chapter on domestic prosecutions in Germany and Argentina – a reflection of the ongoing debate in the literature about whether the fact that identities are "ethnoreligious" makes them operate any differently than other identities in the public sphere.

Three themes emerged from this initial research. First, identities are complex constructs, meaning that conflict and modes of domination rarely operate solely through one type of identity. Even in conflicts where there is an explicit ethnoreligious cleavage, other identities, such as gender, come into play. Both men and women noncombatants may be targeted for abuse or murder because of their gender. Cécile Aptel's chapter on international prosecutions in Rwanda and the former Yugoslavia gives special attention to these issues. Women may be killed in a regime of genocide or ethnic cleansing in order to prevent them from bearing children that will reproduce their community – as happened in Rwanda. Or they may be

[7] Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985), 13.

systematically raped in order to induce individual and communal shame, as was the case in Bosnia and Herzegovina – a particularly effective tactic in societies where perceptions of women's sexual "purity" are highly important. Moreover, noncombatant men may be targeted for murder simply because, as men, they are perceived as potential fighters for their ethnoreligious group. The slaughter of men and boys at Srebrenica is just one example of this phenomenon.

In addition to gender, class and political affiliations can also intersect in complicated ways with ethnoreligious cleavages. Mary O'Rawe, in her chapter on security-system reform, describes how political and ethnoreligious identities are deeply interrelated in Northern Ireland. This point is illustrated through the usage of hybrid terms like "Catholic/Republican" and "Protestant/Loyalist" to describe people's affiliations. Jelin's chapter on memory projects weaves together class and ethnicity in its discussion of how the repression of workers in the north of Argentina is remembered. And, as mentioned, Wilke's chapter on domestic prosecutions foregrounds political identity in the Argentine and German cases, but also weaves in ethnonational, religious, and generational identities.

Second, the research demonstrates the key role of *crosscutting* identities – in effect, bridges across communities. In South Africa, as Fullard and Rousseau's chapter on truth telling relates, political identity allowed people to join forces across the state-enforced racial divide; many whites joined black South Africans in the struggle against apartheid and a commitment to a postracial future. They saw race as a construct used to divide them, and united instead through their political and moral commitments. In Northern Ireland, as O'Rawe's chapter argues, police reform perhaps misguidedly focused its attention on ethnoreligious identities, thus heightening tensions and creating difficulties to seeing the reform process through. Reform may have been better served if it had made gender the focal point for its new "equality framework" – since the need for greater gender sensitivity in policing was something that all sides of the conflict agreed on.

A final, related theme concerns victim identity – an issue that all of the chapters touch on in some way or other. Ethnoreligious identities in particular are often built on experiences of suffering and grievance at the hands of other groups. Collective victimization and collective guilt are common outcomes of conflict and systematic domination, making recognition of victimhood on the other "side" difficult, if not impossible. In both South Africa and Northern Ireland, some strides have been made toward affirming common suffering across ethnoreligious divides – that is, a victim identity that is not exclusively organized along ethnoreligious lines. Victim identities are thorny things, especially when they become entrenched across generations. At the same time, if they help humanize the suffering of those in another group, they can be valuable. No one illustrates this better than O'Rawe. She notes that reform of the largely Protestant police force was made more palatable to working-class Protestants once they saw parallels between the experience of Catholic/Republican

communities and their own experience of the police – they, like the others, had often been on the "rough end" of policing during the Troubles.

IDENTITY AND JUSTICE

Coming into the project, most of the authors, including myself, had deep questions about whether taking identity into consideration raises the stakes of the debate for transitional justice. Do these identities force us to reconsider the basic aims of transitional justice to recognize victims and prevent the recurrence of human rights violations? Beginning to answer this question entails an examination of the fact that transitional justice measures typically focus their efforts on the redress of a narrow band of individual human rights violations, for example, state-led murder, torture, disappearance, or rape.

Incidents of systematic identity-based violations might suggest grounds for reconsidering the narrowness of this focus. On the one hand, as was argued at the time of the South African Truth and Reconciliation Commission, this narrow band ignored many of the rights violations that were hallmarks of the apartheid system, such as forced displacement, expropriation, and violations engendered by the racist pass laws – indeed, violations that were likely to have been experienced by the majority of the population. It could thus be argued that transitional justice measures should be more responsive to the types of violations engendered by the inhuman systems they deal with, rather than limited by a set menu of rights violations to be addressed.

Moreover, the focus on a narrow band of human rights violations might be challenging in contexts in which these violations bear a direct relationship to complex histories of marginalization that may span centuries, which has, for example, been the plight of indigenous peoples in regions settled by Europeans. In these cases, remedying only recent individual human rights violations may not satisfy more ambitious claims for justice, in which social transformation – and a direct reckoning with the beneficiaries of injustice – may be the desired outcome. Here, some may wonder at the relevance of the standard set of transitional justice measures. They may argue that either new measures need to be added or that existing ones should be expanded. On the flip side, proponents of maintaining the focus on a narrow set of rights violations would counter that these rights are important in themselves and in relation to supporting other rights. They therefore deserve efforts dedicated to their protection. Moreover, transitional justice measures perhaps should not be burdened with outsized expectations for social transformation in the first place – and indeed might be more effective if they simply worked in coordination with other efforts to spur such transformation.

The big questions dealt with by this volume's authors seemed to break down into two categories. The first concerned the relationship between human rights abuse and long-term, everyday discrimination. The second concerned the relevance of

transitional justice itself to large-scale social transformation in the wake of discriminatory regimes.

Discrimination and Everyday Violence

Long-term histories of exclusion tend to be punctuated by periods of social unrest, low-level conflict, and outright war in which physical abuses intensify. Yet one of the factors in unrest and violence is the everyday violence that keeps groups in a state of subjection – whether through intentional or through neglectful policies – and that may lead to societies in which collectivities live in two (or more) different worlds. In the first, there is low infant mortality, high literacy, economic security, and more opportunities for people to live their lives in a manner of their choosing. In the second, endemic poverty may be responsible for needless deaths of children, famine, displacement, shortened life spans, and a condition in which people's freedom to make choices in their lives is severely curtailed – if it exists at all.

That is, severe discrimination can lead to everyday violence – a state of affairs in which, as Nancy Scheper-Hughes describes it in her research on Brazil and South Africa, crisis, trauma, and fear are normal rather than exceptional. "For those living in the affluent first world," Scheper-Hughes writes, "crisis is understood as a temporary abnormality linked to a particular event." Scheper-Hughes is concerned about the strategy of weighting justice interventions toward exceptional violence (e.g., state-led torture or disappearances), especially when the everyday violence resulting from social inequality may well remain completely unchanged in the wake of a political transition.[8]

These observations on everyday violence mirror the debate among gender scholars and practitioners about a continuum between ordinary (everyday) and extraordinary violence against women – and how transitional justice measures ought to take this continuum into account. Indeed, the gender field has well-developed arguments that are highly relevant to the question of how identity-based discrimination and inequality may matter for transitional justice.[9] Gender scholars and practitioners have pushed the transitional justice field to consider the ways in which transitional justice measures might take even modest steps in transforming social structures that undergird the violence done to women both in "ordinary" and "extraordinary" times. This involves, at a minimum, ensuring women's participation in debates and processes that hitherto might not have been available to them. It also involves asking a new set of questions of violence that tries to tie "extraordinary" violence committed

[8] Nancy Scheper-Hughes, "Dangerous and Endangered Youth: Social Structures and Determinants of Violence," *Annals of the New York Academy of Sciences* 1036 (Dec. 2004): 13–46.

[9] See, for example, Ruth Rubio-Marín, "Introduction" and "Gender and Collective Reparations in the Aftermath of Conflict and Political Repression," in Ruth Rubio-Marín, ed., *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge: Cambridge University Press, 2009).

on an identity basis to enabling social structures – for example, the legally or socially enforced exclusion of certain groups from access to important sectors of the economy (the public sector; the middleman or trading sector; or the natural resource sector). Also in this case, property ownership regimes are often a critical factor in enforcing everyday violence and giving rise to grievances that lead to outright conflict.

The Resilience of Social Structures

It may be, however, that transitional justice measures as they are currently understood can make only small contributions to the transformation of social structures that both shape and are shaped by identity-based discrimination. After all, prosecutions, official truth-telling efforts, reparations programs, and reform of an abusive state apparatus are more legal-institutional reforms than they are direct interventions in the sphere of social relationships. When they do have effects in the social sphere, these effects may be partly derivative of changes on the legal-institutional level. The exception here may be truth telling (which may include both truth commissions and prosecutions, since the latter may also perform an important truth-telling function), which if designed well could have important effects for helping to reshape public discourse and perceptions.[10] And yet because there has been so much focus recently on the capacity of official truth commissions to be a source for political reforms, the value of this discursive effect has been somewhat displaced by an emphasis on political efficacy. In short, the potential for transitional justice efforts to have effects on social structures that have developed over long periods of time may be negligible. It may thus be important not to burden such measures with expectations that they cannot possibly meet.

Even if this is the case, however, one could ask a different question: what kinds of social reforms should transitional justice measures coordinate with? And, when transitional justice measures have the opportunity to coordinate with them, what are the attractions and the hazards of these measures' support for certain kinds of social reforms?[11] Here, a strategy based on *coherence* may be useful[12] – that is, giving careful consideration to the way in which transitional justice measures may reinforce other means of ameliorating discriminatory regimes and their legacies, including preferential policies, land reform, redistributive schemes, and changes in constitutional and electoral systems.

[10] James Gibson, "The Contributions of Truth to Reconciliation: Lessons from South Africa," *Journal of Conflict Resolution* 50, no. 3 (2006): 409–32.

[11] See, for example, Rolando Ames Cobián and Félix Reátegui, "Toward Systemic Social Transformation: Truth Commissions and Development," in Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

[12] See Pablo de Greiff, "Justice and Reparations," in Pablo de Greiff, ed., *The Handbook of Reparations* (New York: Oxford University Press, 2006), for an elaboration of the notions of internal and external coherence in transitional justice programming.

Still, we are only in the very beginning stages of understanding the ways in which transitional justice may intersect with these wider processes.[13] We need more scholarly research as well as more reflection from practitioners, including evaluations of their work.

Some Starting Points: Citizenship, Empowerment, and Analysis

In the absence of a large body of research, the authors of the second set of studies offer a starting point for thinking through these tough questions. One theme that ties several of the chapters together is that of citizenship.[14] If, as Chris Chapman argues in his chapter, transitional justice measures were to base their design and implementation on principles of minority and indigenous peoples' rights set out in international law, then they could reinforce other transformative processes that may be taking place. Will Kymlicka, in his chapter on multination federations, argues that transitional justice efforts should contribute to new forms of multicultural "citizenization" – a model in which ethnic politics would be accepted as a normal part of an open, democratic polity. He recommends that they act as sites of social learning among groups who may have had little opportunity to engage with each other constructively, and on an official level, in the past. The idea of transforming citizenship is relevant also in established democracies. Courtney Jung uses the recent efforts to hold a truth commission in Canada as a means of highlighting the complex issues around citizenship claims among indigenous peoples, who may both desire recognition of past denial of equal citizenship status and also want to advance claims for sovereignty and equal respect for their systems of laws. Elizabeth A. Cole and Karen Murphy, in a chapter about education, place great stress on the citizenship-building function of history education in particular.

It should be added that many of the case studies also highlight citizenship issues. Rubio, Guillerot, and Paz's study revolves around the question of how reparations programs can be designed to offer recognition of the cultural aspect of citizenship rights. Fullard and Rousseau's chapter argues that truth telling can provide space for members of marginalized groups to perform publicly as citizens – perhaps for the first time in their lives.

Another important theme concerns empowerment – a fraught and overused term, but one that signals the capacity to affect decisions that impact on one's own life and, in this case, the life of one's community. Formal rights mean little in so many places, where everyday discrimination and violence is the norm. Although transitional justice may have little direct effect on transforming these conditions, it can certainly

[13] Some of these connections are explored in de Greiff and Duthie, eds., *Transitional Justice and Development*.

[14] For a theoretical treatment of the role of citizenship in transitional justice, see Pablo de Greiff, "Articulating the Links Between Transitional Justice and Development: Justice and Social Integration," in de Greiff and Duthie, eds., *Transitional Justice and Development*.

contribute to empowering people to initiate transformation themselves over the long term. It can do so, as both Chapman and Jung argue, through recognizing minority and indigenous actors as legitimate. Jung goes so far as to suggest that in settler countries, a "nation-to-nation" framework might be applied to negotiations over transitional justice, such that indigenous actors would be accorded, along with the state, equal status as sovereign. Cole and Murphy suggest that young adults can be empowered through critical history education – but only if the system in which they are educated models fairness and nondiscrimination in its teachers, classrooms, and administration.

Lest it be thought that all the outcomes of the project have been positive, it should be noted that many authors, myself included, recognize that transitional justice can raise tensions between groups – that there is nothing immediately "reconciliatory" about it. Thus, one final theme that emerged was the need for a specific kind of analysis for contexts in which a strong identity dimension is present. In my chapter on ethnic conflict, I argue that transitional justice measures can contribute to preventing ethnic conflict only if they actually address the key factors of ethnic conflict in operation. I suggest that much more contextual analysis is needed – of nationalist myths, of the role of elites, and of fault lines of mistrust, among other things – than is typically undertaken by transitional justice actors.

CHALLENGING THE BOUNDARIES OF TRANSITIONAL JUSTICE?

The authors in this volume ultimately converge around the idea that transitional justice, in its current form, could contribute only in small ways to a broader social transformation in the wake of identity-based exclusion and violence. One of the open-ended questions that the book leaves us with is whether the boundaries of transitional justice may be challenged in the coming years to include new ways of responding to massive and systematic abuse.

In many countries, one of the key issues on which this question has hinged is that of land: what to do about the phenomena of expropriation, displacement, and – more generally – property regimes.[15] There may be ways in which transitional justice measures, on their own, can provide redress for these phenomena, as I note in my chapter on ethnic conflict. Yet these issues would seem to require remedies that go well beyond what transitional justice currently can give. In this case, it is no longer an issue of specific harms done to individuals but rather a historical pattern of exclusion that has severely curtailed the life chances of people in the present, based largely on their identity affiliation. Without shading into questions of "historical justice" and how to remedy intergenerational harms, the challenge here is developing methods

[15] A recent treatment of this issue is Chris Huggins, "Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development," in de Greiff and Duthie, eds., *Transitional Justice and Development*.

of sensitizing transitional justice efforts to the pernicious – and very contemporary and real – effects of these patterns, as well as asking what stances transitional justice efforts should take with respect to remedying them.

Returning to the example of the KRG, many of these questions continue to be live political issues. What remedies might be available for Saddam's Arabization campaigns, and, specifically, what is there to be done about the forced displacement and stolen land that had harmed so many Kurds? These are unresolved issues for transitional justice – not just with respect to land, but also with respect to other instances of structural violence. Whether or not the boundaries of transitional justice are expanded to deal with some of these issues may ultimately depend on several factors. One is whether or not those in the field of transitional justice decide to advocate for an expansion and can find meaningful arguments (and programs) to support it. Another is whether justice claims being made on the ground start to shift transitional justice practice. A final important factor will be the structure of the international framework through which peacebuilding efforts are conceived, run, and funded. If powerful donor countries give structural change an important role in their respective agendas, then this might give the field of transitional justice added impetus to transform its boundaries.

If such pressure for expanding the boundaries does come to pass, an equally important consideration will be whether or not such expansion would be costly to transitional justice by minimizing its positive focus on an important set of human rights and burdening it with outsized expectations it could not possibly fulfill. This is a danger the authors in this volume so far have cautioned against. At the same time, they still hope that transitional justice can contribute meaningfully to addressing the systematized discrimination that has led to the suffering of so many.

PART I

Identity in Transitional Justice Measures

1

Indigenous Peoples and Claims for Reparation: Tentative Steps in Peru and Guatemala

Ruth Rubio-Marín, Claudia Paz y Paz Bailey, and Julie Guillerot

Reparations for victims of gross human rights violations are an increasingly common feature in postauthoritarian and postconflict societies dealing with the legacy of a violent past. This trend is confirmed by the recommendations of several truth commissions and by the jurisprudence of both national and international human rights bodies, including the European and the Inter-American Courts of Human Rights. National governments, such as those of Argentina, Chile, Brazil, and South Africa, among others, have adopted reparations initiatives as one among several transitional justice measures.[1] This addition to prosecutions and to truth commissions as the basic transitional justice "tools" has been endorsed by the UN in, among other documents, its *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which was adopted by its General Assembly in 2005.[2] The conviction represented in this trend is that doing justice in transitional scenarios requires not only doing something against the perpetrators but also doing something specifically for victims.

There are competing visions about what the ultimate goal of reparations should be. In this chapter we will assume that, in situations of large-scale violence and repression like the ones we will describe, reparations are best conceptualized as rights-based political projects aimed at giving victims due recognition and enhancing civic trust

[1] See, e.g., the case studies in Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006).

[2] A/RES/60/147, March 21, 2006 [*Basic Principles*, hereafter]. See also the Secretary General's 2004 report, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (S/2004/616), *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (E/CN.4/2005/102/Add.1, February 8, 2005), and Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity* (E/CN.4/2004/88, February 27, 2004); *Report of the Independent Expert to Update the Set of Principles to Combat Impunity* (E/CN.4/2005/102, February 18, 2005).

both among citizens and between citizens and state institutions.[3] Compensating victims in strict proportion to harm or reverting them to their state prior to the violation are goals that can hardly be suitable to the reality of a large universe of victims resulting from widespread and systematic use of violence. This is only one reason why, instead of judicially decided case-by-case reparations, most of the countries that are currently embracing transitional justice measures address reparations through large-scale out-of-court programs. Peru and Guatemala are, for the most part, not an exception.

It is our understanding that these reparations programs can serve a dual function.[4] Looking backward, they are intended to repair a past wrong. Reparations programs are typically structured around "victims," defined as people whose basic rights were severely infringed in a certain predetermined period of the past. As a general inspirational aim, reparations programs assist victims in coping with the effects of the harm they have endured as a result. But they also have a forward-looking goal of helping to rebuild society by affirming the status of victims as *equal citizens* in a new order that aspires to be not only more peaceful but also more legitimate, more democratic, more inclusive. The promise of equal citizenship may entail recognizing victims' previously affirmed rights that the state failed to guarantee during the authoritarian regime or violent period, but it may also involve recognizing victims' rights that were never affirmed before.

With this and the overall purpose of this project in mind, the aim of this chapter is to explore, in the light of two case studies, some of the goals, expectations, and limitations of reparations as means of redressing identity-based injustice and setting the terms for a more just political order. By identity-based injustice we mean to encompass the systematic curtailment of rights and opportunities of societal groups that either self-identify or are ascriptively defined around specific cultural or ethnic markers. In particular we will focus on indigenous peoples, not the least because, in many of the conflicts worldwide, including Peru and Guatemala, they are either specifically targeted or in any event experience the effects of violence with particular harshness. The aim then is to provide policymakers with guidance for addressing the distinctive challenges of identity conflicts when conceptualizing and designing reparations programs in the aftermath of state repression or violent conflict.

Inevitably, such guidance will have to take the features of particular situations into consideration. Just as importantly, it will be shaped by the ultimate normative conception underlying reparations. In our case, since we have signaled that the goal of reparations should be to give victims due recognition as citizens, the question becomes what this requires when we are talking about people who, as is often the case with indigenous peoples, have traditionally been denied equal citizenship status and at the same time have experienced economic marginalization and cultural and

[3] See Pablo de Greiff, "Justice and Reparations," in de Greiff, *The Handbook of Reparations*.

[4] See Ruth Rubio-Marín, "Gender and Collective Reparations in the Aftermath of Conflict and Political Repression," in Will Kymlicka and Bashir Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008).

political assimilation stemming from prejudice and racism as well as from a deep-rooted resistance to come to terms with a notion of citizenship able to accommodate different forms of belonging in a shared state.

We will argue here that what is essentially required is that both the process and content of reparations policies be able to convey symbolic meanings and provide measures of redress that affirm both the commonality of members of indigenous groups as citizens and holders of basic human rights, but also their condition as members of sub-state groups with distinct cultures and communal forms of life. Reparations, in other words, should help victims feel that they are being recognized as equal citizens not simply in an abstract sense, but *also* because the collectivities to which they belong are treated with equal respect – instead of oppressed, systematically marginalized, or structurally subordinated. People killed, maimed, tortured, or raped because of their religious identity, race, ethnicity, culture, and so on are being denied the status of equal citizens not only because their inalienable right to life and physical and moral integrity are infringed, but also because they are being persecuted, oppressed, and discriminated against on the grounds of their race, ethnicity, religion, or culture. And this is the complex reality that the process and content of a reparations policy should try to reflect.

This perspective poses a series of interesting challenges for reparations discussions. For one thing, those societies where violence targets specific groups are often precisely those where systemic inequality and oppression is the rule even before the conflict starts. This is in fact often the case with indigenous peoples, who are often denied not only equal social, civil, or political rights, but also those group-specific rights that would be necessary for them to preserve their distinct modes of living within the larger state (land rights, self-government rights, language rights, etc.). This is why when reparations are thought of as part of a political project about (re)constituting a new, more legitimate, democratic and inclusive political order – one able to further horizontal and vertical civic trust – we cannot think of reparations only as a task about reverting to the old order of things but must also think of reparations as windows of opportunity to trigger processes and endorse measures that might also help, however minimally, unsettle preexisting racial or ethnic hierarchies at the root of the subordination of indigenous peoples (i.e., reparations that we could call transformative).[5]

In the pages to come we will first present a framework for understanding how reparations programs could respond to the specific needs of indigenous peoples. We will then discuss the case studies of Peru and Guatemala, following a common structure that will provide the reader with the relevant context, an explanation of the political process leading up to the formulation of a reparations program, and

[5] The concept of transformative reparations is explored in Ruth Rubio-Marín, "Gender and Reparations in Transitional Societies," in her *The Gender of Reparations* (New York: Cambridge University Press, 2009).

finally an in-depth discussion of the reparations programs adopted by each of these countries. We will then provide an assessment of both cases that looks at these countries' reparations processes and programs to answer two main questions. First, to what degree have indigenous movements engaged with and shaped the process leading up to and the design and implementation of reparations? What factors acted as facilitators or inhibitors of this engagement and what difference did such involvement make? Second, what can these two cases teach us about the potential and the limitations of a reparations framework for redressing identity-based historical injustice and advancing, however minimally, the agenda of indigenous people for a more inclusive and egalitarian democratic order? We will then conclude with some final and general considerations on the topic of reparations and indigenous peoples more broadly speaking.

A FRAMEWORK FOR ASSESSING REPARATIONS INCORPORATING THE SPECIFIC NEEDS OF INDIGENOUS PEOPLES

Before we present our case studies, let us present a few introductory ideas on how the aim of rendering reparations programs sensitive to the particular needs of indigenous peoples could be achieved, at least in theory, and both in terms of the process and the content of a reparations program. Starting with the *process*, there is a growing awareness that, in order to be legitimate, reparations policies must be developed with the participation of victims, victims' groups, and other relevant actors in civil society.[6] The underlying notion is that when victims are adequately involved in the process, not only can such involvement provide information that is needed for the proper design of programs, but participation can, in itself, have a reparative effect by affirming the victims' status as participatory citizens and the state's willingness to engage with them as valid interlocutors.[7] This may be particularly compelling when we are talking about sectors of the population coming out of a past of systematic marginalization as opposed to only one of episodic oppression.

Now, clearly, the extent to which indigenous groups will be able to act as valid interlocutors in reparations discussions will depend on a wide variety of factors. One is the extent to which there is a (national or international) politically active indigenist movement at the time reparations are discussed. Another is the extent to which there is a more or less generalized awareness about the extent to which members of indigenous communities or the entire communities themselves have been specifically targeted or have suffered in particular ways from the violent or repressive

[6] See, for instance, Cristián Correa, Julie Guillerot, and Lisa Magarrell, "Reparations and Victim Participation: A Look at the Truth Commission Experience," in C. Ferstman, M. Goetz, and A. Stephens, eds., *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 2008).

[7] See Ruth Rubio-Marín and Pablo de Greiff, "Women and Reparations," *International Journal of Transitional Justice* 1, no. 3 (December 2007): 318–37.

episode. Also important is the dissemination and outreach policy endorsed by the agency in charge of reparations to overcome, among other, linguistic, geographical, literacy, and documentation obstacles that people belonging to indigenous peoples may have in accessing reparations delivered by the state.

In terms of the *content* of reparations programs, we should start by saying that massive, out-of-court reparations programs can be thought of as more or less explicitly structured around a set of common elements including 1) a definition of "victims" or the selection of a list of violations or crimes for which there will be reparations, 2) a definition of beneficiaries, and 3) a definition of benefits. A basic distinction among the benefits distributed by reparations programs is that between material and symbolic benefits of either an individual or a collective nature. Material reparations can take different forms, including compensation, restitution of material goods, or access to services such as education, health, and other rehabilitative measures. Symbolic reparations may include official apologies, the changing of names of public spaces, and the establishment of dates and places of commemoration.

Since we have adopted a conception of reparations according to which one of the main goals of reparations is to provide members of indigenous groups and the groups themselves adequate recognition as citizens and in their indigenous condition, one obvious demand when crafting reparations programs is not to leave out the forms of violence and harms experienced by indigenous peoples. This may require reflecting the identity-based, cultural, and collective dimension of violence. There are various ways this can be achieved. One of them has to do with how the notion of victim is defined and which violations are included in the reparations program. Alternatively, one can explore the possibility of rendering entire communities beneficiaries and of including reparations benefits that address the cultural harms as well as harms to community life in addition to personal harms. Indeed, what benefits are distributed and to whom is crucial. Defining the concrete remedies inevitably requires an assessment and prioritization of harms. Such a process can be riddled with cultural and other types of prejudice and bias, but it can also express a transformative agenda.

Most reparations efforts in the past have concentrated on violations of a fairly limited and traditionally conceived catalogue of civil and political rights, including illegal detention, torture, summary execution, and disappearances. Clearly, the selection of violations for which a given program will provide reparations depends on the type of conflict or regime from which a transition is taking place. However, this selection also rests on moral and political judgments about the relative gravity and political relevance of the different violations, especially in situations where the violence expressed itself in multifaceted ways and the country faces the dilemma of scarce resources and equally pressing needs of reconstruction and development.

In theory a reparations program could aim for "comprehensiveness,"[8] that is, for providing benefits for as many types of violations as occurred during conflict,

[8] See Pablo de Greiff, "Introduction," in de Greiff, *The Handbook of Reparations*.

including those of cultural and collective rights. But, obviously, a price is always paid for such an effort; under conditions of scarcity, the more extensive the list of rights whose violation triggers reparations, the more the benefits are diluted. On the other hand, however, a reparations project inspired by a desire to give victims due recognition as *equal citizens* cannot systematically disregard the fact that different groups among the population might have a different experience of the violence, including what for them counts as the most grave violations. So maybe the solution lies in coming up with expanding the violations to some extent but at the same time creatively combining different types of benefits – material and symbolic, individual and collective – to avoid giving rise to comparative grievances among victims. If this is so, we can anticipate that a reparations program that is more complex (that is, one that delivers a diversified type of benefits) might be better suited than one that is less so.

With this framework of analysis in mind, the case studies chosen for exploring this topic are Guatemala and Peru. Both share interesting commonalities but also have telling differences. Both countries are ethnically heterogeneous and have recently emerged from decades of violent conflict during which the indigenous population was either specifically targeted or affected severely as a result of its preexisting condition of cultural, political, and economic marginalization. Both countries have included reparations as an element in their transitional agendas. They have drafted reparations programs, which have just recently begun implementation.

These reparations initiatives took root in a context in which the global movement for rights of indigenous peoples has gained significant visibility. Thus, one question is how local actors have leveraged this visibility in the face of powerful political obstacles. Even after peace was achieved, both countries remained largely run by a nonindigenous economic oligarchy, and neither has seen much in terms of structural reforms to help the indigenous population overcome the discrimination and subordination it has experienced since the time of the Spanish conquest. With respect to the role of identity-based political claims in addressing this long-term legacy, the countries part ways. Ethnicity is a much stronger identity marker in Guatemala than it is in Peru, where the most salient identity markers remain based in class and geography (urban versus peasants). Related to this, the indigenous movement in Guatemala is older and clearer in its demands concerning identity than it is in Peru, where it is still emerging and fragile. This difference helps explain both varying levels of indigenous groups' involvement in the political process leading up to reparations and, to some extent also, the different levels of engagement of the resulting reparations programs in Peru and Guatemala with identity-based grievances.

PERU

Peru is a country of around twenty-eight million people, out which thirteen million live in Lima and along the coast. Inland, in the mountainous and forested areas

of the country, live groups of people who trace their ancestry to pre-Columbian times. Roughly 25 percent of this population lives in the Andean region, and it is comprised largely of Quechua- and Aymara-speaking groups who identify themselves as *campesinos* or peasants. Another 1 percent of the population lives in the Amazonian forests. The terms "native" and "indigenous" in Peru are commonly reserved for Amazonian communities. These communities, who were much less affected by the Incan and Hispanic conquests than Quechua- and Aymara-speaking Andean peoples were, have been shielded from modernization and rural-urban mobility and have better preserved their traditions.

Thus, understanding indigenous identifications in Peru must begin by acknowledging that drawing a bright line between indigenous and nonindigenous is a precarious task. This complicates any attempt to ascribe an overarching common identity or set of common political claims to these groups. Only recently have the two – "native" and "peasant" communities – begun to mobilize under a common banner. Because both the Andean and the Amazonian communities have traditionally experienced manifold forms of economic, cultural, and political subordination, these forms of injustice will be the focus of our chapter. Nonetheless, we will respect the terms they have traditionally used to identify themselves and refer to those living in the Andes as "peasants" and to those of the Amazonian communities as "natives."

Poverty and illiteracy rates are much higher among the Andean and Amazonian communities than they are in Lima and the coast.[9] The roots of this socioeconomic disparity date back to the times of the Spanish colonization, when the native and Andean population were the object of legal, political, and economic subordination as well as of cultural and religious assimilation. After independence in 1821, this system was simply perpetuated by the Creole elite, which consolidated a feudal-like system of land ownership based on large estates controlled by an oligarchy.[10]

Throughout the twentieth century, struggles over rights to land as well as political and administrative autonomy played a role in Peruvian politics, even sparking an incipient indigenist movement in the first half of the century – one that was led for the most part by nonindigenous persons, mostly urban intellectuals and artists from Lima and other important cities. However, none of the constitutional reforms entailed any meaningful social or political transformation. A peasant and agrarian worker uprising in the early 1960s – inspired by Trotskist and Guevarist movements – led to probably the greatest attempt of agrarian reform in Latin America by the revolutionary military government of General Juan Velasco from 1969 to 1974. Together with the agrarian reform, the Velasco government tried to push an agenda that included educational reforms to fight illiteracy, nationalization of enterprises, and the legal recognition of the Amazonian people, whose land had thus far been considered *terra nullius* and hence property of the state. The failure of his state-centered approach in meeting the

[9] Instituto Nacional de Estadística e Informática, IX Censo Nacional de Población, Lima, Peru, 1993; available at iinei.inei.gob.pe/iinei/RedatamCpv1993.asp?ori=C.

[10] See José María Caballero, *Economía agraria de la sierra peruana. Antes de la reforma agraria de 1969.* (Lima, Perú: Instituto de Estudios Peruanos, 1981), 239–241.

land demands of the peasants and indigenous communities, as well as in developing an economic system to overcome rural poverty, and the subsequent denouement of his regime, led to a serious social and economic crisis. By the early 1980s, amid a more general democratization process, indigenous movements and organizations started to mobilize in the Amazonian region, propelled, among other things, by frustration with land reform, threats posed by investment projects on their land, and the taking up of the indigenous cause by international institutions such as the UN and international cooperation agencies. Indeed the first indigenous peoples organizations in Peru were formed during the 1980s.[11]

Both the democratization process and the emergence of an indigenous movement were interrupted, however, by the decision of the rebel group Shining Path [*Sendero Luminoso*] (SL) to start its armed fight, leading to the most bloody period of the Peruvian republic in a struggle that lasted two decades (1980–2000). The conflict involved the state security forces in combating the SL and another subversive group, Revolutionary Movement Túpac Amaru [*Movimiento Revolucionario Túpac Amaru*] (MRTA), leaving behind between 61,000 and 77,552 dead or disappeared, according to the Final Report of the Peruvian Truth and Reconciliation Commission [Comisión de la Verdad y Reconciliación] (CVR).[12]

In Peru none of the main actors in the conflict assumed motivations, ideologies, or claims of a predominantly ethnic nature. This led the CVR to assert that the internal armed conflict could not be characterized as an ethnic or racial conflict.[13] The main armed actor in the conflict, the SL, based its ideology on a Marxist-Leninist-Maoist tradition that saw the revolution as a class struggle to achieve the worldwide dictatorship of the proletariat. This ideology had little interest in the cultural distinctiveness of native communities, which, if anything, it saw as a burden for the creation of the new state.[14] In spite of this fact, the fight for the destruction of the "old State" by SL, a movement led and composed mostly by small intellectual groups and young provincial *mestizos* with higher education, entailed serious harms for the rural communities, which became the main stage for the struggle. In the Andes, local and traditional authorities were annihilated and traditional festivities and ceremonies as well as funerary rituals completely disrupted. Even more severe was the impact on the communities in the area of the Amazonian forest, where SL

[11] The 1980s saw the birth of the first two national organizations for the rights of indigenous peoples in the Amazonian region: the Interethnic Association for the Development of the Peruvian Forest (*Asociación Interétnica para el Desarrollo de la Selva Peruana*) formed in 1980, and the Confederation of Nationalities of the Indigenous Peoples (*Confederación de Nacionalidades de los Pueblos Indígenas*) formed in 1987.

[12] Comisión de la Verdad y Reconciliación, ed., *Informe Final de la Comisión de la Verdad y Reconciliación*, 1st ed. (Lima, Perú: Comisión de la Verdad y Reconciliación, 2003), henceforth referred to as IFCVR.

[13] IFCVR, Vol. VIII, 119.

[14] See Revista Sol Rojo, Documentos Fundamentales, Comité Central, Partido Comunista del Perú (1988); available at www.solrojo.org/pcp_doc/pcp_gd88.htm.

repeated patterns consisting of armed incursions, proselytization of local leaders, replacement of local authorities and local structures of government, indoctrination of the children, recruitment of the population, killing of local dissident leaders, forced displacement, and enslavement of the population inside and outside the communities.

In fact, the CVR admitted an exception to its general conclusion that the Peruvian armed conflict should not be characterized as an ethnic conflict. The CVR considered that in the case of the Amazonian Asháninka people, there was sufficient testimony to assert that the project of SL included the cultural or even physical disappearance of part of this people, pointing to the possibility that SL was responsible for a crime of genocide against the Asháninka people.[15]

It is estimated that 54 percent of those killed in the conflict were victims of SL, toward which the people of the peasant Andean communities and of the Amazon displayed at different times and in different localities a variety of dispositions ranging from an initial strong collaboration, then neutrality, and in the end strong opposition. The rest of the actors in the conflict, including the military and police forces, the MRTA and Self-Defense Committees – none of which explicitly held an ethnicity-based ideology – also displayed in their attitude an undercurrent of ethnic, racial, and regional discrimination, adding symbolic to physical violence. The security forces used the term *indio* as an insult, and ethnicity was used as a proxy to identify the enemy especially during the first years of the conflict. Interestingly, the use of phenotypic features – tall, blond, light-colored eyes, white – was also common to identify the other side too.

In any case, a high number of the abuses and crimes were perpetrated in the rural communities, and all the actors of the conflict contributed to the terror, as a result of which there was massive displacement of the civilian population. The special ties of these communities to their land account for the serious ways in which their lifestyle was compromised and for the traumatic nature of the relocation process of the displaced population, a process that all too often went hand in hand with sheer marginalization, unemployment, prejudice, ethnic and cultural discrimination, loss of identity, and extreme poverty. Moreover the CVR drew the links between social poverty and exclusion and victimization, links that, together with racism and discrimination, help us understand both why the urban class remained rather indifferent, if not surreptitiously gratified, by the atrocities experienced by the poor and illiterate communities in the Andes and in the Amazon region and why, even when they came to be known, they felt little urge to spread the truth or back remedial actions.[16]

[15] According to SL, this people had to leave behind its self-perception as indigenous people to fully assume their identity of poor peasants and be part of the class struggle. See IFCVR, Vol. VI, 723, 728.

[16] See Jorge Bruce, "La CVR, la discriminación, el racismo y la exclusión social; una perspectiva psicoanalítica," *Revista Reacciona*, special issue "Discriminación, racismo y exclusión social" (Lima: *Coordinadora Nacional de Derechos Humanos*, May 2004), 19.

The leaders of SL and MRTA were captured in 1992, effectively decapitating their movements. In spite of this apparent success, President Alberto Fujimori continued to evoke a fear of armed attacks as an excuse to create an increasingly dictatorial and abusive regime. It was not until 2000 that the Fujimori regime fell, opening the way to the reemergence of democracy. Between November of 2000 and July of 2001, the Valentín Paniagua government took office, officially presenting itself as a government of transition. In June of 2001 the Peruvian Truth and Reconciliation Commission was born.

As part of the democratization agenda, the Paniagua government was also confronted with claims for the articulation of a multicultural citizenship proposed for the most part by the new organizations of an incipient yet internally divided indigenous peoples' movement.[17]

These claims were formulated parallel to, and without any connection with, the claims for justice, truth, and reparation advanced mostly by human rights and victims organizations (covered under the umbrella of the *Coordinadora Nacional de Derechos Humanos*, the National Human Rights Committee). Instead, the claims that were related to indigenous peoples' access to land, control over natural resources, education, health, and alternative development were the battlefield of development- and environment-focused organizations. To illustrate the point, the *Qosqo Declaration*, adopted at the end of the First National Congress of Human Rights and Indigenous Peoples in Peru in 1997, does not make any reference to the conflict.[18]

[17] Worth mentioning among the new national indigenous organizations are the Permanent Conference of Indigenous Peoples in Peru (*Conferencia Permanente de los Pueblos Indígenas del Perú*, COPPIP-Conferencia), formed in 1998; the Permanent Committee of the Indigenous Peoples of Peru (*Coordinadora Permanente de los Pueblos Indígenas del Perú*, COPPIP-Coordinadora), formed in 2002 by dissident members of the Permanent Conference after the legitimacy and transparency of the latter came into question; and the National Committee of Communities Affected by Mining (*Coordinadora Nacional de Comunidades Afectadas por la Minería*, CONACAMI), formed in 1999. Several factors accounted for the delay of the formation of an organized indigenous movement articulating identity- and ethnicity-based claims, especially as compared to other countries in the region. For one thing, in Peru the penetration of the state through standard nationalization mechanisms (such as national education, military service, the expansion of the market, mass communications, etc.) had taken place much sooner than in other neighboring countries. Mass migration to urban areas had also diluted traditional practices and identities. Moreover, the internal armed conflict turned people in the Andean and Amazonian communities into direct and indirect actors of the conflict, both as victims and perpetrators. Equally important is the persistence of racial discrimination in Peru, an almost racially segregated country with an obsession with whiteness that renders the possibility of the expression of an "*indio* pride" extremely unlikely. Finally, we must take into account the legacy of a radical leftist discourse that, from the beginning of the twentieth century, has articulated all inequality problems in terms of class confrontation, fitting better with the self-perception of Andean population as peasants and not as *indios*.

[18] "Declaración del Qosqo," final declaration of the First National Congress on Human Rights and Indigenous Peoples of Peru, Cusco, December 2–5, 1997. Only recently has the impact of the internal armed conflict been taken up by indigenous peoples' organizations.

Only since the mid-2000s – after the work of the CVR – has the impact of the internal armed conflict been taken up by indigenous peoples' organizations.[19]

The Organization of the Reparations Plan in Peru

Among the CVR's competences was that of preparing proposals for repairing and dignifying victims and their relatives.[20] The body was initially composed of seven commissioners with a clear underrepresentation of women, non-Spanish speakers, and people from the provinces – something for which it was criticized by the very same sectors who had fought for its establishment. The number of commissioners was subsequently elevated to twelve, but the predominantly urban origin of its members was left unchanged. In spite of this fact, throughout its two-year lifetime, the CVR made an explicit effort to be accessible to the entire population, ensuring that people could approach it in their mother tongue. Although all of the commissioners were intellectuals from Lima and the provinces or members of the clergy, some of them understood Quechua. One of its first decisions was to set up regional offices with mobile teams in charge of testimony taking, investigating and documenting cases, and disseminating information to educate the population. These teams were made up of people with the required linguistic skills.

Throughout its two years of life, the commission's reparations proposals were increasingly shaped through a participatory process that ensured a dialogue with civil society.[21] However, it is important to state from the outset that this participatory process – as the process of the CVR as a whole – involved first human rights NGOs, and then also victims' organizations, but did not include for the most part organizations concerned with the rights of the Andean peasants or the rights of indigenous peoples. Nor did they include the recently created and still internally divided indigenous platforms or environment and development-related organizations.[22] Those taking part in the dialogue with the CVR were largely organizations that had taken

[19] Thus, in the First Summit of the Indigenous Peoples in Peru, organized by COPPIP-Coordinadora in December 2004, the final document (*Declaración de Huancavelica: Refundación nacional con la sabiduría, ética y derechos colectivos de los pueblos indígenas y comunidades*) refers in its tenth point to the need for the government to implement the recommendations of the CVR. It is noteworthy that the rest of the indigenous peoples' organizations questioned the legitimacy of the event – some of them referring to it as a usurpation of the national indigenous space.

[20] Supreme Decree No. 065–2001-PCM, June 4, 2001, Art. 2c.

[21] See Julie Guillerot and Lisa Magarrell, *Memorias de un proceso inacabado. Reparaciones en la transición peruana* (Lima, Peru: APRODEH-ICTJ-OXFAM, 2006), 93–118.

[22] Out of the thirty institutional cooperation agreements signed by the CVR nationwide, only two were signed with NGOs devoted to defending the rights of indigenous peoples (in this case, representatives of the Amazonian peoples). The two NGOs devoted to defending the rights of indigenous peoples to have signed agreements with the CVR were the Amazonian Center of Anthropology and Practical Application (*Centro Amazónico de Antropología y Aplicación Práctica*) and the Center for Amazonian Research and Promotion (*Centro de Investigación y Promoción Amazónica*). See www.cverdad.org.pe/lacomision/cnormas/index.php.

on the fight for truth and justice since the beginning of the armed conflict, and they included organizations of families of the disappeared, of displaced populations, and of pardoned people, among others. As mentioned, by contrast, the demands of indigenous organizations have focused mostly on development, the defense of their lands and natural resources, and the protection of the environment from the negative impact of extractive industries.

Two years after its creation, the CVR submitted its Final Report, which included a Comprehensive Reparations Plan [*Plan Integral de Reparaciones*]. The plan combined a set of symbolic and material, individual, and collective reparations measures.

In February 2004, the Toledo government responded to the report's recommendations. It formed the High-Level Multisectorial Commission in Charge of the State's Actions and Policies Related to Peace, Collective Reparation, and National Reconciliation [*Comisión Multisectorial de Alto Nivel encargada de las Acciones y Políticas del Estado en los Ámbitos de la Paz, la Reparación Colectiva y la Reconciliación Nacional*] (CMAN).

The CMAN developed the first of Peru's reparations policies, called the Comprehensive Reparations Plan – 2005–2006 Multiyear Program [*Plan Integral de Reparaciones – Programación multianual 2005–2006*]. The plan was approved by the executive in 2005, and it consisted only of helping some of the most affected rural areas through general development policies, without distinguishing between individual victims, nonvictims, and perpetrators. After an initial implementation this policy was abandoned with the change of government. We will therefore not discuss it in the rest of the chapter.

The second reparations policy emerged in 2005 as a result of parallel initiatives taking place in the legislature. It is common for the legislative and executive branches to work separately in Peru. Because civil society had reacted with ambivalence to the approach of the Multiyear Program, which it saw conflating reparations and social development, it welcomed the promulgation of the legislature's Comprehensive Reparations Plan Law [*Ley que crea el Plan Integral de Reparaciones*] in July 2005. This law was almost entirely inspired by the CVR recommendations.[23] It provides, for the first time, a definition of victims and beneficiaries for the purposes of the plan and orders the creation of a Reparations Council in charge of preparing a Unified Registry of Victims – something that is needed to identify the beneficiary victims and communities. The CMAN continues to operate as the implementing body of the new reparations policy subsequently established by the legislature. For now, the government has focused on implementing only one of the six programs covered by the Comprehensive Reparations Plan Law, namely, the Program of Collective Reparations.

[23] Law 28592, July 28, 2005.

Definition and Delimitation: Victims, Beneficiaries, and Benefits in Peruvian Reparations

Because of the different stages of the Peruvian reparations process, we must refer here to two main sources: the Comprehensive Reparations Plan of the CVR (hereafter PIR-CVR); and the subsequent Comprehensive Reparations Plan Law (hereafter PIR-Law), approved in July of 2005, which has been developed by an executive decree,[24] and whose program of collective reparations is currently being implemented.

The PIR-Law itself is only a framework and therefore does not give details concerning exactly what the reparations should be and how they should be carried out. Thus, implementers are required by the law to refer to the "conclusions and recommendations of the Report of the Truth and Reconciliation Commission" – that is, the PIR-CVR.[25] It is for this reason that the greatest attention will be given to the analysis of the PIR-CVR. Not only does it constitute the closest attempt to define a comprehensive, conceptually sophisticated and participatory reparations initiative, but it has also overwhelmingly inspired the concepts and vocabulary of the PIR-Law and the executive decree that regulates it.

As a preliminary, it is worth underscoring that the PIR-CVR recommended applying five cross-cutting axes to all of its programs, including one making reference to the need for an "intercultural approach." This approach, which is picked up by the executive decree that regulates and develops the PIR-Law, consists in acknowledging the ethnic and cultural differences of the Peruvian population, showing respect for such differences, and setting the basis for egalitarian relationships. More concretely, this intercultural approach suggested that reparations be interpreted in the light of different worldviews, enabling victims to articulate the way in which they experienced violence and creating a space for different people to exercise citizenship in their own terms and according to their own value system.[26] Special attention will be paid below to the way this intercultural approach was integrated into the various reparations proposals.

Victims and beneficiaries

The decree that created the CVR had asked the Commission to focus its work on extrajudicial killings and kidnappings, forced disappearances, torture, and serious violations to the collective rights of the Andean and native communities.[27] In spite of this broad mandate and the explicit mention of collective rights, in the end the Commission focused only on forced displacement and, for the rest, centered its work

[24] See Supreme Decree No. 015–2006-JUS, July 6, 2006.
[25] Ibid., Art.1.
[26] See IFCVR, Vol. IX, 166 and Supreme Decree No. 015–2006-JUS, July 6, 2006.
[27] See Supreme Decree No. 065–2001-PCM, June 4, 2001, Art. 3.

on the violations affecting the right to life, freedom, and physical integrity. The list of human rights violations recognized in the Comprehensive Reparations Plan of the CVR reflects this approach and includes the following violations as violations triggering reparations: forced disappearance, kidnapping, extrajudicial executions, murder, forced displacement, arbitrary detention, violations of due process, forced recruitment, torture, rape, wounds, damages, and deaths in actions entailing the violation of international humanitarian law.[28]

The Commission thus ruled out the possibility of including violations of cultural and collective rights as a separate category as well as some of the most serious violations perpetrated against members of native communities such as the Asháninkas, including captivity, servitude, slavery, and forced labor. This said, the CVR was not insensitive to the collective harm endured by peasant and native communities and recognized in the PIR-CVR that, besides direct (individual) victims, the conflict affected a wider universe of victims, mentioning both "family members and human groups who, because of the massive violations they endured, suffered from collective harm and from the violation of their collective rights." It therefore granted both the family members of the dead and disappeared and certain groups the status of beneficiaries.[29]

Moreover, in defining family members as beneficiaries, the CVR expressed particular sensitivity to the fact that family units in the communities of the Andes and the forest differ from the Western-style nuclear family notion embraced in Peru's family code. The PIR-CVR thus provided that people who held dependency ties with the dead or disappeared person, but did not fall under the notion of family members as legally defined, could claim benefits if they could show that those ties were comparably strong according to customs, uses, or customary law of the people they belong to.[30] Unfortunately, this sensitivity was not reproduced in the Comprehensive Reparation Plan Law, probably as a result of the tendency of the Peruvian state in the domain of reparations to use shortcuts and to find ways of simplifying its work in view of its weak apparatus and a desire to reduce expenses.

As for collective beneficiaries, the PIR-Law, following the PIR-CVR, identified two different types of groups: one formed by peasant communities, native communities, and other populated areas affected by the internal armed conflict; and another one formed by nonreturning groups of displaced people from areas affected by the conflict, in their places of relocation. This means that the displaced are recognized as both individual victims and as collective beneficiaries of reparations measures. Interesting also are the criteria embraced by the PIR-CVR and the regulations implementing the PIR-Law to determine what counts as an affected community. They include things such as the concentration of individual violations experienced by the

[28] See IFCVR, Vol. IX, 156.
[29] Ibid.
[30] Ibid., 158.

communities; their degree of devastation; the forced displacement of the population; the breakdown of the communal institutions (judged by the number of authorities killed, displaced, or disappeared, and by the harm done to local assemblies and other forms of local government); and the loss of family and communal infrastructure (including loss of land, cattle, transportation means, communal centers, communal means of production, communications infrastructure, and basic services infrastructure).[31]

The Collective Reparations Program, the only part of the PIR-Law implemented thus far, consists in providing reparations mostly through investment projects and only to those communities identified as the highly affected by the conflict. It thus renders communities the single beneficiaries of the PIR-Law for the moment.

Reparations benefits

The PIR-CVR and the PIR-Law consist of a set of individual and collective benefits seeking to address the violations suffered by victims and their families, on the one hand, and violations affecting groups and communities, on the other.[32] Here again we will focus on the PIR-CVR because it inspires the PIR-Law and is acknowledged as the official conceptual framework for the reparations options undertaken.

Symbolic reparations are intended to contribute to the reconstruction of social ties – between the state and citizens, and between citizens themselves – that were broken as a result of the violence, and to do so by means of the public acknowledgment of the harm inflicted by subversive groups and by the state (through its actions or omissions). The underlying idea then is that symbolic measures ought to contribute to the general understanding of the conflict and its impact on families and communities and of the way it affected relations among different social classes and ethnic groups.[33] The proposed measures thus include individual letters of apologies as well as a general apology to the nation, the establishment of a national day in homage to victims, and official ceremonies to disseminate the truth about the origins of the violence and the reasons for the state's actions, based on the CVR report. One such ceremony is to be addressed to the Asháninka, as the single most affected group, both in terms of lost lives and traditions. It is recommended that messages and letters should be translated to Quechua, Aymara, and Asháninka, and that some of the symbolic measures ought specifically to reflect the values of those communities, including renaming schools with names of local social leaders and civil authorities.[34] Although the PIR-Law basically reproduces this recommended

[31] See Supreme Decree No. 015–2006-JUS, July 6, 2006, Art. 50; and IFCVR, Vol. IX, 160.

[32] The PIR-CVR contains six different programs dealing with symbolic reparations, health, restitution of rights, education, economic reparations, and collective reparations. The PIR-Law adds to these six a program promoting and facilitating access to a solution to housing.

[33] IFCVR, Vol. IX, 169.

[34] Ibid., 168–171.

set of measures, it does not specify that symbolic measures must be accessible to indigenous peoples in their languages.

The proposed health program raised expectations with respect to both individual and community healing. The PIR-CVR and the PIR-Law recommended that not only individuals directly harmed should receive treatment (through free clinical therapy and health insurance), but that the entire population in affected communities (those highly affected by the conflict and displaced people in their places of relocation) ought to be beneficiaries of health measures, including measures for the reconstruction of communal support nets, the recovery of historical memory, or the creation of communal spaces for the exercise of techniques of groups support. Moreover, according to the CVR, any intervention in the domain of health (both physical and psychological) should take into account traditional medicine and different people's worldviews, but it should also privilege the use of local languages and involve local organizations and local agents providing, where needed, capacity building for community leaders, healers, and midwives.[35] Unfortunately, neither the PIR-Law nor its implementing rules make reference to a culturally sensitive implementation of health reparations measures.

The CVR explicitly recognized that the internal armed conflict had had a special impact on the population of Andean origin, whose legal condition as citizens was affected given that many of them lost their identification documents. It therefore recommended, as well as the PIR-Law and its regulation, under the program of restitution of citizens' rights, a mass program of documentation of the population, which should also reach the Amazonian communities who have the same problem.[36] Given that such populations had for the most part not even received official identity papers before the conflict, were the program established, its "restoration of rights" component alone would mark a distinct improvement in these groups' exercise of their citizenship rights (some of which in this particular case would not be "restored" but established for the very first time).

Cultural sensitivity of education benefits was a stated element in the PIR-CVR and PIR-Law. These are aimed at giving intercultural educational opportunities to those who could not study or who had to interrupt their studies because of the conflict.[37] Regarding economic benefits to help victims and their families plan their lives better and improve their overall well-being, the PIR-CVR alone made reference to cultural sensitivity. For example, it recognized the stigmatizing effect that accessing individual reparations might have in contexts where the community takes primacy. The PIR-CVR recommended giving victims in native and Andean communities the possibility of forgoing such payments in exchange for increasing

[35] Ibid., 180, 182.

[36] Ibid., 189 and Supreme Decree No. 015–2006-JUS, July 6, 2006, Arts. 14–16.

[37] The executive regulation implementing PIR-Law specifies that the cultural and linguistic specificities of each zone must be taken into account when implementing educational programs. See Supreme Decree 015–2006-JUS, July 6, 2006, Art. 20.

the amounts delivered through the collective reparations program.[38] Unfortunately, neither the PIR-Law nor its implementing decree makes reference to a culturally sensitive implementation of economic reparations measures.

Finally, the PIR-CVR and the PIR-Law included a collective reparations program. Acknowledging the special impact that the armed conflict had in the high-Andean and native communities, the program aims at partially redressing the social, economic, and institutional harm suffered by those communities.[39] These communities, and the nonreturning displaced populations that have often settled in marginalized neighborhoods in the urban periphery, are to be the beneficiaries of amounts that depend on the harm suffered, the degree of poverty, and the size of the community.[40] The PIR-CVR and the PIR-Law referred to four possible elements of this program, including institutional consolidation (to give back to traditional self-government institutions of the Andean and native communities their lost respect, authority, and leadership),[41] reconstruction of productive infrastructure, recovery and improvements in basic services, and income and employment generation. A participatory process would allow a choice among the various elements so that the cultural specificities of the groups as well as their concrete social and reconstruction needs could be prioritized.

Implementation

With the abandonment of the Multiyear Program, the government of President García has begun the implementation of the PIR-Law, specifically, the collective reparations program. The program started in 2007 by targeting 440 rural communities with investment projects of up to 100,000 soles (approx. $32,000) per community. In the following years other communities were added, making in 2010 a total of 1,568 communities (it should be noted that 5,609 of an estimated 9,000 communities had been registered in the Unified Registry of Victims). These projects are to be identified

[38] There were, however, some gaps. By recommending one single and equal amount of lump-sum payment to be divided among the number of family members (in proportion of 2/5 for spouse or partner, 2/5 for descendants, and 1/5 for parents), the CVR expressed little sympathy for the fact that Andean and native families tend to have a very large number of descendants. Similarly, the requirement to be fifty years old before the partners or spouses of the killed and disappeared could ask for a pension was inappropriate; marital unions in the high Andes and the forest take place at a young age, and women in those areas (76 percent of those killed and disappeared were men) are not likely to find alternative sources of income easily, not the least because of the stigmatizing effect that "being alone" in those regions tends to have. This provision does not sufficiently take into account the vulnerable position of women in these communities and the difficulties that they are likely to face in having their voices heard in such decisions. Ibid., 198.

[39] Ibid., 200 and Supreme Decree No. 015–2006-JUS, July 6, 2006, Art. 25.

[40] As of this writing, the collective reparations program has not yet been implemented in the marginalized neighborhoods in the urban periphery where the nonreturning displaced populations have often settled.

[41] Ibid., 201.

by the communities themselves through a participatory process and approved when considered viable by the CMAN. Almost all of them seek to improve access to basic services and infrastructure – including water, electricity, and schools – and some seek modest improvements in agriculture and cattle productive infrastructure. The only other type of request concerns the demand of multiuse offices. Unfortunately, neither capacity building nor transfer of expertise or technical assistance has been given to communities to help them choose and formulate the projects, and as of July 2010, the CMAN had approved the financing of 1,392 projects and effectively financed 760 projects. The CMAN offers a workshop on the conflict, reparations, and training in public investment projects to the "executive committees" named by the communal assembly in the chosen communities. However, since such trainings take place after the communal assemblies have decided on their project, the link between the notion of collective reparation and the funding provided is likely to be lost.

President García has officially and publicly committed himself to the implementation of reparations for victims. The government justified the decision to start with collective reparations on the grounds that, absent a victims' registry, it is not possible to identify individual victims/beneficiaries to start with individual reparations. In the beginning of 2007, the Reparations Council began to set up the registry. It was announced that, once the Reparations Council succeeds in registering victims, the CMAN will coordinate the implementation of the rest of the programs. As of 2010, the Reparations Council has registered 76,814 victims in the individual registry and identified 39,000 individual beneficiaries of compensation. A technical Commission on Compensation has also been recently created.

The fact is, however, that, in terms of implementation, up to this day, only a minimal part of the 2005–2006 Multiyear Program, by now abandoned, and the first steps of the collective reparations program of the PIR-Law have been implemented. There is still little political will to implement the individual compensation measures.

Many reasons may account for this lag, including the fact that the old economic, social, and cultural elite still in power is deeply racist and has little interest in the construction of an inclusive democratic system that would undermine its institutional, economic, and social privileges. Animated by a conservative oligarchy that dominates business, the military, and the press, Peruvian society still expresses little empathy for victims of the conflict – who are Quechua-speaking or speakers of other native languages, illiterate, rural, too often still portrayed as "terrorists." Moreover, in a context of scarce resources, the argument is sometimes made that reparations money would be better spent in housing, health, and education to the benefit of larger numbers.

Unfortunately, there is no wide political coalition – beyond human rights NGOs and victims' organizations – to counter this discourse and to press for the implementation of the CVR recommendations, including the reparations plan. We could say

that whereas the agenda of indigenous organizations in Peru is looking forward and outward, that of victims' organizations looks backwards. Whereas the latter appealed to people's vulnerability during the conflict years and to the identity and condition of victims in need of state assistance, the former is based on a new sense of agency, both nationally and internationally recognized, that expressed, for the first time, pride in the condition of being indigenous. It thus looked not for assistance related to the consequences of the conflict but for the adequate recognition of indigenous peoples' place within the state in order to fight against its neoliberal policies.

GUATEMALA

Guatemala is also a multicultural nation. With almost twelve million inhabitants, four different peoples coexist in Guatemala: the Maya (who constitute roughly 40 to 45 percent of the population, although there is a debate over these numbers), the Xinkas, the Garifunas, and the Ladinos or *mestizos* – the latter being heirs to the Spanish colonial powers.[42] Although the term "indigenous" refers to the Maya, the Xinkas, and the Garifunas, the Maya are the large majority, and thus Ladino and Mayan are to this day the main ethnic markers in the country. Guatemala is also one of the poorest and most unequal countries in Latin America, with disparities running along ethnic and gender lines: 72 percent of the Maya are poor, and 31 percent are very poor.[43] Indigenous women have the worst indexes of social and economic well-being: 42 percent are illiterate (in some communities this number is as high as 90 percent), whereas only 18 percent of the nonindigenous population is illiterate. Out of 158 MPs, only 13 identify themselves as indigenous.

This extreme inequality is the result of a long process of exclusion and subjugation stemming from the time of the Spanish conquest in the sixteenth century. The 1945 Constitution was the first to guarantee specific rights to indigenous people, abolishing forced labor and establishing the inalienability of indigenous people's land. In 1954, however, the incipient democratic regime was overthrown, and a cycle of violence started that was to last for more than fifty years. In 1962, a guerrilla uprising reacting against political and economic exclusion brought the country to a war that ended only with the signing of the Peace Agreements in 1996 between the government and the Guatemalan National Revolutionary Unit [*Unidad Revolucionaria Nacional Guatemalteca*] (URNG), which was a coalition of four insurgent organizations. Although the war did not have ethnic confrontation at its root, being grounded instead in socioeconomic or class factors, the historic marginalization

[42] See Irma Alicia Velásquez Nimatuj, *Derechos de los pueblos indígenas, diversidad étnica y cultural, y cohesión social en Centroamérica* (Guatemala: ICEFI CIEPLAN, 2008).

[43] See PNUD, *Informe Nacional de Desarrollo Humano 2005, Diversidad étnico-cultural: La ciudadanía en un Estado plural* (Guatemala: PNUD, 2005), 99. This report also discusses the limitations of statistical sources in capturing the enormous ethnic and cultural diversity of Guatemala (see 47ff).

of the indigenous population was clearly one of the main features underlying the conflict.[44]

The Guatemalan Historical Clarification Commission (CEH), established in 1997 to shed light on human rights violations related to the armed conflict, in its report *Guatemala: The Memory of Silence* [*Guatemala: Memoria del Silencio*], published in 1999, reported some 200,000 people killed, more than 400 villages destroyed, and between 500,000 and 1.5 million people internally displaced. It acknowledged that state and paramilitary forces were responsible for 93 percent of all violations, including 92 percent of summary executions, 91 percent of forced disappearances, and 89 percent of sexual crimes. From the overall number of fully identified victims, 83 percent were of Mayan origin and 17 percent were Ladino.[45]

The Report covered extensively how, in certain regions during the conflict, fear forced the Mayan people to hide their ethnic identity, commonly expressed in the use of their language and traditional dress. The military presence in the communities entailed the disruption of traditional ceremonies and rituals. Deeply symbolic elements, such as corn crops and grinding stones, were purposefully destroyed, and sacred sites were desecrated. The elderly and Mayan priests as well as other community leaders such as midwives and auxiliary mayors were systematically assassinated. From the year 1982 onwards, the CEH reported, the traditional Mayan authorities were replaced by military commands and members of the Civilian Self-Defense Patrols [*Patrullas de Autodefensa Civil*] (PACs).[46] At the same time, as an act of discrimination, the military practiced forced recruitment, especially in regions with a high concentration of indigenous peoples, imposing a pattern of cultural assimilation among the recruited population, including the prohibition on speaking native languages. In its report, the CEH highlighted the fact that racism was an officially endorsed doctrine. It legitimated the hatred and the arbitrariness with which military operations against thousands of Mayan communities took place, especially between 1981 and 1983. Indeed, the CEH concluded that during those years genocidal acts were perpetrated in several communities against the Mayan people, which had been

[44] Although the insurgent organizations were Ladino dominated and, not unlike the Peruvian organizations, based their action on Marxist theories, they did not despise ethnicity but increasingly "situated their social analysis within the historic and systematic ethnic oppression of the Maya." See Madeleine Fullard and Nicky Rousseau, "Truth Telling, Identities, and Power in South Africa and Guatemala," Chapter 2 in this volume. On the other hand, according to the CEH, "The coming together of radicalized Ladinos and Mayan did not imply an alliance on equal terms. Although the insurgency recognized many of the social and economic demands of the Mayan people, it did not succeed in developing a political platform that sufficiently expressed their demands as a different people (language, spirituality, representative authorities, customary law, etc.)." CEH, *Guatemala: Memoria del Silencio* (Guatemala: UNOPS, 1999), Vol. I, 171.

[45] See CEH, *Memoria del Silencio*, Vol. IV, 21.

[46] The PACs were paramilitary groups formed by the military with local community members for the purpose of controlling the civil population identified as insurgent. In many cases, the patrolmen were forced, under life threat, to assassinate, torture, and rape. In other instances they actually identified with the counterinsurgency role assigned to them by the military forces.

identified by the military as an internal enemy because of their assumed ties to the guerrillas – regardless of whether or not they actually belonged to or supported the subversive movement. Ethnicity served as a proxy.

The years of the conflict saw an upsurge in the organization and mobilization of indigenous peoples. The first indigenous organizations were formed during the 1970s.[47] Many youth and Mayan leaders joined the guerrillas and the peasants' movements. During those years the indigenous movement did not highlight a cultural dimension, although it did contribute to the increasing self-understanding of the Maya as a people. Still, at that time their claims were almost exclusively related to the living conditions and socioeconomic status of peasants (access to land, improvement of salaries, rejection of forced recruitment).[48]

In 1984, the military initiated a so-called process of democratic transition. It called a constituent national assembly, which in 1985 approved the constitution now in force. This constitution acknowledges Guatemala's cultural diversity and the state's obligation to acknowledge, respect, and promote indigenous peoples' form of life and social organization, as well as the use of the indigenous dress, language, and dialects.[49] Although this "democratization" process was more of a strategic move to preserve the status quo than an attempt at real reform, it did encourage indigenous organizations to further assert publicly their rights and claims. In fact, a proliferation of civil society organizations formed mostly or exclusively by indigenous peoples emerged, including victims' organizations, organizations of displaced people, human rights organizations, and organizations for the defense of indigenous peoples' cultural rights.[50]

The increase in mobilization of indigenous groups in Guatemala linked up with the international indigenous peoples movement and, most important, the growth of international law and principles on indigenous issues across the 1990s. The internationally shepherded process of the signing of the Peace Agreements also strengthened the consolidation of a movement that, for the first time, identified itself as a "Mayan movement." This transformation from *Indio* (the term used by the colonizer with an undertone of subordination) to *Mayan* expressed an entirely new approach to ethnicity and offered to the more than twenty different linguistic groups in Guatemala

[47] See Santiago Bastos and Manuela Camus, *Entre el Mecapal y el cielo. Desarrollo del movimiento maya de Guatemala* (Guatemala City: FLACSO, 2004), 56.

[48] See Rigoberta Menchu and Comité de Unidad Campesina, *El Clamor de la tierra. Luchas campesinas en la historia reciente de Guatemala* (Donostia, Spain: Tercera Prensa, 1992), 56.

[49] See Art. 66 of the Constitution.

[50] Among these indigenous peoples' CSOs are CONAVIGUA, GAM, Communities of People in Resistance (*Comités de Población en Resistencia*), Permanent Commissions for the Return of Mexican Refugees (*Comisiones Permanentes para el Retorno de Refugiados en México*), Guatemalan National Council for the Displaced (*Consejo Nacional de Desplazados en Guatemala*), Council of Ethnic Communities "We Are All Equal" (*Consejo de Comunidades Étnicas "Runujel Junam"*), the Mayan Languages Academy (*Academia de las Lenguas Mayans*), Mayan Defense (*Defensoría Maya*), and the Council of Mayan Organizations of Guatemala (*Consejo de Organizaciones Mayas de Guatemala*).

a common platform from which to assert with pride cultural differences linked to history, language, and spirituality allowing for a new, positive, unified, and dynamic "we."[51]

To optimize its potential for political impact, in 1994, during the peace negotiations between the government and the URNG guerrillas, several civil society organizations jointly formed the Coordinating Committee of Organizations of the Mayan People of Guatemala [*Coordinadora de Organizaciones del Pueblo Maya de Guatemala*] (COPMAGUA),[52] a group meant to represent the Mayan people through a Civil Society Assembly that was in charge of generating proposals for the negotiations. The negotiations for the seven peace accords were strongly influenced by the UN mission in Guatemala (MINUGUA), and this involvement helped raise "the transformative content" of the agreements.[53]

There were reasons for optimism. In 1995, the Agreement on the Identity and Rights of Indigenous Peoples [*Acuerdo de Identidad y Derechos de los Pueblos Indígenas*] (AIDPI) was signed. In it the Guatemalan government committed itself to an ambitious agenda of recognition of cultural and land rights, leaving out only the important question of the agrarian reform.[54] Unfortunately, the AIPDI (to this day largely unenforced) did not embody more than "cosmetic multiculturalism."[55] This was shown by the fact that the constitutional reforms needed to consolidate the recognition of indigenous peoples' rights were rejected in a 1999 referendum in spite of the great mobilization of indigenous groups and thanks to a well-endowed campaign led by economic, religious, military, and political elites, as well as to the passivity of the central government and the main political parties.

The organizations of indigenous peoples that had invested great effort in overcoming their internal differences in order to push for a common agenda suffered greatly from the defeat, and in 2001, COPMAGUA dissolved. This setback did not imply the disappearance of the indigenous movement, however, and in fact the movement would soon turn to reparations as an avenue to achieve some of the recognition it had sought through the implementation of the Peace Accord. What the failure expressed, though, is the lack of a genuine commitment by the Ladino elite of the country to subvert Guatemala's deeply racist and nonegalitarian system.

[51] Santiago Bastos and Manuela Camus, "Multiculturalismo y pueblos indígenas: reflexiones a partir del caso de Guatemala," *Revista Centroamericana de Ciencias Sociales* 1 (July 2004): 92.

[52] COMPMAGUA gathered together over 100 organizations. See Bastos and Camus, *Entre el Mecapal y el cielo*, 125.

[53] See Fullard and Rousseau, "Truth Telling, Identities, and Power," Chapter 2 in this volume.

[54] Covenant 169 of ILO on the Identity and Rights of Indigenous People was ratified by the Guatemalan state in 1996. See also Roger Plant, "Ethnicity and the Guatemalan Peace Process: Conceptual and Practical Challenges," in Rachel Siedler, ed., *Guatemala After the Peace Accords* (London: Institute of Latin American Studies, 1998), 328.

[55] Bastos and Camus, "Multiculturalismo y pueblos indígenas," 105.

Organization of the Guatemalan Reparations Program

The peace agreements had designated the Guatemalan state as responsible for providing reparations for the victims of the armed conflict.[56] In its 1999 report, the CEH echoed this position. The CEH organized several consultations and incorporated input of civil society organizations into its reparations recommendations.[57] These recommendations covered several measures including material restitution, economic compensation, and psychological rehabilitation, as well as satisfaction measures and measures to dignify victims. The CEH explicitly referred to the need to create a national reparations program, to ensure the participation of Mayan people in its development, to use Mayan languages in the search for the disappeared, as well as to translate the CEH report into Mayan languages. (Ultimately, only the chapter on conclusions and recommendations, not the entire report, was translated into seven of the main Mayan languages.)[58]

Through lobbying by civil society groups overwhelmingly formed by Mayan people such as the Multi-Institutional Office for Peace and Harmony [*Instancia Multiinsitucional para la Paz y la Concordia*] and the Coordinating Committee of Organizations for Reparations of the Mayan people [*Coordinadora de Organizaciones para el Resarcimiento del pueblo Maya*] (CORPUMA), the government began to take seriously claims for finding loved ones, reconstructing historical memory, access to justice, compensation, and cultural reparation.[59] In 2003, pressured by the reactions provoked by both the payment of compensation to ex-paramilitaries, or PACs, and the lack of enforcement of the Peace Accords, the government of Alfonso Portillo (2000–2003) finally decreed the creation of a National Reparations Program [*Programa Nacional de Resarcimiento*] (PNR).

The PNR is the agency in charge of the design and implementation of a national policy of reparations for the victims of the armed conflict. Its executive body is the National Reparations Commission [*Comisión Nacional de Resarcimiento*] (CNR), an autonomous entity that was initially designed to include members of the state and civil society. It was initially presided over by Rosalina Tuyuc, the Mayan leader

[56] Both the Human Rights Agreement and the Agreement on the Resettlement of the Population Displaced by the Armed Conflict referred to this duty.

[57] On May 27, 1998, a National Forum on the recommendations was organized with the participation of more than 400 people from 139 different organizations of civil society. For the most part these were victims' organizations, comprised mostly of indigenous people. See CEH, *Memoria del Silencio*, chapter I.

[58] See United Nations Verification Mission in Guatemala, *Estado de cumplimiento de las recomendaciones de la comisión para el Esclarecimiento Histórico. Informe de Verificación* (Guatemala City: MINUGUA, 2004), 34.

[59] This Coordinating Committee (CORPUMA) was formed by many of the main organizations including CONIC, CONAVIGUA, MOLOJ, MOJOMAYAS, DEMA, among others, and expressed its main claims in a document written in 2002.

of the National Commission of Guatemalan Widows [*Comisión Nacional de Viudas de Guatemala*] (CONAVIGUA).

Power struggles among different civil society groups slowed down the work of the Commission and eventually led to a reform of its composition. Thus, in 2005, civil society members were excluded altogether from the Commission, resulting in its present configuration, which is comprised only of governmental representatives. César Dávila (president of the Republic) and two female representatives of civil society were supposed to form an advisory committee, which, as of this writing, had not yet been established.

As of 2009, the PNR has a headquarters in Guatemala City as well as fifteen regional offices. The regional offices have been placed precisely in the municipalities and departments that were most severely affected by the internal armed conflict, and where most of the Mayan population resides. Seventy-five percent of the personnel working in the program are Mayan, which ensures that victims can communicate with staff in their own language.[60] As of this writing, and according to a December 2008 report of the PNR,[61] 23,948 people have received payments in individual, one-time lump sums.

Definition and Delimitation of Victims, Beneficiaries, and Benefits in the Guatemalan Reparations Program

Victims and beneficiaries

The PNR includes the following crimes and violations as demanding reparations, according to the original government decree and its modifications: forced disappearance, extrajudicial execution, physical and psychological torture, forced displacement, forced recruitment of boys and girls, rape and sexual violence, violations against children, and massacres. It also allows for the possibility to ask the CNR to consider other violations not included in the list. Victims are defined as persons who directly or indirectly, individually or collectively have suffered the violations of human rights and crimes against humanity listed by the PNR.[62]

In spite of the insistence of some civil society groups (especially CORPUMA), the government of President Berger refused to include genocide as a reparable crime in the decree that created the program, even though a prohibition against genocide had been incorporated in the Guatemalan criminal code prior to the conflict. Fearful of possible consequences, including in the domain of criminal prosecutions, the government was initially unwilling to officially acknowledge genocide – something severely criticized by Mayan organizations and a source of tension with the CNR itself in its early years.

[60] Interview with Martín Arévalo, Director of the PNR, April 2007.

[61] PNR, *Informe Anual de Actividades 2008 Programa Nacional de Resarcimiento* (Guatemala: PNR, 2008), 6.

[62] See Governmental Agreement No. 43–2005, Art. 2, February 2005.

In 2008, however, Guatemala saw a shift in power with the election of President Álvaro Colom, who was more open to denouncing the genocide than his predecessors had been. By August of that year, the CNR exercised its power to amend its regulations and to consider other violations as reparable. In a great leap forward, it has included acts of genocide as a violation of human rights that merit reparations. It remains to see what effects this change will have. And, indeed, a later commission has the power to nullify the change.

As mentioned earlier the CEH described many harms to the Mayan community and culture in its report. Interestingly, although these harms were not conceptualized as separate violations of cultural, group-based rights or rights with a collective dimension, they were taken into account when designing measures for cultural reparations, as we will see. Also, the crimes and violations that were selected for purposes of reparation were defined to a large extent in a culturally sensitive way, that is, in a way that took into account their impact on Mayan culture and on the overall living conditions of the Mayan people. For instance, the new regulations of August 2008 refer to intangible or psychological harms, including under this rubric "the undermining of very significant values . . . such as spirituality."[63] The definition of the forced recruitment of minors in the PNR's regulations also attempts to be culturally sensitive. It refers to "recruiting minors against their will and assigning them military or paramilitary tasks by exercising any kind of pressure over them and transgressing the prohibition of discrimination on the grounds of race, economic, social or any other condition" – a definition that duly shows the disparate impact of forced recruitment on poor indigenous minors.

The definition of acts of genocide included in the new regulations are based on the Genocide Convention and the Guatemalan criminal code. Genocide includes any of the following acts, with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such:

a) Killing members of a group.
b) Causing serious bodily or psychological harm to members of the group.
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
d) Imposing measures intended to prevent births within the group.
e) Forcibly transferring children of the group to another group.

According to the PNR's regulations, massacres are defined as the "arbitrary execution of more than five people in the same place (a house, neighborhood, estate, or village), as part of one and the same military action, when the victims were in a situation totally or partially defenseless." Regrettably, the definition in this case leaves out elements such as the destruction of homes, crops, and so forth, which can

[63] CNR, *Reglamento para la calificación de beneficiarios del programa nacional de resarcimiento*, Art. 3, August 17, 2008.

be relevant when conceptualizing adequate measures of reparation. In any event, and as we will see, restitution measures have indeed covered the obligation to return homes when they were lost, as part of the human rights violations listed.

Finally, and as far as rape and sexual violence are concerned, the PNR's regulations define them as "acts of physical or psychological sexual aggression perpetrated by men against captive or vulnerable women, conditions that are used to consummate many forms of sexual, physical, and psychological contact and aggression, without the consent of the women, including sexual slavery, forced prostitution, forced pregnancy and sterilization as well as any other sexual abuse of equally serious nature." This definition, modeled after the Rome Statute, leaves out some of the most common practices perpetrated against women during the conflict, especially Mayan women, such as forced unions. Indeed, after violent episodes, widows were commonly forced to live in "marital" unions with members of the military and paramilitaries, who exploited them both sexually and economically.[64]

Reparations benefits

Currently, the PNR encompasses a series of individual and collective reparations measures, including measures to dignify victims, cultural reparation measures, material restitution measures, psychosocial reparation and rehabilitation measures, as well as measures of economic indemnification. Of all of these, only the economic indemnification measures have a strictly individual character. The other measures have been defined both with individual and collective dimensions. As we shall see, most of these measures have been only conceptually defined but not specifically spelled out yet.

The beneficiaries of individual reparations are victims and family members, and beneficiaries of collective reparations are, in principle, groups of persons, communities, or sets of communities. However, none of the collective measures have been implemented as of yet – although in February 2008, a pilot project was rolled out in Cocop, Nebaj El Quiché that included burials and acts of communal dignification.[65] Because of the focus on individual compensation measures, there are still no criteria to properly define what the relevant groups or communities are, nor how the notion of collective harm is to be understood.

As for economic indemnification, the government has approved a compensation of Q24,000 ($3,200) for each victim of extrajudicial execution and enforced disappearance, and Q20,000 ($2,667) for survivors of torture, rape, and sexual violence, with a ceiling of Q44,000 ($5,867) per beneficiary in case of loss of more than one family member or multiple violations of rights.[66] Although these are mostly

64 See CEH, *Guatemala: Memoria del Silencio*, Ch. III, 56.

65 PNR, *Informe Anual de Actividades 2008 Programa Nacional de Resarcimiento* (Guatemala: PNR, 2008), 9.

66 Comisión Nacional de Resarcimiento, Acta 10–2006.

symbolic amounts, they can nonetheless make an important contribution to improving victims' lives, given the level of poverty in the country.

Material restitution measures are intended to reinstate the victims to their situations prior to the violation, or to compensate them in proportion to their losses resulting from the violations. They are supposed to consist mostly of the restitution of land, housing, land security, and productive investments. Beneficiaries of such measures can be victims of forced displacement, minors who suffered forced recruitment as well as other types of violations, and victims of massacres and acts of genocide. These measures reflect those basically asked for by Mayan organizations, which together with access to land, productive investments, housing, and education grants have also claimed the recovery of ancestral seeds that were lost because of the "scorched earth" policy.[67] Unfortunately, these measures have yet to be concretized and implemented.

Psychological rehabilitation measures are proposed for all those victims who suffered any kind of physical or psychosocial harm as a result of the listed crimes. They are supposed to function through individual and family assistance methods as well as through self-help groups, community reflection groups, community-based rehabilitation, and psychological help for exhumations. They include measures of physical and psychosocial rehabilitation, access to medicine, and psychological help during the search (and reencounter) between families and children who disappeared during the conflict.[68]

Indigenous organizations have demanded that, when these measures are implemented, psychosocial rehabilitation specifically targeted at indigenous communities be offered and it be implemented from the perspective of their spiritual traditions. It should take into account the wisdom of the elderly, the midwives, and other female community leaders who have thus far helped confront the traumas. Among other things, these measures would reach more people and address them in their own language. In fact, in the acts of exhumation that have taken place thus far, Mayan organizations have indeed given psychosocial support to victims.

Measures to dignify victims include actions to disseminate the truth, vindicate the good name of victims, keep history alive, and help victims with their mourning process. Some of these measures, including the exhumation of bodies and reburial according to the Mayan worldview, were explicitly requested by Mayan organizations and brought forward by the CORPUMA in a public document. Among those specifically recommended to the PNR by Mayan organizations were the dissemination of the CEH report and the report of the Human Rights Office of the Archbishop

[67] Coordinating Committee for the Reparation of the Mayan people, position paper on the compensation of the victims of genocide and other victims of the internal armed conflict (Guatemala: CORPUMA, 2002).

[68] CNR, *Reglamento para la calificación de beneficiarios del Programa Nacional de Resarcimiento*, Art. 43.

of Guatemala,[69] the assistance to victims in their search for the disappeared, the creation of museums or monuments to dignify victims, the search for clandestine cemeteries, and the promotion of a policy of exhumations. As we can see all of these were incorporated in the PNR, either under the "measures to dignify victims" or "cultural reparations measures" banner. Only a request to include the creation of a Mayan University in the PNR was rejected.

The final type of reparation measures included in the PNR is cultural reparation. The PNR's regulations state that this measure consists in recovering the culture of communities affected by the internal armed conflict. It is worth underscoring that these measures were not among those recommended by the CEH. In fact, they were added only at the request of Mayan organizations and under the initiative of Rosalina Tuyuc, who presided over the first three instances of the CNR. What these measures will consist in is far from clear, perhaps with the exception of the need to restore sacred sites. The PNR does not elaborate criteria about the definition of a beneficiary community or the assessment of communal harm. Although the regulations do emphasize the importance of assessing and registering collective harm, it concretizes this only by saying that in deciding these measures the opinion of the different beneficiaries must be taken into account. Mayan organizations have asked that at least several aims be achieved, including recovery and systematization of the collective memory of the communities, acknowledgment of spiritual authorities, reestablishment of ritual centers, and construction of *Nimajá* houses to promote their culture and language.[70]

Implementation

In 2006, individual economic compensation measures started, owing to heavy pressure from victims, as well as the government's need to spend the funds that had been allocated.

The payments have had some positive effects in terms of the empowerment of individual victims, but they have also had some unintended negative effects. For one thing, the fact that economic compensation is disconnected from any other reparation measure entails a departure from the comprehensive vision elaborated by the PNR, and it decreases the likelihood that victims will perceive the payments as fulfilling the state's obligation to compensate them as victims of human rights violations.[71] Victims also have difficulty understanding the rationale behind the

[69] Oficina de Derechos Humanos del Arzobispado de Guatemala, *Guatemala Nunca Más* (Guatemala: ODHAG, 1998).

[70] Coordinadora de Organizaciones para el Resarcimiento del Pueblo Maya, *Planteamiento de organizaciones del pueblo Maya para el resarcimiento histórico de las víctimas del genocidio y del enfrentamiento armado interno* (Guatemala City: Fondo de Tierras, 2003), 14.

[71] See Fernando Luis González Rey, "Atención Psicosocial de las víctimas: Proyección para nuevas acciones que permitan superar las omisiones," in PNR, *La vida no tiene precio. Acciones y omisiones del Resarcimiento en Guatemala* (Guatemala: PNR, 2007), 96.

different amounts they receive – something that is generating conflict both in family and community settings, often to the detriment of the most vulnerable members in the community.[72] Finally, victims are sometimes deceived by their own family members (as when a son takes all the money from his widowed mother)[73] or by individuals who render payments conditional on victims' affiliation or lack of affiliation with certain organizations.[74]

Among the measures designed to dignify victims, only exhumations with psychosocial assistance for victims have begun. Indeed, two organizations that provide psychosocial assistance have been involved in the implementation of this measure, Mayan Sacbé Centre and the Utz Kalesmal. Implementation so far has focused mostly on accompaniment of family members to exhumations, where some victims have been provided psychosocial support. To this end, the PNR has supported capacity building of mental health professionals.

Many measures still need to be more concretely defined before implementation. This is, tellingly, the case for cultural reparations measures. Among the reasons why implementation is proceeding so slowly is the fact that designing measures of cultural reparation is intellectually challenging. No other reparations program has ever attempted to create such measures. There has also been significant disagreement about the order in which the different reparations measures should be implemented, and whether they should be implemented at all absent a national registry of victims, which is still in process.[75] Crucial of course has been the weak political support for the PNR – which explains why the program was never passed as a law, but only as a governmental agreement – and the constant series of modifications to which it was subjected between 2003 and 2005.

As of July 2007, the PNR has opened 25,196 files and has registered 36,408 victims, of which 26,714 are male and 11,626 female. According to interviews, 90 percent of the victims are Mayan.[76] According to a December 2008 report of the PNR,[77] 23,948 people have received payments in individual one-time lump sums; 85 percent are more than 45 years old, and 83 percent are women. In total, the PNR has spent Q511.6 million ($68 million) through December 2008.[78]

[72] Report of the Ombudsman, *Substantive Aspects of the Reparation Policy Executed by the PNR-Guatemala* (Guatemala: PDH, 2006).

[73] Interview with Rosalina Tuyuc, former Presiding Commissioner of the CNR, Guatemala, 2007.

[74] Report of the Ombudsman, "Substantive Aspects of the Reparation Policy."

[75] Some sectors were strongly opposed to starting with the implementation before the creation of a comprehensive national registry of victims, which is only now in process of being established. This, it was argued, was needed to know the whole universe of victims and better plan the implementation of measures that, it was argued, should be delivered in the following order: first, psychosocial, then dignification and cultural measures, then restitution, and only then economic compensation.

[76] Figures provided by the PNR.

[77] PNR, *Informe Anual de Actividades 2008 Programa Nacional de Resarcimiento* (Guatemala: PNR, 2008), 7.

[78] These figures do not include a 10 percent charge for administration. The PNR has an annual budget of Q300,000,000 ($40,000,000) for thirteen years.

COMPARATIVE ASSESSMENT OF CASE STUDIES

It is time now to return to our reparations framework in order to assess the Peruvian and Guatemalan experiences with reparations and evaluate the extent to which reparations have not only provided remedy to the indigenous groups harmed during the conflict, but also helped reaffirm their status as equal citizens of the state. In doing so we will distinguish between lessons that can be drawn from the process leading up to reparations and from the actual content of reparations programs themselves.

The Process

Looking back on our cases and returning to one of the opening set of questions, we can ask how and to what degree indigenous movements have engaged with and shaped the process. Which factors acted as facilitators or inhibitors of this engagement, and what was the difference that the different levels of involvement finally made?

One may rightly ask oneself about the relevance of the greater sense of agency and direct participation of indigenous groups in the Guatemalan process, especially in view of two facts: one, the fact that, judging by the actual reparations programs, in Peru, the sensitivity expressed by the white intellectual elite leading the transition and shaped by international indigenist sensitivities seemed at least partly to make up for the weaker role of indigenous groups. The other fact that is worth thinking about is the slow implementation common to both countries. Although the specific reasons accounting for this may vary, a fundamental fact shared by the two countries is that, in spite of the "transition" and its accompanying rhetoric, the elite in power in each country has not significantly changed, and this elite expresses little sympathy for rural, non-Spanish-speaking, poor, and illiterate people. Some taboos have been broken and systemic discrimination and repression have been recognized – more so in Guatemala than in Peru – but, not surprisingly, simple recognition has not been sufficient to alter age-old structures of economic, political, and cultural subordination.

In spite of these similarities, there has been one striking divergence, namely, indigenous groups in Guatemala are now in a significantly stronger position to push forward the recommendations of the CEH, including a stalled reparations program, than are indigenous groups in Peru.

Several factors have influenced this outcome. As noted, the starting positions for indigenous people in general in the two countries were quite different. In Guatemala, most violations against indigenous people were perpetrated by the state, whereas in Peru, the state and the rebel forces (with which Andean peasants and Amazonian natives were involved in varying capacities) shared responsibility to a much greater degree. Given overwhelming state responsibility in Guatemala, the massive violations there could rightly be characterized as "genocidal acts." The

outcome was that indigenous groups in Guatemala had a platform for asserting their identity, precisely since the CEH had determined that their identity itself had been under attack. Nothing of the sort was possible in Peru, on the other hand. It would have been much more difficult to substantiate such a characterization in Peru given the plethora of violent agents and the rigid ideologies mobilized in the conflict: one centered on a legitimate state versus "terrorist," and the other focused on class struggle. In Peru, ethnic pride barely existed among Andean and Amazonian peoples, and, indeed, the "Indio" was despised by all.

The way different civil society groups intervened in the transitional process also had an impact. In Peru, organizations representing Andean and Amazonian peoples used a different language and advanced different claims than did human rights organizations relying for the most part on a development framework. The almost exclusive focus of human rights NGOs on violations of basic civil and political rights, and the fact that they did not integrate cultural rights into their frameworks and operational schemes, also meant that whatever the cultural claims expressed by people in consultation processes on reparations (including the valuing of customs and traditions, the preservation of indigenous identity, or the solution to the problem of land title in the communities), they ended up relegated to the category of "marginal," "secondary," or "additional" and thus were easily discarded.[79] Not so in Guatemala, where these groups overlapped, and where cultural and development claims in many cases were intertwined.

Finally, it is important to recall that the transition in Peru did not come about as a result of negotiations, but from defeat. In this process, a predominantly urban and intellectually progressive elite drove the process of unveiling the truth by establishing a Truth and Reconciliation Commission and then crafting a reparations policy. This elite connected well with the international discourse emphasizing the importance of the rights of indigenous peoples, as can be seen from the culturally sensitive reparations program that it drafted. However, it has not been sufficiently powerful, thus far, to motivate the oligarchy still in power to make remedial actions a strong priority or to take the challenge of crafting a renewed sense of multicultural citizenship as a defining feature of Peru's new democracy. Hence the slow and tepid implementation of the reparations plan.

In Guatemala, by contrast, the conflict ended through negotiation, and indigenous actors were part of that process – advancing an indigenous rights agenda – from the beginning. The indigenous movement developed mechanisms to engage with, first, the negotiation of the peace accords and, later, discussions about reparations. With the support of the UN, the movement was successful in having the peace accords express a new vision of multicultural citizenship. When the Ladino elites still in

[79] See Julie Guillerot, Humberto Ortiz, and Rolando Pérez, *Hacia la reparación integral de las víctimas. Memoria del II Encuentro Internacional "Sociedad Civil y Comisiones de la Verdad"* (Lima, Perú: Asociación Paz y Esperanza, 2002).

power successfully blocked the attempt to reflect the new multicultural ideal of the Guatemalan state in the Constitution, the movement channeled its conquered sense of political agency into following up on the CEH's recommendations for reparations (many of the CEH's other recommendations still remain unfulfilled).

Unlike in Peru, organizations that advocated for the interests of the indigenous population in Guatemala – such as the Coordinating Committee for Reparations of the Mayan people – were involved in the discussions about reparations from the very start (alongside victims' organizations, which were also overwhelmingly composed by Mayan people, and human rights organizations). These organizations have played a strong role in the formulation of proposals as well as in the organization of the PNR, including the expansion of the traditional reparations parameters to include, for the first time, a program of cultural reparations. The first Reparations Commissions had counted on the direct participation of civil society organizations, including Mayan organizations and victims' organizations formed overwhelmingly by Mayan people. Even after the structure changed to exclude civil society representatives, the Mayan presence was ensured through the representatives appointed by the government. In fact, the first three Commissions were presided over by Rosalina Tuyuc, a Mayan woman.

The Programs

Going now to our second set of questions, what can the reparations policies adopted in these two cases teach us about the potential and the limitations of a reparations framework for redressing identity-based historical injustice and advancing, however minimally, the agenda of indigenous people for a more inclusive and egalitarian democratic order? How can policymakers come up with creative ways of putting together the different pieces of the reparations puzzle (such as definition of victims, list of violations, definition of benefits and beneficiaries) to achieve that purpose?

It is too early to answer these questions since the reparations programs are still in the process of being implemented. But we may advance three tentative answers, which should be scrutinized when further research becomes available.

First, we argue that the design of the programs to include various measures of cultural recognition should, over the long term, signal a political and social advance for indigenous peoples – as long as implementation does not dilute those culturally specific aspects of the programs. In general, it seems that to the extent that the Peruvian but even more so the Guatemalan programs captured the group-specific harms to identity, culture, and institutional and communal life endured by indigenous peoples, they did so mostly when defining reparations benefits and beneficiaries, rather than in their definitions of victims and violations. This strategy was probably more compatible with the prevailing human rights angle that dominates

the field of transitional justice and the large emphasis on individual civil and political rights within.

The focus on culturally sensitive benefits rather than culturally specific victims has yielded two different options for incorporating a cultural dimension into reparations programming in Peru and Guatemala, and it will be worth following their outcomes in the years to come.

In Peru, an intercultural approach is supposed to be mainstreamed throughout, although the program does not make many specific recommendations for how this will in fact be accomplished. This means that political negotiation may continue to play a key role in how benefits are conceived and distributed in a sufficiently "intercultural" manner. The Peruvian program has also included a specific collective reparations program that perhaps holds out the most promise for transformative political and social effects. Andean and native communities will benefit from a collective reparations program intended to help them with the recovery of their traditional institutions, the reconstruction of productive infrastructure, the recovery and increase in basic services, and the generation of employment and income – all of which is supposed to be shaped in collaboration with the communities.

In Guatemala, by contrast, and under strong pressure from indigenous groups, specific culturally related benefits have been inserted into the program throughout. The aim was to recognize the collective impact of the violence by ensuring that all reparations measures (excluding only measures of individual indemnification) incorporate a collective dimension. Also, Guatemala's reparation program includes, for the first time, measures of cultural reparations intended to recover and revitalize the culture and identity of the people, communities, and regions affected by the internal armed conflict, mainly the Mayan people. These measures are rightly supposed to be shaped through a participatory process that includes the different beneficiaries involved, but thus far this has not taken place. It is interesting, however, that Mayan organizations, when asked, do not limit themselves to claims about recovering things that were lost during the conflict but also ask for measures of recognition that were never adequately granted to start with.

Second, we argue that trust of indigenous groups in state institutions may be enhanced through the efficient delivery of benefits that incorporate a cultural element, as well as through symbolic measures. In both countries, trust in and interaction with state institutions has historically been low. The state's bureaucracy operates in a different language (Spanish), is populated largely by nonindigenous staff, and is not seen as serving the needs of indigenous peoples. Indigenous groups' interventions in Guatemala have suggested that even the efficient delivery of deserved benefits, such as health and educational services, may not be welcomed by indigenous groups if these benefits are in the dominant group's idiom, as well as only in its medical and spiritual traditions. That is, the language of the state is not, for them, neutral.

Additionally, symbolic reparations are essential to the reinforcement of social ties and the recovery of relations of trust. The Peruvian PIR-CVR refers to apologies, commemoration, and ceremonies to disseminate the truth. It expresses cultural sensitivity by endorsing a ceremony addressed specifically to the Asháninka, the translation of messages and letters to Quechua, Aymara, and Asháninka, and the renaming of schools with names of social leaders and civil authorities of such communities. The relatively poor dissemination of the CVR report in Peru sets a discouraging precedent. The situation in Guatemala is a bit better, as parts of the report have been translated into several languages. However, the promotion of a policy of exhumation is the only measure to dignify victims that the state seems to be promoting. In the meantime, payment to the ex-PACs has undermined the recognition of victims in many of the affected communities.

Third, we argue that, as important as the collective dimension may potentially be for signaling a political and social advance for indigenous peoples, as well as shoring up their trust in state institutions, it is nonetheless wise that the reparations programs remain highly complex. That is, they need to combine a large variety of reparations measures including individual compensation measures.[80] Whereas measures to redress communal resources, infrastructure, institutions, and trust give due visibility to the ways in which violence disrupts community life, a reparations policy that focuses only on a collective approach runs the risk of not giving individuals due recognition as individuals. It is important that the shift toward appreciating harms to social tissue and community life in Peru and to indigenous culture in Guatemala does not deprive individuals of their sense of full entitlement to basic individual human rights, regardless of their ethnicity and especially when indigenous peoples have been unable to enjoy full citizenship in the past. Perhaps because of this the option followed in both Guatemala and Peru to compensate all of the victims of the same type of violation with the same amount, rather than adjusting the payment in accordance with calculations of individual harms, ensures that the program avoids a potentially inegalitarian message, which could lead to resentment and divisions among victims to the large detriment of the poorest victims, who all too often are from rural or indigenous ancestry.

The existence of such diversity makes it all the more disheartening to see that, when it comes to implementation, both countries are not only failing in terms of the slowness of the process, but also betraying the comprehensive logic embedded in the programs. Peru first deviated from the comprehensive vision of the PIR-CVR to start implementing a multiyear program that focused only at the community level, thus conflating itself with development investment. It then came back to the comprehensive reparations project. But although the 2005 PIR-Law statute basically reproduces the conception of the PIR-CVR, Peru has thus far only timidly started to implement its collective reparations programs, something that, again, limits the recognition

[80] For the notion of complexity, see de Greiff, "Introduction," in de Greiff, *The Handbook of Reparations*.

effect of reparations. Guatemala, for its part, is on a different and somewhat opposite track, basically limiting itself to the handing out of checks and practically nothing else.

FINAL CONSIDERATIONS

Undertaking the challenge of crafting reparations that address the double victimization of indigenous peoples in postconflict societies is a daunting one. In these scenarios, reparations cannot just be about reverting oppressed indigenous peoples to where they were before the conflict began. Instead, affirming their condition as equal citizens may also require affirming the importance of their culture and communal life in ways that were never officially recognized before.

The cases we have examined here point to ways in which this challenge can be met, namely, by ensuring first of all the participation of indigenous peoples in all of the stages of a reparations policy, as well as their chances to access information about the programs and the actual benefits distributed. As we have seen, several factors may facilitate the participation of indigenous peoples in the process of designing and implementing reparations programs. These factors include, besides the outreach, consultation, and dissemination policies of the state, the degree to which indigenous peoples have formed or can rely on articulated civil society groups to advance their needs and priorities and the degree of consensus among them. The possibility of profiting from international influence favoring the recognition of indigenous rights can also be relevant, and this includes the impact such influence may have on the nonindigenous governmental elites often in charge of crafting reparations. Human rights NGOs not sufficiently attuned to the importance of cultural rights or group-based harm for indigenous people, internal division among indigenous organizations themselves, as well as centralized and nonparticipatory reparations processes may on the contrary be great obstacles to participation.

This participation of indigenous peoples may in and of itself be a desirable aim. It can, for instance, help ensure that the reparations measures included are sensitive to their experiences of the violations and ensuing harms. But participation may also contribute to building trust in state institutions that have all too often failed to recognize indigenous peoples both as distinct communities with unique cultural traditions and in their status as citizens of the state entitled to participate in state affairs.

In spite of the many virtues of participation, we should be aware of the risk of raising expectations. Extending an invitation to join in the dialogue and spelling out in great detail the differential impact of ordinary plus extraordinary violence may result in frustration and backlash when a highly sophisticated reparations program is developed that the state is then unable or unwilling to implement. In any event, the temptation to think that reparations programs can act as great engines of the kinds of structural changes needed to guarantee indigenous peoples' full and differentiated

citizenship, including resource redistribution and large-scale legal, political, and institutional reforms, should be avoided.

This, of course, is not to say that when choosing among competing options for the design of reparations programs one should forgo the possibility to at least signal progress in the desired direction. Signaling may fulfill, among other things, an important symbolic function. In fact, both the Peruvian and Guatemalan cases provide many examples as to how it could be done. The options include expanding the list of human rights violations that qualify for reparations to include the most serious violations of cultural and collective rights; selecting or prioritizing among the violations of civil and political rights those that have had a differential impact on individual and collective life of indigenous peoples; expanding the notion of beneficiaries to include not only individuals but also affected communities as such; choosing among benefits those that can better reflect the needs of and harms done to indigenous peoples, such as cultural reparations benefits, social benefits, or symbolic measures that address them both as citizens of the state and as indigenous peoples; and, finally, using egalitarian modalities of distribution of material benefits. The complexity of the reparations programs of both Peru and Guatemala (including material and symbolic, as well as individual and collective measures) may prove to have been their greatest asset.

Unfortunately, however, both of the case studies discussed in this chapter show also the limits of what even a properly crafted reparations program can do. Providing due redress to victims and taking modest steps toward transformations has been difficult absent serious commitment on the part of the state and ruling elites to the wider transformations that the crafting of a more inclusive political order would entail. The slow, partial, or null implementation of a reparations program can defeat whatever expectations its careful drafting might have generated.

Lack of consistency among a reparations program and other transitional justice measures, on the one hand, and other political options, on the other, can also limit the transformation potential of reparations policy to a minimal degree. Guatemala provides an interesting example of this. Although the Mayan genocide was recognized in the historical clarification process undertaken by the CEH, the government of President Berger failed to include it among the list of violations in its reparations program – much to the dismay of indigenous people's organizations, who felt the government was betraying them in so doing. Only with the election of a new president in Guatemala has recognition of the genocide become politically feasible. Including "acts of genocide" in the list of reparable harms is a big step forward. Still, it remains very unclear at this early date how the current recognition of genocide will affect the content and delivery of reparations in Guatemala.

More importantly, the insufficient implementation of the reparations program, the weak implementation of the peace agreements (especially of those concerning the rights of indigenous people), the failed constitutional reform that such

implementation required, and the persistent unwillingness on the part of the government to undertake the long needed land reform have surely frustrated whatever symbolic gain was achieved through the inclusion of indigenous peoples' concerns in the process of discussing reparations as well as through the difference-sensitive reparations program ultimately adopted.

2

Truth Telling, Identities, and Power in South Africa and Guatemala

Madeleine Fullard and Nicky Rousseau

In the mid-1990s, South Africa and Guatemala were among some seventeen countries that had instituted truth-telling initiatives in the form of truth commissions to examine past political conflict and violence.[1] By the end of 2008, this number had almost doubled, with several more waiting in the wings.

The first Latin American truth commissions were organized to respond mostly to state-directed violence toward individuals. Subsequent truth commissions, including those explored here, generally operated in more varied and fractured settings, where severe and multiple inequalities running along the tracks of race, ethnicity, region, religion, or class had been politically mobilized and had formed a key factor in political violence and human rights abuses. These latter contexts have placed a far greater burden of expectation on truth commissions in delivering wider social transformation, including the creation of democratic practices and a more inclusive citizenship.

The subsequent failure of these societies to resolve divisive forms of identity or identification, or to effect social transformation, has frequently led to criticism of the individual-human-rights-violation approach in such societies, and more widely of truth commissions themselves.[2] One strand of criticism has focused on questions of reconciliation, for which the key point of judgment is whether South Africa or Guatemala has successfully reconciled the parties to the conflict. In these assessments reconciliation is not understood simply as being between victim and perpetrator but in terms of ethnic or racial identity – black/white or Mayan/Ladino. The second set of assessments is driven by the apparent endurance of structural and

[1] This figure is based on the list provided in Priscilla Hayner's classic text, *Unspeakable Truths: Confronting State Terror and Atrocity* (London: Routledge, 2000). There is some debate about whether some of those listed should be regarded simply as enquiries, raising the question as to what constitutes a truth commission.

[2] See, for example, Greg Grandin and Thomas M. Klubock, "Editor's Introduction," *Radical History Review* 97 (2007): 1–10.

systemic forms of violence at an economic level. The main concern here has been the extent to which these truth commissions can reasonably be said to have illuminated and helped to transform these forms of violence.[3]

To some degree the differences between these assessments are reflective of divergent political perspectives and assumptions about nation building, which is closely associated with truth-telling initiatives such as official truth commissions. Those favoring the discourse of reconciliation tend to frame the role of the truth-telling initiative in terms of helping to reconcile opposing parties in the conflict through accommodation and the development of a consensual and official view of the past. Those favoring the second, more transformational approach tend to be more critical, arguing that truth commissions have functioned to narrow the "narration of violence and remedy,"[4] and have thereby blunted demands for a more thoroughgoing transformation and failed to address issues of social and economic justice, which are often at the core of identity-based violence. They criticize a nation-building agenda that, in their view, aims merely to install the liberal-democratic citizen as the subject of a political order that has been transformed in only limited ways.[5]

Although we are sympathetic to many of these critiques, we argue in this chapter that truth commissions can provide a stage for a potentially powerful encounter with the past (and present). Truth commissions' engagement with issues of citizenship, in particular, can open significant space for new public positions and forms of agency at the discursive level, even if their capacity to *effect* transformation in societies marked by wider patterns of marginalization and exclusion is limited (and in any event the expectation that they should do so is unrealistic).

TRUTH TELLING AND CITIZENSHIP

Truth commissions animate issues of citizenship in several ways. In contexts of state violence where secrecy and denial is the norm, receiving testimony, establishing what happened and who was responsible, and providing official acknowledgment of state culpability are all processes seen as vital in restoring dignity to victims and their families, thereby valorizing their status as citizens with rights. Where gross human rights abuse is associated with wider histories of exclusion and forms of structural violence, citizenship itself may have been denied. Thus the impact of a

[3] Although these two approaches frame many of the scholarly debates, truth commissions themselves, following Ignatieff, often opt for an even more modest measure, viz., their capacity to "reduce the number of lies that can be circulated unchallenged in public discourse." Michael Ignatieff, "Articles of Faith," *Index of Censorship* 25, no. 5 (1996): 11.

[4] Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," *Third World Quarterly* 29, no. 2 (2008): 276.

[5] See, for example, Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001); and Greg Grandin, "The Instruction of Great Catastrophe: Truth Commission, National History, and State Formation in Argentina, Chile and Guatemala," *The American Historical Review* 110, no. 1 (2005): 46–67.

truth commission can be to confirm or constitute a citizenship that has previously been denied, or even that is "yet to come."[6]

This is especially so where truth commissions hold public hearings.[7] Here, in an often highly publicized space, citizenship is more visibly engaged and performed and its differentiations challenged. Importantly, citizenship in this instance is not simply conferred by a truth body standing in for the state; rather it is enacted, demanded, and invoked by those testifying. Although these encounters are not without constraints (mandates and media representations, to name just two), they arguably constitute what Engin F. Isin, Greg M. Nielsen, and others refer to as "acts of citizenship," which challenge or rupture symbolic hierarchies and patterns of power. Such acts are collective or individual "deeds that . . . disrupt habitus, create new possibilities, claim rights and impose obligations in emotionally charged tones; pose their claims in enduring and creative expressions; and, most of all, are the actual moments that shift established practices, status and order."[8]

The focus on acts, following Isin and Nielsen, provides a different lens for understanding the meaning of citizenship, which is usually understood in terms of having rights, engaging in public activism, or having membership of an identifiable political or territorial community. Acts of citizenship focus rather on how citizens may be constituted through acts.

Truth-telling interventions led by civil society – such as the Recovery of Historical Memory Project [*Proyecto Interdiocesano de Recuperación de la Memoria Histórica*] (REMHI) as well as exhumations of victims of political violence in Guatemala – can similarly be seen through this prism. Although not all their acts are verbal or public and, in the case of exhumations, are frequently collective processes, they may be regarded as having a wider import, indeed constituting a form of address in which "subjects constitute themselves as citizens, or better still, as those to whom the right to have rights is due."[9]

From this perspective, it may be possible to view truth-telling initiatives as sites or vehicles through which such declaratory acts of citizenship may be performed – acts that prefigure different identities and future altered power relations. Although they may not actually redistribute power among unequal groups, they can do so discursively, on the symbolic level, by calling attention to inequalities of power.

Importantly, though, by using the concept of "acts of citizenship," we are not signaling the constitution of the liberal-democratic citizen that truth commissions are often said to produce. Instead we aim to signal a potentially more fluid field of

[6] Engin F. Isin and Greg M. Nielsen, "Introduction," in Engin F. Isin and Greg M. Nielsen, eds., *Acts of Citizenship* (London: Zed Books Ltd., 2008), 4.

[7] In this chapter public hearings are seen as an important methodology in constructing citizenship. At the same time, it should be noted that there is substantial debate about the psychological impact of testifying on individual witnesses that is not explored here.

[8] Isin and Nielsen, "Introduction," 10.

[9] Ibid., 2.

activity in which different modes of what it means to be a citizen may be enacted. Arising "from the paradox between universal inclusion in the language of rights and cosmopolitanism, on the one hand, and inevitable exclusion in the language of community and particularity on the other,"[10] the forms of citizenship enacted may be transgressive or remain circumscribed by race, ethnicity, gender, or religion. Whether they have a more radically transformative or conservative edge is shaped not only within the institution and life of the truth-telling initiative, but more broadly in its reception and aftermath.

TRUTH TELLING AND IDENTITIES

Implicit in this emphasis on citizenship is the suggestion that although both group and personal identities may seem to be stable over time, indeed representing what Frederick Cooper and Rogers Brubaker refer to in their critique of the term "identity" as "a terrible singularity,"[11] they are historically produced and reproduced in specific settings. This broadly constructivist approach – whose outlines are described in greater detail in Paige Arthur's introduction to this volume – suggests that truth commissions do not encounter stable, preexisting, singular identities.[12] Rather, they engage ongoing processes of identification – indeed, they interrupt them. Truth commissions require protagonists to think about the past (and present) in terms outside of the everyday, to apply a different and specific lens that disrupts the normal process of memory and recall, requiring them to think about their lives in new and different ways.

In some cases, the specific lens that truth commissions and other truth-telling initiatives propose – a seemingly universal one employing categories of victims, witnesses, and perpetrators – opens up new possibilities of identification and solidarity. In others, the terms of the encounter among actors may challenge the universal categories themselves, making them bear particular and specific local meaning in ways that may entrench or transgress the lines of the identity conflicts. As we argue, the encounter between the truth-telling initiative and those testifying is a transactional one, a negotiation between the terms of description each have set, a process not fully determined by either.

The debate about whether truth commissions should take on wider issues of structural violence is well rehearsed in the literature and will not be repeated here. However, it must be pointed out that this critique does have significant implications for truth telling and identities. It is not simply about whether truth commissions should be tasked with investigating systemic violence or held accountable for socioeconomic transformation. It is more pertinently about the citizenship that is

[10] Ibid., 11.

[11] Rogers Brubaker and Frederick Cooper, "Beyond 'Identity,'" *Theory and Society* 29, no. 1 (2000): 1.

[12] See Paige Arthur's "Introduction: Identities in Transition" in this volume.

visibly crafted through the truth-telling process and the identities that they alternatively admit or exclude.

In exploring the relationship of identities to political violence, Mahmood Mamdani criticizes approaches that explain violence through simple categories of cultural or class identity, arguing instead for an emphasis on the ways in which processes of identification are organized and mobilized for *political* ends.[13] In other words, identity matters not in and of itself, but when the meaning of difference is attached, mobilized, and organized as the basis of a political identity. This view places political power and contestation, as well as their particular histories, at the center of processes of identity formation and mobilization. In a similar vein, truth-telling initiatives may disrupt existing identifications because they are part of new alignments and struggles to reorganize power.

This line of thinking suggests that the possible outcomes of truth commissions and other truth-telling initiatives, in particular in relation to their intersections with and production of identities, are difficult to predict and not reducible to what their mandates may prescribe. This conclusion may not be particularly instructive to those considering or implementing a truth-telling initiative. However, what this chapter attempts to do is to examine two particular truth commissions, analyzing how these may be read in the light of the approach described earlier.

WHY SOUTH AFRICA AND GUATEMALA?

Several factors determined the choice of case studies. Both authors worked for the South African Truth and Reconciliation Commission (TRC) for the duration of its work. In addition, the work of the TRC has been especially influential in shaping subsequent initiatives and thus provides an important example. In seeking a comparative dimension, we thought a number of factors suggested Guatemala as a second choice.

Both South Africa and Guatemala face significant issues of systemic violence and ethnic and racial discrimination reaching back to the colonial period, and they rank among the most unequal societies in the world. Virtually coterminous, both truth commissions examined a remarkably similar period of political violence, violence that was overwritten by the context of the Cold War. Both truth commissions took place within larger projects of political, social, and economic transformation. And in each case, both post–truth commission contexts have seen either poor or sporadic implementation of the recommendations by the state – although this is hardly unique to these two. Both countries also continue to face problems of gross inequality and the persistence of racial identities.

[13] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001), chapter 1.

Neither commission set out to address identity issues within the conflicts under examination. However, the Guatemalan Commission for Historical Clarification [*Comisión para el Esclarecimiento Histórico*] (CEH) engaged far more extensively and directly with the question of racialized ethnic oppression and its historical roots. Indeed, it ultimately became the first and only truth commission to make a finding of genocide – one that directly links the commission's work to identity. By contrast, the South African TRC largely avoided issues of race, although as this chapter argues, accounts of race and wider apartheid violence are embedded in the commission's work in multiple forms.

In addition to these distinct approaches, both followed different paths owing to specific contexts and constraints. Whereas the TRC operated in the full glare of media, the CEH took place behind closed doors, resulting in a different weight being given to different methodologies and a different capacity to engage with identity-based issues. For the TRC, the public hearing was the key place where identities were performed and citizenships enacted; for Guatemala, it is through the CEH report and other associated but independent truth-telling initiatives that these processes took place.

South Africa and Guatemala thus present circumstances that resonate with each other yet also demonstrate different trajectories.

GUATEMALA

Issues of identity and ethnically exclusionary citizenship are at the core of heated debates around interpretations of Guatemalan history, the internal armed conflict, the peace process and the associated truth commissions, as well as indigenous pan-Mayan mobilization.

The thirty-six years of armed conflict in Guatemala that ended in 1996 were only the culmination of centuries of conflict over racialized inequality and dispossession of the indigenous people dating from Spanish colonial rule in 1524. Independence from Spain in 1821 saw political and economic power increasingly dominated by a small Ladino elite who established authoritarian rule in alliance with the military.[14]

The marginalization of the indigenous populations in all social, cultural, economic, and political respects has been described as a "de facto apartheid."[15] The national image or identity of Guatemala has long been one in which indigenous people ("indios") were invisible, despite making up between 40 and 60 percent

[14] Ladinos are the "mestizo" heirs to the Spanish colonial powers, who retain a strong identification with Spanish cultural heritage.

[15] Suzanne Jonas, *Of Centaurs and Doves: Guatemala's Peace Process* (Boulder, CO: Westview Press, 2000), 19.

of the population.[16] Although “Ladino” and “indigenous” are today the two key ethnic markers in Guatemala, each has its own contested histories, and their current coherent ascriptions hide significant shifts and historical differentiations. Guatemala has also experienced opposing impulses between a modernist assimilation strategy, through which indigenous people could “become Ladino,” and a more powerful history of segregation.[17]

Opposition to the closed political space following a 1954 U.S.-sponsored coup led to the development of an armed conflict in the early 1960s. The guerilla war, waged in the context of the Cold War, led to sustained and devastating state repression against both insurgent and emergent civil opposition groups. The insurgent organizations were Ladino-dominated and operated within a classic Marxist class approach, but they increasingly sought to situate the historical and systematic ethnic oppression of indigenous communities, notably Mayan, in their social analysis. Indeed, in arguing that “prior to the war, Mayans were not ‘Mayans,’ they were usually called ‘indios,’” Guatemalan academic Arturo Arias suggests that Mayan identity was constituted through the war.[18]

Violence peaked during the period 1981 to 1983 and moved beyond the individualized abductions, torture, and killings that had previously characterized the conflict. This escalation precipitated the emergence of victim and support organizations that, as elsewhere in Latin America, mobilized around “the right to truth.”

In order to eliminate the guerillas and destroy their social base, the military conducted a veritable scorched-earth policy, chiefly targeting the rural, indigenous population and making no distinction between civilian and combatant. All in all, the violence resulted in the killing of some 200,000 people, mainly indigenous, and the destruction of more than 400 villages, with their populations massacred, displaced, or forcibly relocated into military-controlled villages.[19] Another approximately 200,000 people, mainly Mayan peasants, fled the country. One observer has also argued that the efforts by the military to selectively incorporate and decimate various forms of indigenous cultural practices in order to conscript Mayans into

[16] The question of population figures for indigenous people in Guatemala is a highly contested one, with figures ranging from as low as 40 percent to over 70 percent. See discussion in Corinne Caumartin, “Racism, Violence, and Inequality: An Overview of the Guatemalan Case,” *CRISE Working Paper*, no. 11 (March 2005): 12–15.

[17] Both Ladino and indigenous populations historically contain multiple subgroups (and languages, in the case of the indigenous groups). For example, the term “indigenous” includes Mayan, Garifuna, and Xinca groupings.

[18] Arturo Arias in Charles Hale et al., “Current Anthropology Forum on Anthropology in Public: Consciousness, Violence, and the Politics of Memory in Guatemala,” *Current Anthropology* 38, no. 5 (1997): 8.

[19] There is extensive academic and activist debate regarding the choices and identities of the indigenous population during the armed conflict, a fractious literature that alternatively depicts them as insurrectionaries or as neutral parties “trapped between two armies.”

a Ladino-defined Guatemalan nationhood constituted a form of "ethnocide."[20] In particular, the large-scale recruitment of all males into the Civil Defence Patrols under the military, which were subsequently deployed in perpetrating violence against their own communities, devastated the rural areas.

The Peace Process and Negotiations

The UN-led peace process between the Guatemalan state and the umbrella grouping of the four insurgent organizations – the Guatemalan National Revolutionary Unity (URNG) – unfolded over a full decade from 1986 to 1996, involving ten separate accords and culminating in a final agreement in December 1996. The leadership of both the state and the URNG conducting the negotiations were largely Ladino – indigenous and civilian voices were confined to input of proposals through the Civil Society Assembly (ASC), a structure designed to enable civil society participation in the substantive matters under negotiation. The process of negotiations was strongly shepherded by the UN, whose crucial role in sustaining the peace process as a virtual third party at the negotiating table points to significant internal weakness within the Guatemalan state, the insurgent groups, and civil society in sustaining the transition.[21] The UN's peacekeeping mission, known as the UN Verification Mission in Guatemala (MINUGUA), would ultimately remain in Guatemala until 2004 to monitor and facilitate implementation of these accords.

Far more than a simple operational plan for the termination of hostilities and demobilization, the peace accords sought to provide a comprehensive national program of reform, peace, and development. They included seven substantive agreements to redress the structural political, socioeconomic, and cultural inequities that undergirded racist and exclusionary Guatemalan society. These agreements were framed in the language of the increasingly dominant international human rights movement of the early 1990s, as well as the emergent indigenous rights movement.

The agreement on the establishment of the Guatemalan truth commission, formally termed the *Establishment of the Commission to Clarify Past Human Rights Violence and Acts of Violence that have Caused the Guatemalan Population to Suffer*, formed part of this ensemble of surprisingly radical measures aimed at reforming Guatemala's political, economic, and social landscape. One of the most contested accords, the CEH has been described as a "concession to international norms" – norms not internalized by the two negotiating parties.[22] Located in this

[20] Anika Oettler, "Guatemala in the 1980s: A Genocide Turned into Ethnocide?" *GIGA Working Papers*, no. 19 (2006).

[21] Marcie Mersky, "Human Rights in Negotiating Peace Agreements: Guatemala," *International Council on Human Rights Policy* (working paper, ICHRP, Belfast: 2005), 14.

[22] Anika Oettler, "Encounters with History: Dealing with the 'Present Past' in Guatemala," *European Review of Latin American and Caribbean Studies* 81 (2006): 5.

wider envisaged transition, the CEH was thus not a creation of the Guatemalan state or legislature, but a UN-sponsored and -overseen body, although it reported also to the state and the URNG.

Two Forms of Truth Commissions

A mere two pages long, the accord that established the CEH specified a mandate that was both wide and highly restrictive:[23] wide in the sense that it was to address all human rights violations and acts of violence during the thirty-six years of conflict, but restricted in that it granted only six to twelve months to conduct this all-encompassing brief. The failure of the mandate to specify what forms of violence should be addressed ultimately enabled the CEH to address directly the ethnicized character of violence.

The powers of the CEH were viewed as profoundly limited – it had no powers of subpoena or search and seizure, it could not name individual perpetrators, and its report would have no legal standing in court procedures. In addition, a Law of National Reconciliation, enacted in December 1996, provided immunity for politically motivated acts by both state and guerilla forces, excluding, among other crimes, genocide, torture, and forced disappearance.

These apparent constraints on the CEH led to a civil society initiative sponsored by the Catholic Church to hold an "alternative" truth commission process known as REMHI. Guatemala thus ultimately experienced two formal truth-telling initiatives, an unofficial one initiated and run by civil society, and the official CEH thereafter. The REMHI project began in 1994 and lasted for three years, involving some 800 volunteers. Its reach and impact on rural indigenous communities was extensive. REMHI's strong focus on breaking cultures of silence and fear through "speaking out," combined with its powerful religious authority in a predominantly Catholic country, provided an impetus and legitimacy to the act of testifying. Its work also laid the basis for the construction of a collective memory of violence among indigenous communities, which formed an important component of the pan-Mayan movement. All in all, REMHI interviewed nearly 7,000 victims and gathered over 5,000 testimonies. The accounts of over fifty thousand victims were documented.[24]

REMHI's grassroots work, community networks and four-volume report, entitled *Guatemala: Nunca Más* (Guatemala: Never Again) and handed over in April 1998, provided the CEH with a significant complementary base of work and staff to draw upon. In addition, other segments of civil society, including an NGO coalition and victims groups, produced data banks of human rights violations and gave these to the

[23] English translation of the accord establishing the CEH is available at www.c-r.org/our-work/accord/guatemala/historical-clarification.php.

[24] Roberto Cabrera, "Should We Remember? Recovering Historical Memory in Guatemala," in Brandon Hamber, ed., *Past Imperfect: Dealing with the Past in Northern Ireland and South Africa* (Northern Ireland: INCORE/UU, 1998), 25–30.

CEH.[25] Thus, initial opposition to the CEH's constraints translated into a wider set of truth-seeking processes among other social groupings, which the CEH was able to mobilize and utilize. REMHI's memory work with victim communities continued even after the finalization of its report.

The Work of the CEH

The CEH, a hybrid of international and national staff, was headed by a German law professor and supported by two Guatemalan commissioners. The accord establishing the CEH had specified that of these two one should be an academic and the other a "citizen of irreproachable conduct." Similarly to South Africa, the appointment of a Ladino (male) and a Mayan (female), respectively, to these positions projected an image of demographic balance. However, the same was not true of the CEH staff, who numbered some 300 at the commission's peak and who were evenly split between foreigners and local Guatemalans. It appears that few of the Guatemalan staff were themselves indigenous, aside from mainly translators taken on board to improve the outreach to indigenous communities.

The CEH's work was composed of a phase of institutional establishment, a six-month period of investigations, a phase of data analysis, and a report-writing phase. In its fieldwork-investigative phase, begun in September 1997 from fourteen field offices, more than 7,000 interviews were conducted with individual victims and groups across the country. Dozens of civil society organizations also made submissions. The United Nations provided significant logistical and personnel support. Funding for the CEH primarily came from international donors and sympathetic countries, with less than 10 percent of the budget coming from the Guatemalan government.

There was considerable debate and discussion over how to interpret the unspecified and broad mandate. Ultimately, the CEH chose to focus on violations that had incurred grave physical harm. Although the enabling accord did not specify a particular focus on historical ethnic and racial discrimination, the mandate's broadness and prohibition on naming individual perpetrators allowed an approach more attentive to historical questions of racialized and discriminatory identities.[26] In part, this interpretation of the mandate came in response to pressure from various civil society and indigenous groups. Several commentators have noted that the growing mobilization of indigenous Mayan organizations enabled civil society to engage with the CEH and firmly place the question of racism and genocide within its interpretive framework.[27]

[25] Oettler, "Encounters with History," 5.

[26] Greg Grandin has commented that this ambiguity in the looser mandate "allowed the commission to define its work broadly and to use social science and historical analysis to a greater extent than did previous truth commissions." Grandin, "The Instruction of Great Catastrophe," 13.

[27] Ibid., 59.

Shortly after it commenced operation, the CEH began a publicity campaign through radio and posters with the slogan "Es Tiempo de Decir la Verdad!" (Now is the Time to Tell the Truth!).[28] However, as the accord specified that the proceedings of the CEH should be confidential in order to guarantee the secrecy and safety of sources and witnesses, the CEH's work took place behind closed doors. Statements from victims – who were overwhelmingly Mayan – were confidential, as was the minimal information gleaned from perpetrators. There were no public hearings and hardly any media coverage, although one public forum was held to elicit contributions to the report's recommendations. In this respect, the CEH was the direct opposite to the South African TRC.

Consequently, it is somewhat difficult to reflect on the identities articulated by victims and other participants. Although the CEH report contains examples and excerpts of testimonies, these are fragments selected and culled from longer narratives. This more limited public engagement precluded a more visible and national exchange and circulation of narratives that could impact on and perhaps shift perceptions of the conflict and associated identity positions.

Given this veil of secrecy, the CEH's public presentation of its findings in a twelve-volume report, *Memoria del Silencio* (Memory of Silence), on February 25, 1999, was its chief public moment, and something of a bombshell. Presented to a large public assembly including the state, civil society, and victims' groups, the report far exceeded civil society's low expectations. It found that some 200,000 persons had been killed or had disappeared during the conflicts. Of the recorded deaths, 93 percent of these were at the hands of the state or other bodies related to the state. Only some 3 percent of the deaths were attributed to insurgent groupings. Most significantly, Mayans made up 83 percent of all cases recorded by the CEH, an overwhelming majority, and they were the chief target of the 624 recorded massacres.

The most dramatic and shocking finding was that "agents of the State of Guatemala, within the framework of counterinsurgency operations carried out, between 1981 and 1983, acts of genocide against groups of Mayan people" in four regions.[29] The CEH was the first and indeed only truth commission to make a genocide finding.

The CEH's report placed historicized identities and socioeconomic discriminations both center stage and center page in its work and report, thus significantly widening the borders of the landscape of violence to be addressed. The report's first volume was devoted to historical analysis of the causes of the violence that the CEH examined, as well as the reasons for the state's ferocious violence against

[28] Amy Ross, "The Creation and Conduct of the Guatemalan Commission for Historical Clarification," *Geoforum* 37 (2006): 77.

[29] Commission for Historical Clarification, *Guatemala Memory of Silence: Conclusions and Recommendations*, English translation (Washington, DC: AAAS, n.d. [note that the original Spanish-language report was published in 1999, but AAAS does not give a date for this shortened translation]); available at shr.aaas.org/guatemala/ceh/report/english/toc.html. Hereafter, cited as CEH, *Memory of Silence*.

the Mayan people in particular. It cited a litany of statistics of inequality that mark Guatemalan society and outlined the deep systemic roots and structural causes of the violence, including racial injustice and political authoritarianism, stating bluntly that "political violence was thus a direct expression of structural violence."[30]

The genocide finding marked a collective identification of Mayan people as victims – at least, in certain places and times. Coinciding with the emergence of an increasingly vocal and organized "pan-Mayan" movement of indigenous communities and indigenous women in Guatemala, the report and its findings placed Mayans center stage in a national context in which they were largely invisible. As such, the report can be seen as a key *official* text constituting and consolidating Mayan identity at both national and international levels, authoring and authorizing key elements of the historical narrative of the Mayan account of oppression. This affirmatory act transgressed the racialized hierarchical citizenships historically embedded in Guatemala. The CEH report is one of the first national documents in which indigenous people form an integral part of an account of Guatemalan history.[31]

Reception and Legacy of the CEH and Its Report

Although victims, NGOs, and elements of civil society enthusiastically welcomed the findings and recommendations of the CEH report, the official reception by the state was largely grudging and negative, and the finding of genocide was specifically rejected. The military, who had offered little cooperation to the CEH, remained hostile and similarly rejected the finding of genocide.

Given its time constraints, the CEH's reach could be only limited and partial. One commentator has called the participation of victims and survivors in the CEH "brief and superficial,"[32] particularly in rural areas. The report constituted the main form through which its work obtained a wider public circulation. Public truth telling thus took place overwhelmingly through text, and testimony was localized to statement taking. Despite translation of parts of the report into five Mayan languages, the report as a written product in a multilingual society with low literacy levels clearly remains inaccessible. A Mayan activist in indigenous and women's organizations has commented that "we need to *say* the truth, it's not only a question of having it written down."[33] Two years after its publication, the CEH Report was described as having had a "negligible effect on public life."[34]

[30] CEH, *Memory of Silence*, "Conclusions," point 8.

[31] Oettler, "Encounters with History," 14.

[32] Paul F. Seils, "Reconciliation in Guatemala: The Role of Intelligent Justice," *Race and Class* 44, no. 1 (2002): 36.

[33] Maria Toj, based on Nicky Rousseau's personal notes from a presentation given at the Conference on the Challenges of Reconciliation: Truth, Justice and Repair, Haverford College, Philadelphia, 16–17 April, 2004.

[34] Seils, "Reconciliation in Guatemala," 36.

Nevertheless, some commentators suggest that the CEH report did help open social space for the previously taboo discussion of Guatemala's violent past – racism, discrimination, and the integration of indigenous population into the representation of the Guatemalan nation. One outside observer views it positively as a "foundational historiographic text" that can help build a "multicultural Guatemalan self-image" and serve as a "counterweight to other narratives circulating in public discourse."[35]

Elizabeth Oglesby has described some relatively small-scale outreach efforts, including developing education curricula and organizing debate and distribution initiatives.[36] However, she suggests that the report has been used mainly in efforts to build a "culture of peace" narrative that depicts Guatemala's violent past primarily through horrific "tales of death" rather than a historicized account of ethnic subordination and discrimination. The end point of this narrative becomes the triumph of democracy (itself still rather debatable in the case of Guatemala), which does not necessarily include the need for redress and broader social change. Although building and promoting democracy is indeed necessary and invaluable, this discursively delinks ethnicized violence from other forms of structural violence, most notably socioeconomic violence, removing the more radical thrust of the CEH report.

Although the public reach of the CEH and its report has been limited, other modes of truth telling were mobilized or engaged through its work. One powerful and visible form of truth telling in Guatemala that preceded, intersected with, and continued after the CEH has been the recovery of human remains of victims killed in the conflict, primarily in the highlands.[37]

The conclusions of the CEH report speak vividly to the importance of recovery of the dead, describing how Guatemalans were prevented by the circumstances of violence from observing death and burial rites:

> For all cultures and religions in Guatemala, it is practically inconceivable that the dead not be given a dignified burial; this assaults everyone's values and dignity. For the Mayans, this is of particular importance due to their core belief in the active bond between the living and the dead. The lack of a sacred place where this bond can be attended is a serious concern that appears in testimonies from many Mayan communities.[38]

In its recommendations, it described exhumations as "an act of justice and reparation and . . . an important step on the path to reconciliation" and called for a public and active policy and program of exhumations.[39]

[35] Anika Oettler, "Encounters with History," 14, 16.

[36] Elizabeth Oglesby, "Educating Citizens in Postwar Guatemala: Historical Memory, Genocide, and the Culture of Peace," *Radical History Review* 97 (Winter 2007): 77–98.

[37] By 2005, for example, the Guatemala Forensic Anthropology Foundation, one of several such teams in the country, had conducted 946 forensic investigations and 530 exhumations in sites across the country. See www.fafg.org, and Julie Stewart, "A Measure of Justice: The Rabinal Human Rights Movement in Post-war Guatemala," *Qualitative Sociology* 31, no. 3 (2008): 231–50.

[38] CEH, *Memory of Silence*, "Conclusions," point 53.

[39] See CEH, *Memory of Silence*, "Recommendations," 28–31.

The investigations conducted into the whereabouts of burial sites usually involve the recording of testimony and witness accounts. The subsequent forensic exhumations, often involving mass graves, speak powerfully of the past violence and its victims and thus constitute a form of truth telling, albeit nonverbal and mediated through forms of forensic examination. The visual power of the exhumed human remains, often women and children, acted as testimonial counterimages to military denials, through which private memory of loss could be transferred to public space through the publicity and community interest it often generated.

Mobilization around the call for exhumations and dignified reburials according to appropriate rites has become widespread in rural Guatemalan communities affected by massacres and killings.[40] Several forensic groups now exist, and NGOs have formed to provide psychological and emotional support to persons and communities participating in exhumations. Through the study of the community of Rabinal, which experienced amongst the worst massacres, Julie Stewart has highlighted how this mobilization has built a collective identity at the local level, and contributed to broader democratization in Guatemala, through consciousness of civil and political rights that include the right to publicly mourn and bury the dead, the rights of recognition by the state, and the rights of protest and demand. She points to the cultural and expressive benefits of the process of mobilization itself, through which Rabinal activists have restored their sense of agency and identity.

Another commentator accords this mobilization as perhaps having a greater impact than that of the CEH, as a form of truth telling that visibly validates and confers authority on their accounts of past violations and achieves concrete outcomes:

> The process of exhuming the dead has had a profound effect on rural consciousness and power relations within communities. Arguably, this process has greater implications than events in the capital, or the experience of sharing one's story with a foreign testimony-taker.[41]

The CEH was ultimately one of the more successful outcomes of the peace accords, surprisingly exceeding the expectations of victim and civil society groups. However, the CEH's own recommendations have seen minimal implementation. Impunity has largely continued through the absence of prosecutions, except in a handful of cases due to the tenacious mobilization by families and communities.

The remaining peace accords have also had weak and uneven implementation. Despite their focus on the reform of the historic inequalities at the root of Guatemalan conflicts, and a truth commission that emphasized ethnic discrimination and the need to transform racist relations, Guatemala has not seen significant change at the political, economic, or social levels, rendering its political transition and contested transformation far weaker than those of South Africa.

[40] This work has also been affected by ongoing security threats. Guatemalan forensic anthropologists received death threats and other forms of intimidation during their work.

[41] Ross, "The Creation and Conduct," 80.

Although this outcome could be used to argue that truth commissions are not well placed to engage with systemic violence, it is more directly the consequence of a weak and corrupt Guatemalan state that has little investment in the success of the peace accords. Transformation continues to be a marginal project propelled by those outside the state. There have been resurgent threats and attacks against individuals and groups connected to social change, accompanied by a dramatic rise in violent crime affecting civilians.

Yet this weak transition has been accompanied by the strengthening of a pan-Mayan movement as well as a largely indigenous women's movement – both given additional momentum by the CEH. However, this emergent Mayan movement, as well as its reception by both the Guatemalan state and the human rights movement, is itself highly contested. There are distinct disagreements within Mayan groups as to what constitutes "Mayanness." Neither has the growing strength and numerical presence of the indigenous movement translated into political power at national level.

In this context, the pan-Mayan movement's focus on cultural rights rather than economic demands places particular constraints on their transformative project. Some argue that the pan-Mayan movement's focus on demands for cultural rights permits the "paradox of simultaneous cultural affirmation and economic marginalization."[42] The new discourse of human rights and multiculturalism has been powerfully legitimated by the CEH in its call for a "new democratic and participatory nation that values its multiethnic and pluricultural nature."[43] This discourse may enable wider democratization and citizenship, but it may also be easily accommodated by an elite that does not have to address the need for other forms of structural change, and thus places narrow limitations of what constitutes meaningful citizenship in postconflict Guatemala.

SOUTH AFRICA

The first democratic elections held on April 27, 1994, marked the formal transition from white rule to democratic government in South Africa. The history of racial exclusion in South Africa has popularly been understood through the lens of apartheid, the system of rule associated with the white National Party that governed South Africa from 1948 to 1994. Yet racialized forms of domination in the region cannot be reduced to apartheid; rather, they are part of longer histories of exclusion and marginalization constructed along the lines of race, class, ethnicity, religion, and gender. These include histories of slavery and other forms of servitude, the

[42] See Charles Hale, "Does Multiculturalism Menace? Governance, Cultural Rights and the Politics of Identity in Guatemala," *Journal of Latin American Studies* 34, no. 3 (2002): 485–524. See also John-Andrew McNeish, "Beyond the Permitted Indian? Bolivia and Guatemala in an Era of Neoliberal Developmentalism," *Latin American and Caribbean Ethnic Studies* 3, no. 1 (2008): 33–59.

[43] CEH, *Memory of Silence*, "Conclusions," point 79.

violent subjugation of various indigenous peoples and polities including the genocidal extermination of nomadic communities, and the particular racialized forms of peripheral capitalist development.

As a massive social, economic, and political engineering project, apartheid penetrated every aspect of life and determined economic, civil, and political rights through skin color. No black person was exempt from the strictures of apartheid from cradle to grave through the system of racial classification, the pass laws, and its associated systems of migrant labor. Every South African was racially classified, with blacks also ascribed to one of twelve ethnic groups. These ethnicities formed the basis for citizenship in "tribal homelands" and the accompanying loss of citizenship in "white South Africa." Whites, constituting only some 12 percent of the population, exerted exclusive control of the economy, in which black people were to serve only as a cheap labor reserve.

The liberation movements, banned in 1960, were forced into exile, from where they waged a limited armed campaign. State repression, framed in the language of Cold War anticommunism, was initially successful in shattering underground networks and internal resistance. From the 1970s, waves of mass local protests, including labor unrest, and the emergence of internal antiapartheid organizations unleashed further repression. Ultimately, political violence in the thirty-four years from 1960 to 1994 saw some 25,000 South Africans killed. In the wider Southern African region, neighboring countries faced deadly raids and punitive measures for hosting the liberation movements, as well as civil wars encouraged and sponsored by the South African state in which hundreds of thousands were displaced or killed.

Although this violence has largely been represented within a "resistance and repression" narrative in which the actors were antiapartheid liberation movements and the white apartheid state, this binary belies more fractured and complex conflicts. Nearly three quarters of those killed died in the final four years of apartheid rule from 1990–1994 as a result of intercivilian clashes, covertly encouraged by the state, within black communities.

Political identities associated with the struggle against apartheid were generally not articulated through the lens of racial conflict. Particularly from the 1980s, they were predominantly mobilized within a nonracial or antiracist framework that regarded race and ethnicity as illegitimate constructs and that frequently incorporated elements of class-based identities

The transition to democratic rule in 1994, following four years of multiparty talks, was the result of a political compromise in the absence of victory for either the apartheid government or the liberation movements. Unlike Guatemala, the transition in South Africa was brokered directly by parties involved in the conflict, and the TRC was similarly a domestic initiative. Importantly, the TRC was but one of a range of institutions and policies in an extensively envisaged social, political, and economic transformation program. A new Constitution was drafted, widely regarded as one of the most progressive in the world, with twin mandates, namely,

to undertake redress and build a single nation.[44] Commissions on Human Rights, Gender, and Youth were established; a Land Commission was mandated to deal with redressing the injustices of forced removals. A Reconstruction and Development Program aimed to ensure that every component of government policy and practice was directed toward development aimed at redressing past inequalities.

Within a few years of the transition, an arsenal of legislation was put in place to address racial, gender, and disability discrimination, as well as to promote black economic empowerment and representation through affirmative action. These efforts were bolstered by new institutional infrastructure and the allocation of considerable resources.[45] However, these multiple initiatives have become highly contested, with critics contending that they have been ineffective and, at best, have benefited a newly emerging black elite.

The South African Truth and Reconciliation Commission

The TRC was framed by the various concessions reached during the period of multiparty talks. The former apartheid government secured a last minute agreement to some form of amnesty for politically motivated offenses. This amnesty compromise was later linked to the idea of a truth commission, thus connecting the question of amnesty to the broader concerns of truth recovery and reparation, and also providing a platform to deal with both victims and perpetrators.[46] In the context of ongoing violence between the Inkatha Freedom Party (IFP) and the African National Congress (ANC) in South Africa's most populous region and the fear of a racial war between white and black, the TRC was also seen as a vehicle of nation building and reconciliation.

Despite this broader political intent, the range of violations covered in the TRC's mandate remained within the realm of physical violations, namely, killings, torture, abductions, and severe ill-treatment committed by all parties to the conflict between March 1, 1960 and May 10, 1994. Its mandate was never to investigate the policies and practices of apartheid but rather to address the violations that arose in the struggle against apartheid.

The TRC officially began operation with the president's appointment of seventeen commissioners in December 1995. The commissioners were recommended by a panel that had overseen a fairly wide and transparent process of nomination, interview, and selection. In addition to commissioners and committee members, the

44 Kristina Bentley and Adam Habib, "Racial Redress, National Identity and Citizenship in Post-apartheid South Africa," in Kristina Bentley and Adam Habib, eds., *Racial Redress and Citizenship in South Africa* (Cape Town: HSRC Press, 2008), 9.

45 Bentley and Habib, "Racial Redress," 20.

46 Graeme Simpson, "'Tell No Lies, Claim No Easy Victories': A Brief Evaluation of South Africa's Truth and Reconciliation Commission," in Deborah Posel and Graeme Simpson, eds., *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: University of Witwatersrand Press, 2002).

TRC consisted of four regional offices and a national office based in Cape Town, with up to 350 staff employed to run information, media, investigation, research, and other units. In contrast to other commissions, the TRC was entirely locally staffed, barring a few foreign investigators from European countries, and was funded by the national fiscus, with the exception of some specific projects that received foreign funding.

The selection and appointment of persons to the TRC tended to take notions of representativeness into account at every stage, in order to demonstrate racial, gender, and political balance. Indeed, two additional commissioners were added by President Nelson Mandela to ensure what he regarded as a more appropriate racial and political balance, a balance equally sought in the appointment of committee members and staff. This enactment of a "rainbow" nation aimed to give the TRC credibility among contending political parties and the wider public. TRC Chairperson Desmond Tutu described the process of electing committee members: "We were very careful to ensure the broadest possible representativeness in those we nominated, taking into account gender, race, geography, political, cultural, linguistic, etc factors. We were particularly concerned that we would have someone from the Afrikaner Community who would strengthen the input from that grouping that would be provided by the two Afrikaner Commissioners."[47]

In a similar accommodation, the time span of the TRC's legislated mandate had initially ended with the adoption of the Interim Constitution in 1993. Parliament later shifted this closing date to May 1994 at the request of the TRC. The change was made in order to include the significant wave of pre-1994 election violence, as an act of outreach to the organizations (mainly the white and black right-wing groupings) involved in that period as both victims and perpetrators.

The TRC formally began its work in early 1996 with an original eighteen-month life span. This period was extended until 1998, when all but the amnesty component run from the national office closed down. In October 1998, the TRC submitted the first five volumes of its report to the government, and the final two volumes were completed after the end of the amnesty process in 2001 and handed to the government in 2003. Some 22,000 human rights violations statements were made to the TRC, as well as 7,000 amnesty applications submitted, of which only roughly 2,000 were deemed to fall within the TRC mandate.

In sharp distinction to the Guatemalan CEH, the TRC dramatically moved much of its work into the public domain, holding public hearings for both victims and amnesty applicants. Some 2,000 victims testified in hearings held across South Africa, and a similar number of amnesty applicants spoke of their involvement in

[47] Desmond Tutu, "Foreword," in Piet Meiring, *Chronicle of the Truth Commission* (Vanderbijlpark: Carpe Diem Books, 1999). However, one commissioner later privately commented that the selection of Amnesty Committee members had perhaps focused too much on race and gender balance rather than the kinds of legal practitioners best suited to developing international human rights jurisprudence through the amnesty process.

political violence before the public and media. Special hearings were convened to question both political parties and their armed wings regarding their motives, policies, and actions. Different sectors of society including the judiciary, media, faith communities, and business were summoned before special "sector hearings" and questioned regarding their role and complicity in enabling a climate of human rights abuse. Here, to a limited extent, questions of racism and economic inequality were addressed.

A reparations policy proposal was prepared and included in the TRC's report. This policy, as well as the recommendations of the TRC, significantly included proposals dealing with wider issues of redress and social inequity.

The TRC found the primary perpetrator of gross human rights violations to have been the South African state and its security agencies, followed by an ethnically mobilized traditionalist organization, the IFP, with whom it also colluded. Although the TRC accepted that apartheid was a crime against humanity and that the ANC and other liberation movements had fought a just war against it, certain limited activities they had taken in the course of the armed struggle had constituted gross human rights violations. Beyond this conclusion, sectors of civil society were also found to have enabled and facilitated the context in which these gross human rights violations were committed.

Constructing Victims and Perpetrators

The terms and categories the TRC adopted served to organize, summon, and exclude particular identities. For example, the TRC's enabling legislation was written in the universalist language of human rights, that is, victims and perpetrators. Yet, as the TRC itself noted, many political activists were uncomfortable with the label "victim" and declined to make statements. Instead, it was family members, largely female, of young dead activists and the many hundreds of ordinary civilians caught in the violence who dominated testimony and articulated the terms of past violence. This delimitation meant that it was predominantly ordinary citizens, rather than activists, who narrated identity within the TRC. It also resulted in significant exclusions and silences – such as hardly any torturers being named in statements received in the Western Cape, despite many instances of torture.

In addition, liberation movement members, with proud identities as freedom fighters against apartheid, were deeply unhappy at being classified "perpetrators" in an amnesty process that drew no distinction between those supporting and those resisting apartheid. Despite this apparent moral equation, the ANC eventually did agree to facilitate amnesty applications from their members, although some refused to participate.

However, perhaps the most significant exclusions were those violations directly associated with race and the everyday violence of apartheid. Organized political action and violence were privileged in their place. Perpetrators could not get amnesty

for racially motivated violations, nor were victims of racially motivated attacks considered to be victims of gross violations of human rights. Thus, black farm workers who experienced brutality and killings at the hands of white farmers were turned away from the TRC. Similarly, those affected through the daily violence associated with the implementation of apartheid fell outside of the mandate. As a result, if a victim's house had been burnt down by a political opponent, he or she could qualify for TRC consideration, whereas if a victim's house had been bulldozed by the state as part of apartheid's forced removals of some five million people, he or she could not.

This exclusion of racist and apartheid violence was contested by a civil society lobby that argued that the category of "severe ill-treatment" offered the TRC significant space to examine systemic and other violence used to enforce apartheid.[48] Gender activists argued that not only did patriarchy keep women out of politics, but the gendered nature of apartheid placed a greater burden on women, particularly rural women, whose daily struggle to sustain families wrenched apart by migrant labor, exile, and imprisonment, as well as the direct violence of pass arrests, forced removals, or domestic violence, would be rendered nonpolitical and invisible.[49] Thus, by focusing only on direct political action, women would slip through the net and the TRC's dominant victim figure would be a male political activist.

This critique was to some degree taken on board by the TRC through the sector hearings and the special women's hearings. Nevertheless, these inquiries did not constitute an examination of the full breadth and devastation of apartheid's violence.[50] The TRC was accused of rendering invisible both acts of direct racial abuse and the psychological violence inherent in racialized privilege and power reenacted daily in South African lives and deaths. As a result, although framed in the terms of a wider reconciliation in a racially divided society, the TRC rarely addressed racial identities directly. A key critic of the TRC, Mahmood Mamdani, argued that confining the reconciliation project to one between political activist and state agent allowed a broader white South African public, whose beneficiary status had been excluded, "off the hook." Indeed, he suggested, they were able to feel a righteous sense of moral outrage at the brutality of the state without having to acknowledge any complicity or benefit from centuries of segregation and oppression.[51] In short, the TRC failed to face up to race, along with several other key constitutive elements

[48] See the submission by a coalition of NGOs, "Submission to the Truth and Reconciliation Commission Concerning the Relevance of Economic, Social, and Cultural Rights to the Commission's Mandate," 1997; available at www.doj.gov.za/trc/submit/esc6.htm.

[49] See Beth Goldblatt and Sheila Meintjes, "Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission" (1996); available at www.justice.gov.za/trc/hrvtrans/submit/gender.htm.

[50] See Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, vol. 4 (Cape Town: TRC, 1998). Hereafter cited as TRC, *Final Report*.

[51] Mahmood Mamdani, "Reconciliation Without Justice," *South African Review of Books* 46 (Nov/Dec 1996): 3–5; and "A Diminished Truth," *Siyaya* 3 (1998): 38–40.

of the parameters of apartheid, including class and ethnic identities and their place in political violence.

Victim and Perpetrator Identities in Public Hearings

As the TRC did not directly address questions of race, this section looks primarily at the ways in which identities were performed and produced through the public hearings.

The TRC consciously selected victims for public testimony across multiple racial and political identities in order to demonstrate even-handedness and to valorize a human rights' conception of victimhood instead of heroic resistance. This would provide a visual outreach to all political identities, constructing a community of victims on the basis of shared suffering rather than on racial, ethnic, or political identities. For example, the first public victim hearing held in Cape Town included victims of all demographic markers, a range of violations across four decades, both well-known and unknown cases, victims of both the security forces and the liberation movements, as well as victims of intercivilian violence and even a case outside South Africa's borders in Namibia.

Public victim and amnesty hearings were broadcast live on radio and television over many months and were widely covered in both the local and international press. Victim and perpetrator thus became highly visible identities that people publicly inhabited and repeatedly enacted.

As with the mandate, the format or scripting of the public hearings adopted by the TRC undoubtedly structured and framed testimonies in particular ways. Despite this fact, the power of representation was not determined by the TRC alone: the subject positions of victims and perpetrators were not passively replicated but shaped and occupied in different ways. Certain testimonies (or moments thereof) burst through, sometimes contesting the boundaries of the TRC's mandate, sometimes exposing difficult even uncomfortable questions or memories, and sometimes revealing glimpses of new possible identifications.

For example, although the "writing out" of race from the TRC mandate undoubtedly foreclosed possibilities of a direct engagement with the racialized (or ethnicized) forms of violence and the identifications arising from these, race still registered within many victims' testimonies. Narratives of torture or killing, for example, frequently demonstrated how such violence did not just mark bodies but also how it racialized and gendered them, and how apartheid's reach extended beyond death. The TRC special hearing on prisons heard how racial classification determined the kind of food prisoners and detainees were given. Numerous deponents recounted the ways in which the bodies of black (non)citizens were treated. Thus, although race was formally "out of mandate," the overwhelming association of victimhood (and often perpetration) insisted on reinscribing it, notwithstanding the TRC's attempts to include victims across the demographic and political spectrum.

On the other hand, testimonies of those who broke the assumed boundaries of racial identity disrupted monolithic racial stereotypes. For example, Father Michael Lapsley, a white priest seen as a liberation movement supporter by the apartheid government, who testified in public about the terrible injuries inflicted on him by a letter bomb sent to him by state security forces, was one of several who may be described as "righteous dissenters."[52]

Aside from instances such as this one representing the clear and conscious choice of a political activist, there were several instances in both victim and amnesty hearings where those testifying themselves disrupted such boundaries. These included testimony from a black detainee thanking a white prison warder who provided care and sympathy to a fellow (black) detainee, a white police guard offering ointment for the wounds of an abducted and tortured victim, the numerous generous expressions by black victims or family members toward perpetrators, or the rare white family members of those killed by guerillas expressing understanding, even perhaps support, for the cause of the liberation movements.

Although the separation of victim and perpetrator in TRC hearings did not enable complex and intermingled experiences to be expressed in a single setting, testimonies that came before the TRC did not always fit neatly into seamless categories of black/white, good/evil, and victim/perpetrator. In several instances, victims themselves were also perpetrators, at times disrupting the fixed heroic identities associated with liberation struggle. A revered activist turned out to have possibly been an informer. Another, long believed to have been killed by an apartheid assassin, had actually been killed by his own comrades – moreover, he himself turned out to have led an attack on his teacher who belonged to a rival political movement. Conversely, the testimony of so-called "collaborators" offered accounts of force and choice that complicated the simple label of community "traitor."

Testimonies also complicated assumed identities of solidarity and commonality. The wife of a human rights lawyer killed by a security police bomb testified to the denigrations of widowhood within her community, revealing fissures along lines of gender within a romanticized, single black identity.

These expressions of identities broke the boundaries of neatly packaged categories of guerrilla/activists versus soldier/police perpetrators, unsettling the established seamless "resistance and repression" narrative and bringing to the fore voices of civilian experiences of violence. Indeed, prevailing monolithic narratives were undermined by the public testimony of diverse experiences, particularly regarding the years of intercivilian violence, or horizontal violence, which ultimately led to roughly 14,000 deaths in clashes between members of the liberation movements and conservative black groupings. For example, members of the Self-Defence Units associated with the ANC testified regarding the fratricidal violence with local political opponents.

[52] See Paige Arthur's "'Fear of the Future, Lived through the Past': Pursuing Transitional Justice in the Wake of Ethnic Conflict," Chapter 9 in this volume.

Amnesty applicants from the state security forces, who had seen themselves as upstanding pillars of their community, holding communism at bay, spoke bitterly of having been disowned by their commanders and political masters, and of violence whose purpose had been rendered meaningless in the context of a democratic South Africa.

Somewhat discomfortingly, perpetrators at times also revealed a human and emotional side through their testimony, opening moments of recognition, even empathy. This is not to suggest an easy reconciliation based on mere sound-bites, but rather to point to what American historian David Thelen suggests is the opening up of a difficult but deeply human conversation about choice and constraint. He suggests that the TRC missed opportunities in making more of such moments. Testimony at public hearings involved moments of reenactment where testifiers and, via them, the broader public explored "the horizons of possibility and constraint from which they made – or deferred – choices about what to say or do." Rather than viewing testimonies as enabling a bigger picture to emerge, or as the basis for investigations and ultimately findings (thus drawing them to a conclusion), as the TRC did, the power of public testimony should be regarded as an entry point to open a public conversation about individual choice and responsibility.[53] Whereas Thelen's emphasis is on individuals, he points to the ways in which spaces may be opened to engage in difficult dialogues.

Gendered identities were also performed in sometimes unexpected ways. Notwithstanding concerns by gender activists that the focus on direct political action and violence placed male agency at the center of the TRC's accounts of violence, perhaps the most iconic and enduringly memorable figure from the TRC victim hearings is not the male political activist but the image of a woman, usually a mother, testifying to the harm of a child or husband. Concerns that this positioning reproduced stereotypes of female passivity perhaps overlooks the ways in which the voices and narratives of male victims have been rescripted through female testifiers.

Further, as Mark Sanders has suggested, through their many calls for the recovery of bodies and human remains, black women were not the passive articulators of others' pain. Rather, by drawing attention to the inability of families to lay victims' bodies to rest with dignity, they exposed the ways in which the apartheid state prohibited mourning through its disruption or denial of funeral rites, a form of violence in itself.[54] In so doing, women called attention to the fundamental rights of citizenship; indeed they enacted citizenship. This went beyond establishing merely the whereabouts of missing persons and what had happened to them; it further performed a posthumous conferral of the rights of citizenship on the dead and the rites and rights of mourning for the living.

[53] David Thelen, "How the Truth and Reconciliation Commission Challenges the Ways We Use History," *South African Historical Journal* 47 (2002): 162–90.

[54] Mark Sanders, *Ambiguities of Witnessing: Law and Literature in the Time of a Truth Commission* (Stanford: Stanford University Press, 2007), chapters 2 and 3.

Far less work has been done to explore the TRC's constructions of masculinities and its challenge to the prohibitions on affective modes of being masculine. Although the dominant liberation movement identity of the 1980s was that of the unflinching militant, victim testimony at hearings often produced narratives of great vulnerability and emotion, sanctioning a different kind of masculinity in which male victims could break down while testifying without a sense of public emasculation.

Whereas the earlier examples point to the possible transgressions of fixed identities, such transgressions may have contributed to the creation of new and problematic gendered communities of solidarity and commonality. Despite the complex and multiple sites of both civilian resistance and repression against civilians, both male state security force members and male liberation movement guerrillas attempted to legitimate their actions by reference to cultures of war ("it was a war"). The former chief of the South African Defence Force, General Constand Viljoen, sought to explain the military's actions by saying "it was a new kind of war." Similarly, the ANC's National Political Commissar General Andrew Masondo also used this assertion to contextualize abuses within the ANC against its own members in exile, including torture and execution.[55] The logic of this combatant commonality recently extended to the formation of a single veterans organization, the South African Military Veterans Association, uniting opposing sides a mere fourteen years after the end of apartheid.[56] In general, this identity tends to be pitted against what is seen as a naïve civilian and international human rights perspective.

The Reception of the TRC

The TRC submitted the first five volumes of its Report in October 1998, after most of its work, barring the amnesty process, wound down. The report, which concluded that all parties had, to a lesser or greater degree, committed gross violations of human rights, elicited a storm of protest across the political spectrum of parties thus affected, leading in several instances to legal action. Notably, the ANC objected to the apparent moral equation of the struggle for and against apartheid through the politically undifferentiated notion of victim and perpetrator, and saw the critical findings as damaging the heroic and noble representation of their struggle against the apartheid regime.

The subsequent breach between the TRC and the ANC accompanied a shift in the ANC government's nation-building project following the 1999 elections. Under the presidency of Thabo Mbeki, the new administration moved away from the reconciliatory discourse of the Mandela presidency toward a greater focus on the racialized discriminations of all aspects of South African life. However, it has

[55] This is described more fully in TRC, *Final Report*, vol. 5, ch. 7, para. 262.

[56] A similar form of soldier solidarity across political lines appears at times even in Guatemala – indeed, some suggest this played a role in the shaping of the CEH. See Amy Ross, "The Creation and Conduct of the Guatemalan Commission for Historical Clarification," *Geoforum* 37 (2006): 74.

been argued that this new imperative has been dominantly framed in a "nativist," ethnic model of redress, which has tended to reify race and undermine a more civic or cosmopolitan citizenship. Indeed, this view suggests that although formal deracialization has taken place at the apex of the class structure in South Africa, creating a more racially diverse elite, it is paradoxically "precisely here where racial identities are being reified most because it is through the assertion of [these] identities that these stakeholders can advance their material interests."[57]

Accordingly, the work and legacy of the TRC has been increasingly decentered from state discourse on transformation. The national conference on reconciliation recommended by the TRC never took place; instead the government organized a high profile conference on race and racism in 2000. Although the TRC recommendations focused considerable attention on the need for broader forms of redress for apartheid wrongs, transformation initiatives on this front by the state proceeded without reference or linkage to the work of the TRC. Thus, the TRC was effectively delinked from the heated national debates in multiple forms and forums around race and its legacies, continuities, and reformulations in contemporary South Africa.

The previous section argues that, in particular, the public hearings of the TRC were spaces where particular identities were performed, in ways that confirmed or disrupted perceptions of self/group and other. Here, we analyze continuities between these identities and the ANC government's nation-building agenda, in which there has been a reconstitution (or an attempt to do so) of the boundaries of citizenship and victim/perpetrator identities.

The public hearings of the TRC enabled the visible enactment of citizenship in the new democracy. The testimony of black South Africans – covered live on radio and TV – shattered their previously ordained identities as mere providers of labor and a potential threat to privilege. The immediate impact was profound. These visible expressions of human pain, the grim accounts of torture and killing by perpetrators, the exhumation of bullet ridden skeletons, marked a distinct rupture of the highly segregated forms of historical knowledge that had helped reproduce racialized conceptions of South African citizenship across generations.

An important component of this rupture was the delegitimization of the apartheid race project and the destruction of the façade of legalism to which the apartheid state had clung. The subjective and emotional testimonies broadcast through the media was for many white South Africans quite literally their first such encounter with black South Africans as sentient beings. At the same time, and partly as a consequence of the unremitting hostility of the white Afrikaans press, and an absence of buy-in from their constituency, this must not be overplayed: many whites remained implacably hostile, deeply racist, and dismissive of the TRC project.

Further, this discursive humanization of black South Africans focused on political violence rather than overtly on racial privilege and power. Its capacity to provoke

[57] Bentley and Habib, "Racial Redress," 22.

empathy thus weakened somewhat as the government moved to institute programs to redress economic inequalities such as affirmative action, black economic empowerment, and redistributive municipal levies scaled along lines of income. Indeed, many whites perceived (and perceive) these policies as reverse discrimination, even persecution, for apartheid policies that they no longer own – and often claim they never supported.

The marginalization of the TRC from national transformation priorities also resulted in considerable foot-dragging by the state in respect of key recommendations, most notably reparations and prosecutions. The battles around these issues have also been contestations about the validity and boundaries of the terms "victim" and "perpetrator." Referring to proposals for reparations, important government figures declared that no one had "been in the struggle for money," reflecting their distaste for the conflation of the struggle for democracy with victimhood. Rather than acknowledging the special harms caused by gross human rights abuse, the government attempted to reinscribe the boundaries of the victim identity associated with the TRC by arguing that redress was due to all the victims of apartheid, and this should be done through national development. Only in 2003 did the government present a reparation package – one that fell far short of what the TRC recommended. This gap has left a bitter legacy for former TRC victims, many of whom now identify themselves as "double victims."

Efforts at prosecutions – as recommended by the TRC and implicit in the amnesty deal – have been equally dismal. The government sought to delimit post-TRC prosecutions through the introduction of special prosecution guidelines in terms of which prosecutors could plea bargain, among other things, in exchange for disclosure of information. In November 2008, these were overturned following a legal challenge in the Constitutional Court by civil society and victim organizations. The possibility of liberation movement personnel facing prosecution as perpetrators probably underlies some of this government reluctance to pursue prosecutions more vigorously.

The ANC government has also sought to rescue and rehabilitate a heroic resistance identity that it regarded as tainted by the TRC's attachment of either a "victim" or a "perpetrator" label. Although the government upholds the resistance struggle as the foundational identity of the new democratic South Africa, the defining characteristics of the liberation militant, such as defiance and violence, conflict with the contemporary needs of citizenship as noted by Thokozani Xaba.[58] This identity was to be writ large in grand memorialization projects, with names of those heroic citizens quite literally hammered in stone on the walls of the new presidency-led memorial project, Freedom Park.

[58] See Thokozani Xaba, "Masculinity and Its Malcontents: The Confrontation between 'Struggle Masculinity' and 'Post Struggle Masculinity' (1990–1997)," in Robert Morrell, ed., *Changing Men in Southern Africa* (Pietermaritzburg: University of Natal Press, 2001).

In its recommendations on reparation, the TRC included memorialization projects as a form of symbolic reparation. Although these recommendations were framed largely in local, community terms, the government chose to build a massive memorial, Freedom Park, in Pretoria, South Africa's administrative capital and the historic bastion of Afrikaner nationalism. Built on a hill, Freedom Park literally faces the equally monumental Afrikaner Voortrekker Memorial. A key site of contestation and debate has been whether the Wall of Remembrance includes names of *all* those who died in the antiapartheid struggle or only a small subset of organized resisters.

Assessing the TRC's Legacy

The legacy of the TRC's work has been mixed. There has been a diverse mobilization in postapartheid South Africa around issues of race and ethnicity. On the one hand, race is more evidently salient and solidified in public discourse with respect to such issues as affirmative action and black economic empowerment, where the very boundaries of "blackness" are highly contested. On the other, the language and categories of race have been discredited and subjugated, finding expression in a new language about violent crime and disease. The hostility of whites to policies of affirmative action and black economic empowerment, and their reluctance to acknowledge their status as beneficiaries, all underscore the argument that the failure to demonstrate the links between bodily and structural violence by either the TRC or other institutions in the immediate postapartheid period would contribute to a broader reconciliation and citizenship project.

Similarly, despite the TRC's finding that more non-South Africans than South Africans died through subregional civil wars in the broader struggle against apartheid, the boundaries of black victimhood have not been extended to include those victims beyond South Africa's borders. There is little recognition of the cost born by South Africa's neighbors in the struggle against apartheid – a fact that was especially evident in the wave of xenophobic violence in South Africa in 2008 in which black citizens assaulted, expelled, and killed refugees from other African countries who were seen merely as alien competitors for jobs and resources.

Achille Mbembe suggests that the failure "to face up to race" in South Africa arises from

> the persistent denial of white privilege . . . [and] the drive to assert a form of black identity predicated on the idea of victimhood. The two defensive logics of black victimhood and white denialism collide and collude, often in unexpected ways. Together, they gradually foster a culture of mutual *ressentiment* which, in turn, isolates freedom from responsibility and seriously undermines the prospect of a truly non-racial future. Furthermore, the logic of mutual *ressentiment* frustrates blacks' sense of *ownership of this country* while foreclosing whites' sense of truly *belonging to this place* and to this nation.[59]

[59] Achille Mbembe, "Black Nativism, White Melancholia" (public lecture, University of Cape Town, Cape Town, South Africa, July 8, 2007); available at wiserweb.wits.ac.za.

Finally, Deborah Posel, generally a sharp critic of the TRC, has referred to the wider imprint of the TRC on society, producing a mode of testifying, disclosure, and "speaking out" that is widely visible in public life, "about the manner of our democracy and the nature of selfhood within it." This ethical radicalism of the TRC traveled and infused other seemingly unrelated situations beyond the TRC, such as HIV/AIDS and gender violence, constituting what we have referred to as "acts of citizenship" that have "valorized more open and declarative ways of being."[60]

TRUTH TELLING AND TRANSITION: AN ASSESSMENT

What can these diverse instances of truth telling and transition indicate about what reasonably can be expected or hoped for from the work of truth-telling initiatives in conflicts associated with systemic racial or ethnic marginalization? The two case studies examined here highlight some common and different responses to these questions.

Zones of Possibility and Constraint

As several commentators have noted, truth-telling initiatives do not exist in a power vacuum. The circumstances that led to the establishment of the truth-telling initiative are usually fraught with struggles that considerably shape the mandate of the truth-telling initiative, as both cases demonstrate. Further, such power relations continue to mediate the truth-telling process and its afterlife.

Secondly, some critics have portrayed truth commissions as mere legitimization devices for new governments that authorize their particular nation building or power projects, through their supposed aim to install official histories. The TRC's turbulent relations with the new ANC government and the CEH's genocide finding in Guatemala suggest that truth-telling initiatives may in fact provide a counterweight to dominant political players and fixed historical narratives. They serve as a reminder that the particular trajectory such initiatives follow are not predetermined and may not neatly match their mandates or the intentions of its initiators.

It is perhaps useful to see truth-telling initiatives as spaces that are somewhat indeterminate rather than prescribed zones of constraint and possibility, in which intent, direction, and outcomes are transformed through the intersections, interventions, and conflicts between multiple actors and parties. Indeed, acknowledging this fact suggests possibilities for consciously extending truth telling through the creation of public platforms to deepen discussion and dialogue. An initiative by a single TRC staff member to generate a wider discussion around issues of redress, reconciliation, and reparation, for example, included a public forum where Mahmood Mamdani

[60] Deborah Posel, "The TRC's Unfinished Business: Healing," in Charles Villa-Vicencio and Fanie du Toit, eds., *Truth and Reconciliation in South Africa, 10 Years On* (Cape Town: Institute for Justice and Reconciliation/David Philip Publishers, 2006), 86–7.

aired his influential critique of the TRC. Although such initiatives may seem to provide an additional (maybe burdensome) function that some may see as outside its core work, if – as is argued here and in other sections of this volume – the power of a truth-telling initiative is largely discursive, then this may well be a key area of work.

Truth-Telling Initiatives and Identities

We have argued here that truth-telling initiatives do not function merely as platforms through which existing identities are channeled but rather may engender two different reactions. First, they may disrupt or transgress existing processes of identification, enabling new identity positions. In this regard, human rights categories of "victim" and "perpetrator," often criticized for their denuding of political content and context, may indeed enable forms of testimony outside of rote, solidified identities. Thus, testimony in South Africa by male victims in public hearings that displayed emotion or vulnerability challenged dominant norms of masculinity and demonstrated different ways of being male.

Second, they may result in enabling or affirming current self or group identities. In Guatemala, the CEH's focus on indigenous communities made visible those long denied the rights of citizenship. In so doing, it lent legitimacy, weight, and visibility to the claims of the emerging pan-Mayan movement that sought to mobilize a collective identity, not just around cultural commonalities, but around the experience of marginalization and war. It could be argued that the very act of naming violence as genocide *officially* constituted Maya as a single ethnicity – naturalizing an identity that was not necessarily shared by all those so named as Maya. Whether solidifying a Mayan identity in the context of the earlier denial, invisibility, and isolation that marked indigenous identities is necessarily a positive outcome is a matter of debate. In other instances, a hardening of identities may arise through giving space to the repeated narration of hostile "myth-symbol complexes" that constituted collective identities during the conflicts.[61]

Whereas transitional justice's use of universal perpetrator-victim categories in ways that flatten social complexity has been criticized, far less attention has been given to the ways in which these identities or subject positions are worked on through truth telling. These examples suggest that the production of identities within transitional justice mechanisms is neither self-evident, formulaic, nor prescribed but are rich processes of formulation and contestation. Even within the binary schema of victims and perpetrators, this process is arguably varied.

Following from the above examples, it has been argued that truth-telling initiatives may perform a critical intervention through forming part of a wider transitional effort to construct citizenship on a basis that is not determined by divisive identities.

[61] For further discussion on myth-symbol complexes, see Arthur's "'Fear of the Future, Lived through the Past'," Chapter 9 in this volume.

Conflicts in which identities are important factors usually involve highly differentiated citizenships, or even the de facto or de jure exclusion of a particular grouping from the currency of national citizenship with its equal access to the state and its services, the economy, and social value with visibility, agency, and legitimacy. Indeed, a conception of national or civic citizenship may not even be present in societies dominated by ethnic, racial, or religious divisions. Truth-telling initiatives, particularly official ones, may disrupt this exclusion, transgressing the hierarchy of value placed on the voices of different individuals or groups through a visible and deliberate egalitarian approach that affords acknowledgment and dignity to all. Testimony can reconstitute or unsettle exclusionary notions of citizenship and nation. They can help permit/constitute a citizen with family, belongings, and needs.

Although the mechanisms of this disruption are laid down or facilitated by the truth-telling initiatives, the specific ways in which citizenship is crafted through it is a consequence of the interventions or actions of multiple actors, inside and outside of the truth-telling institution. These include, as has been argued, the manner in which victims themselves imbue the generic identity of victim with a specific meaning, sometimes contesting the frameworks or mandates of the truth commissions.

Similarly, and insufficiently considered here, civil society organizations can play a critical role in shaping the terrain on which a truth commission functions, as REMHI's work demonstrated. In South Africa, a more limited initiative was undertaken jointly in 1998 by NGOs and the state's new Gender and Human Rights Commissions. Through the same mechanism of public hearings, this initiative attempted to extend the meaning of violence to include that of racialized poverty, and by association the notion of citizenship to include economic rights. These "Poverty Hearings," at which more than 600 people testified over thirty-five days, were largely ignored by the media, and their discursive impact was thus limited to those who physically attended them.[62]

These examples suggest that although the state may desire or even expect a truth commission to affirm its own nation-building agenda, this conclusion is not foregone, even with a narrow mandate. Indeed, this chapter suggests that an important contribution a truth-telling initiative can make is not to reinforce a single, state-led understanding of citizenship on the basis of an official history, but to open a discourse of discussion and debate around citizenship, as for example, the CEH's genocide finding precipitated national debate, disagreement, and demand.

Visibility and Representations of Citizenship

Arguably, the enactment of citizenship should be *seen* to be done. The visible forms that truth telling takes in speaking of past violence may differ sharply, with

[62] See Sandy Liebenberg and Karrisha Pillay, "Sangoco's Report on Poverty and Human Rights," *Economic and Social Rights Report*, vol. 5 (South African Human Rights Commission, 1997–1998).

the formats determined by political context, security concerns, as well as struggles within the truth commission among staff and commissioners. Each have had their own limitations, strengths, and impact and cannot be ranked or adjudicated as preferred options. In South Africa, where security concerns were fairly low, truth telling was performed chiefly in public through individual victim, perpetrator, and political party testimony to a national audience.

In Guatemala, the security context was far more serious. The head of the REMHI project, Bishop Juan Gerardi, was assassinated two days after publicly handing over its report, just as the CEH began its work. Victims testified to the CEH behind closed doors, and the CEH's visual moment of telling was through the presentation of its comprehensive report in a public forum. In South Africa, the images and accounts from public victim and perpetrator hearings have had far greater circulation and impact than its expensive, bulky, and scarce report. Where public hearings are not possible, reports may assume far greater importance. Yet in neither country was enough energy and attention expended on ensuring appropriate circulation of the reports. Neither produced a popular version for ongoing mass dissemination, nor explored ways of ensuring that the substance and findings of each truth commission were sufficiently circulated and debated, an especially critical task given the low rates of literacy in both countries. Although the mere printing of written reports may be a viable dissemination methodology in a country with high levels of literacy, such as Argentina, whose 1984 truth commission report, *Nunca Más* (Never Again), became a best seller, it has tremendous limitations in countries such as Guatemala or South Africa.

This is not to suggest that public testimony is the only effective methodology for truth telling. The process of exhumations in Guatemala, where images of mass graves provide powerful visual testimony at the local level and in media coverage, suggests that truth telling may take diverse and multiple forms, and that the disruption of long standing historical beliefs may take place through visual symbol, not only voice.

This is also not to suggest that there are no downsides to highly publicized work. In South Africa, the TRC's public identity and its work was largely constructed by and through the media. Indeed, it could perhaps be argued that the chief composer of identities through the TRC process was the media. Although its role was indispensable, it had significant costs and limits. The TRC's abiding images and sound-bites were selected, broadcast, and recast by the media. Whereas the TRC's public hearings provided space for diverse expressions of citizenship and identity, it was the media that determined *which* specific expressions gained coverage and currency, and *how* these were represented. The media generally tended to focus on simple expressions and catchy images of pain and suffering, rather than the more complex accounts that may have been more successful at disrupting fixed notions about identities. Thus, whereas mediatization was the chief manner in which the "discursive humanization" of black South Africans took place, media representations were less able to depict the ways in which victims could be perpetrators and

vice versa – in part because the TRC itself held separate victim and perpetrator hearings.

These reflections draw explicit attention to the question of selection of testimonies and the staging of truth telling, and it suggests a site for deeper engagement on the part of researchers and practitioners.

Reworking Identities in the Aftermath of Truth Telling

Truth-telling initiatives, naturally, do not operate in a vacuum but work within, across, or even against the grain of other transformation projects (including identity transformation), the particular nation-building project of the state, the broader implementation of redress, and forms of memorialization. These contexts may contradict or attempt to undo some of the representations arising from the truth-telling initiative, as made evident by the reworking of the identities produced within the TRC to fit neatly into new grand memorials such as Freedom Park.

In addition, a truth-telling initiative's effects on identities are not permanent, and the loosening or reworking of collective identities may not endure under the new social, economic, and political pressures in the years that follow. In South Africa, the state's project of redress crafted explicitly around racial categories has tended to have the (perhaps unintended) consequence of fixing and reifying racial identities. In both Guatemala and South Africa, spiraling criminal violence, including extremely high levels of violence against women and children, has also tended to affirm negative identifications in threatening racial or ethnic terms. Where poverty coincides with ethnic or racial markers, rhetoric around crime more easily assumes racialized overtones.

Although intersections to the wider transition project may deepen the work of a truth-telling initiative, this connection is especially vital when its institutional life comes to an end. The gains and possibilities arising through the work of truth-telling initiatives equally depend on their insertion into the wider transition, whether failed or ongoing, and how and if both state and civil society put the truth-telling initiative to work to buttress the "acts of citizenship" that have contributed to new or changed identities.

Truth-telling initiatives, specifically truth commissions, have tended to sink into oblivion on closure. The question of post–truth commission structures is controversial, and there is debate regarding whether a truth commission should prescribe its own aftermath in the form of post–truth commission units or institutions, or remain a one-off intervention. This relates to the pressing issue of whether truth commissions are primarily symbolic or genuinely investigative structures, a matter that, if left unresolved, may create false expectations and dashed hopes for victims, and doom the truth-telling initiatives and those who participated to an afterlife of resentment.

The fate of most truth commission reports is retirement to libraries, limited bookshops, and study by academics. In both South Africa and Guatemala, the reports

have had varying degrees of partial and ad hoc incorporation into school curricula, usually through the simple recounting of particular cases and testimonies that have a reconciliatory impulse, as opposed to any explanation of the key findings and arguments in the reports. However, incorporation into educational curricula is clearly a key method of circulating the critical questions that truth-telling initiatives may have raised, although the terms of that incorporation may work merely to fix the past into narratives that delimit rather than enable a critical citizenship, or that do not interrogate the fissures of the past but merely describe its violence.

In conclusion, truth commissions themselves have little capacity to effect widespread transformation. Their contribution, however, may consist in the symbolic or discursive disruption of hierarchical relations of power dominated by the previous elites. Here, the effects of truth-telling initiatives can provide an alternative lens through which the past may be recounted, sometimes unsettling the identities of self and other, and possibly enabling the imagining of a more critical citizenship as the basis for transition and nationhood.

3

Security System Reform and Identity in Divided Societies: Lessons from Northern Ireland

Mary O'Rawe

When a divided society attempts to make the transition from violent conflict to peace, it is required to engage with what in its past governance arrangements made harmonious communal living so dysfunctional and seemingly impossible. The new dispensation will, among other things, face the daunting challenge of rehabilitating those state institutions most responsible for violations of human rights. Reform of security organizations[1] is generally writ large in any transitional justice "to do" list. However, the reform of organizations cannot be seen as an end in itself. Such reform adds value only to the extent that it provides an entry point to address deeply felt, often identity-based grievances and paves the way for wider systemic and holistic engagement, facilitating people of differing backgrounds, views, and aspirations to feel respected, safe, and secure.

It is not presumed that "solving" identity conflicts should be the goal of security system reform (SSR), or that identity conflicts are the *only* important conflicts or points of resistance. In some ways, conflicts among identity groups can, in fact, obscure other difficult and important challenges. This chapter aims to highlight only how identity conflicts may have or appear to have an impact on available legal and policy choices in transitional contexts. This chapter particularly examines the salience of ethnoreligious/political identity in the reform and rehabilitation of security provision in Northern Ireland to assist in framing some broader dilemmas and options, informed by the empirical reality of one particular jurisdiction. I use the phrase "ethnoreligious/political identity" to indicate the overlapping nature of

[1] The 2004 OECD Defence Assistance Committee (DAC) Guidelines on Security System Reform and Governance define the security system as including core security actors (e.g., armed forces, police, gendarmerie, border guards, customs and immigration, and intelligence and security services); security management and oversight bodies (e.g., ministries of defence and internal affairs, financial management bodies and public complaints commissions); justice and law enforcement institutions (e.g., the judiciary, prisons, prosecution services, traditional justice systems); and nonstatutory security forces (e.g., private security companies, guerrilla armies and private militia).

identities in Northern Ireland. Although political identities do not map neatly onto ethnoreligious identities there, they are often perceived to do so – something I will return to later.

The chapter contends that, in societies split dysfunctionally and violently along evident identity fault lines, the challenge of guaranteeing security requires a holistic, "whole of governance" approach, with respect for human dignity and diversity firmly situated as cornerstones of any change process.[2] The Organisation for Economic Co-operation and Development (OECD) emphasizes people-centered, locally owned, multisectoral approaches based on democratic norms, human rights principles, and the rule of law. How deep-seated, identity-related grievances affect what is done in the course of such endeavors is clearly significant.

The case of Northern Ireland merits specific consideration for a number of reasons. First, its identity-related conflict spanned several decades, and yet it has, in relative terms, sustained a successful SSR project over the past ten years, with parity of esteem for different identity-based affiliations at the heart of the process. Second, the 1999 Report of the Independent Commission on Policing for Northern Ireland,[3] known as the Patten report, with its 175 recommendations for change to the ethos, symbols, structure, and organization of policing and police accountability, is widely deemed to have provided an important blueprint for SSR endeavors globally, and for divided societies in particular.[4] Third, the report itself attempted to engage not just with "the police" as an organizational entity but with the function of "policing" and security governance more broadly.[5] It was part of a multilayered, but ultimately

[2] This premise is in keeping with the UN Human Security agenda led out by the UN Development Programme and described in the 2003 report of the UN Commission on Human Security, *Human Security Now*; available at www.humansecurity-chs.org/finalreport/index.html. It similarly conforms to the Organisation for Economic Cooperation and Development–Development Assistance Committee conceptualization of Security System Reform and set out most recently in the *OECD DAC Handbook on Security System Reform (SSR) Supporting Security and Justice* (Paris: OECD, 2007); available at www.oecd.org/dataoecd/43/25/38406485.pdf.

[3] Report of the Independent Commission on Policing for Northern Ireland, *A New Beginning for Policing: Northern Ireland* (1999); available at www.nio.gov.uk/a_new_beginning_in_policing_in_northern_ireland.pdf (hereafter cited as Patten Report).

[4] See D. H. Bayley, "Police Reform as Foreign Policy," *The Australia and New Zealand Journal of Criminology* 38, no. 2 (2005): 211; Michael Kempa and Clifford Shearing, "Post Patten Reflections on Patten" (paper presented at Transitional Justice Institute, University of Ulster, Northern Ireland, June 2005); Keir Starmer and Jane Gordon, *Human Rights Annual Report* (Belfast: Northern Ireland Policing Board, 2006); available at www.nipolicingboard.org.uk/hr_annreport06.pdf; Law Commission of Canada, *In Search of Security: The Future of Policing in Canada* (Ottawa: Law Commission of Canada, 2006). See also Graham Ellison and Mary O'Rawe, "Security Governance in Transition: The Compartmentalising, Crowding Out and Corralling of Policing and Security in Northern Ireland," *Theoretical Criminology* 14, no. 1 (2010): 31–57.

[5] Policing is a societal function carried out by a range of context-specific individual and social groupings, which may or may not include a formal state-sponsored police organization. "The Police" are not an automatic part of the policing equation more broadly understood. See Mary O'Rawe and Linda Moore, *Human Rights on Duty: Principles for Better Policing – International Lessons for Northern Ireland* (Belfast: Committee on the Administration of Justice, 1997), 37.

overcompartmentalized, approach by government that included two further separate reviews dealing respectively with the criminal justice system and the operation of emergency legislation in a postceasefire context.

Other relevant aspects of the peace process in Northern Ireland, which have been deemed necessary to secure the legitimacy of the process and the durability of the peace in the face of huge segregation and mistrust, include the establishment of a Human Rights Commission charged, inter alia, with providing advice to parliament on the drafting of a Bill of Rights specific to Northern Ireland, the passing of strong equality legislation such as the equality duty on all public authorities mandated by Section 75 of the Northern Ireland Act 1998 and monitored by a separate Equality Commission, the early release of politically motivated prisoners, the development of restorative justice mechanisms, the establishment of a Parades Commission to adjudicate on the rules for and routes of contentious marches, the appointment of a Commissioner for Children, and the establishment of a Victims and Survivors Commission.

Finally, the Northern Ireland context is interesting for the part played by a vibrant civil society, both in terms of coalition building, directly and indirectly informing security reform, and in providing its own stamp on the implementation of new policing and justice realities. Northern Ireland's main success appears to lie not in having resolved identity conflicts, but in where it has found creative ways to work within and around them at a range of levels.

SECURITY SYSTEM REFORM

Before moving to consider the specific mechanics of the Northern Ireland SSR process, it is important to situate the discussion in the wider context of difficulties and dilemmas with the notion and operationalization of SSR to date.

SSR: From Policy to Practice

According to the 2007 OECD Handbook on Security System Reform, "a democratically run, accountable and efficient security system helps reduce the risk of conflict, thus creating an enabling environment for development to occur."[6] But security in this context must be seen as more than measures to stabilize a regime per se. Instead, it should be based firmly on the protection of human rights and human dignity. It is fundamentally tied up with governmental assurance of "personal . . . safety, access to social services and political processes."[7] A properly functioning security system is not just about ensuring the investigation, prosecution, and punishment of crime,

[6] *OECD DAC Handbook on Security System Reform*, 3.

[7] OECD DAC Guidelines and Reference Series, *Security System Reform and Governance* (Paris: OECD, 2005), 11; available at www.oecd.org/dataoecd/8/39/31785288.pdf.

but equally will have a part to play in creating appropriate and fair conditions for economic and social development, and assuring, to the extent possible, health and freedom from fear and want.[8] A justice-centered approach should ideally commence with a needs analysis, identifying and including key stakeholders, and developing proactive measures to engage the marginalized to instill legitimacy, trust, and effectiveness into the workings of government. Indeed, the concept of justice is now frequently added to SSR terminology to signal that the two concepts are indivisible.[9]

Despite these recommendations, SSR in practice has tended to be concerned with making ad hoc changes to the traditional security apparatus of a given state postconflict, with a view to promoting territorial or regime security. The main reform strategies tend to be concerned with improved representation of alienated identity groups within the police/military, the provision of training and, in a postconflict setting, efforts around the disarming, demobilization, and reintegration (DDR) of former combatants. The thrust of change is largely top-down and organizational in focus.

Sometimes, vetting procedures are applied to institutions as one means of ensuring that the state achieves and maintains a rights-respecting level of integrity and nonpartisan administration.[10] Yet, in order to prevent the recurrence of abuses, vetting, even if accompanied by a raft of other organization-specific reforms, is insufficient. Institutions such as the police, military, and intelligence services form part of a system. As such, the removal or sanctioning of individuals from one or even several organizations or the building of technical competence can only be a half-measure in reform efforts. Rather, the way in which a system functions to permit abuses needs to be addressed.

As is the case with other transitional justice measures, the reform of a state's security system is no mere technical enterprise – a fact that is underscored in the case of divided societies. The process of reforming state institutions in such contexts will run up against histories of grievances, pent-up animosities, and structural inequalities, perceptions of which may be deeply embedded in communities' sense of identity. Although it is incumbent on the state to furnish or facilitate such processes, the state is often poorly placed to deliver. Alongside the damage wrought by conflict economically, politically, and socially, the identity of state and the nature of relationships vis-à-vis state can create an integrity gap. Even with resources and support in place (by no means a given), the state may not be trusted by many victims of past abuse or past incumbents to act with fairness and integrity. Where oppositional actors have now become part of the establishment, wrongs done in the name of armed struggle will have an equally delegitimizing effect among certain identity-based groups.

8 Ibid., 12.

9 See *OECD DAC Handbook on Security System Reform*.

10 On vetting, see Alexander Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007).

One problem common to SSR endeavors is the fact that reform of state institutions, even when agreed as desirable, is often not undertaken with a sufficient eye to the long term. This fact may be understandable. Transitional moments might coincide with spiraling crime rates, a society in meltdown, and new fears as well as old antagonisms ripe for stoking to suit particular political agendas.

This chapter argues that, even in the taking of stopgap measures, the SSR project will ultimately be better served if informed by a thorough, justice-sensitive needs analysis and firm commitment to human rights protection as both a tool and a benchmark of change. Quick-fix solutions are not value-neutral. They may, for example, compound the marginalization of particular groups, or scapegoat others, sowing seeds for a new underclass. Gaining a fuller understanding of the causes of insecurity and what good security provision might look like to a range of different people might usefully form an integral part of SSR strategies to avoid different and sometimes competing definitions, understandings, and experiences of justice and injustice thwarting reform efforts going forward.

SSR and Identity

Identity conjures up notions of communal belonging and loyalty. For many ordinary people, communal belonging as a way of interpreting the social and political world is so self-evident as to need little analysis or justification. Theorists such as Stanley Cohen sometimes question, however, whether "self-understanding" and "identity" should be deemed "public" issues.[11] Although a person's sense of self and feeling of belonging to a particular community may be important to them on a subjective level, this is not always of clear import to issues of public debate.

In this chapter, I am not particularly concerned with the normative question of whether collective identities add positive value to public life. It is nevertheless fair to say as a general claim that, with respect to security provision, where particular ethnoreligious/political groups have been repressed or otherwise viewed by state agents as "suspect communities,"[12] there will be significant postconflict legacies to address. In countries exiting a period of ethnic conflict, genocide, or ethnicity- or religious-based repression, legacies of group-based hostility, mistrust, and perhaps outright hatred clearly will play a role in any political negotiation, including security system reform. People's access to and experience of power and self-worth is often delineated along identity lines – particularly in conflicted societies. Group loyalties and allegiances are strengthened by common understandings and experiences and can become particularly entrenched when under perceived or real attack.

[11] Stanley Cohen, "Crime and Politics: Spot the Difference," *British Journal of Sociology* 47 (1996): 1–21.

[12] See, for example, Paddy Hillyard, *"Suspect Community": People's Experience of the Prevention of Terrorism Acts in Britain* (London: Pluto Press, 1993).

Thus, collective identities may not always matter; when they do, they may matter differently depending on the social, political, and historical context. In many authoritarian regimes, state agents will have been largely comprised of or controlled by an identifiable ethnoreligious/political group. In such cases, security has typically been skewed to meet the perceived or real needs of dominant elites. This was certainly the case in Northern Ireland. As a result, alienation and mistrust comes to distort both the articulation and recognition of harms done and notions of what is required to address them. Similarly, those within state security forces who have been deemed legitimate targets by oppositional actors will have adopted their own identity-based siege mentalities and coping strategies, which are inherently distrustful of the "other." Otherness in this context will be defined in relation to organizational or unit loyalty, further underpinned by a sense of belonging to a particular dominant ethnoreligious/political group.

Yet there is also an important distinction to make here between the identity affiliations that members of the security system might share among themselves, such as unit identity, and affiliations they share with a broader social group, such as ethnoreligious/political identity. In many cases, corporate identity and ethnoreligious/political identity overlap very strongly, creating important resistance to policies of inclusion.

SSR IN NORTHERN IRELAND

Background

The island of Ireland was partitioned in 1921 into two political entities. The majority of the population of Ireland were (and continue to be) Catholics, with religion, then as now, being a strong signifier of identity on the island as a whole. The six northeastern counties had a two-thirds majority Protestant[13] population for a number of historical reasons. These counties subsequently became known officially as Northern Ireland or, for some, Ulster.[14]

Prior to partition, Protestants in the northeastern part of the island maintained a strong power base, and they valued trade and other links with Britain. When the rest of Ireland was clamoring for "Home Rule" and independence from Britain, the political influence of Unionism was sufficiently strong to ensure that Northern Ireland remained politically united with Britain despite the remaining twenty-six

[13] According to the 2001 census, Protestants make up 55 percent of the population in Northern Ireland, Catholics 44 percent, and other ethnic minorities almost 1 percent.

[14] Historically, Ulster comprises the nine northernmost counties of Ireland, but has also become shorthand in certain minds for Northern Ireland. Republicans and Nationalists would be unlikely to use this terminology. Republicans, in particular, would tend to say "the six counties" or "the North of Ireland," also referring to the "statelet." What names are used for people and places, and even how certain letters of the alphabet are pronounced, such as the letter "h," can be signifiers of a person's religion and politics.

counties of the island becoming a "Free State" and, later, a Republic. With partition of the island, "a Protestant parliament for a Protestant people" was installed to govern the six northeastern counties, ushering in decades of discrimination against the minority Catholic community in Northern Ireland, which self-identified as Irish rather than British.[15]

The emergence of ethnoreligious/political identities in Northern Ireland has been long in the making. In much of the literature, the term "Catholic/Roman Catholic" is used coterminously with "Nationalist" and "Republican," whereas in fact these three broad categories represent different identifications and aspirations that have evolved over time and been shaped through conflict. Whereas both Nationalists and Republicans favored a united and independent Ireland, Republicans were more extreme in their political aspirations, being prepared to countenance and support force of arms to achieve a thirty-two-county Irish socialist republic.

Similarly, the terms "Protestant," "Unionist," and "Loyalist" are often used interchangeably, in spite of the fact that they also connote very different identifications and aspirations. Protestantism encompasses a variety of religious denominations, with the umbrella term existing as much in opposition to Catholicism as in its own right. Most Protestants would be in favor of maintaining the political union with Britain, and are, hence, Unionist. The term "Loyalist" connotes a particular form of Unionism that tends to be prevalent in (although not exclusive to) working-class communities, where people see themselves as fiercely British, loyal to Queen and country, and prepared to defend the realm through force of arms.

The governors of Northern Ireland understandably feared reabsorption into a reunified Ireland where Protestants would lose their inherent power base and might not be assured of equal recognition and parity of esteem. The Unionist government, known as the "Stormont regime" after its seat in the Stormont Estate in the suburbs of Belfast, therefore pursued "strategies of domination rather than accommodation" toward the Catholic minority.[16] The one-party regime orchestrated discriminatory practices resulting in a lack of jobs, housing, education, and votes for Catholics. Moreover, Stormont legislated special powers from the establishment of Northern Ireland to assist the security apparatus of the state, notably the Royal Ulster Constabulary (RUC) – the almost totally Protestant police force – and its attendant militia in repressing opposition from Catholics.

State-led discrimination and inequality ultimately led to the emergence of a civil rights movement in the 1960s. The response of the state (and in particular the police and its auxiliaries) to civil rights protesters was characterized by a lack of recognition of legitimate grievance, as well as a brutality that ultimately rekindled a campaign of violence by a revitalized Irish Republican Army in the form of the Provisional IRA

[15] First boasted by James Craig, first prime minister of Northern Ireland, see *Northern Ireland House of Commons Official Report* 34, COL 1095 (April 24, 1934).

[16] See Aogán Mulcahy, "The Police Service of Northern Ireland," in Tim Newburn, ed., *Handbook of Policing* (Devon, UK: Willan Publishing, 2008), 205.

(PIRA). Suggested political reforms and attempts at accommodation at this point fell short of the mark, and three decades of violent civil unrest, known colloquially as "the Troubles," ensued.

In a context of brutality toward civil rights protesters, a number of Catholics were burnt out of their homes by rampaging Loyalists, and the fabric of society quickly unraveled. The British army was put on the streets to perform a containment role. When it became clear that the civil unrest was not being successfully contained, the government introduced internment without trial between 1971 and 1975. The Catholic community was affected disproportionately by this practice, with internees generally wrongly targeted on the basis of inaccurate, partial, and out-of-date police intelligence. Stories of ill treatment and torture of detainees soon began to surface, many of which were ultimately independently verified.[17] In 1972, British paratroopers killed fourteen unarmed Catholic civilians during a civil rights protest in Derry. This highly significant event, which became known as "Bloody Sunday," generated, alongside internment, major recruitment into the ranks of the still relatively dormant PIRA.

Meanwhile, violence and the fear born of it generated thousands of refugees fleeing to Dublin. With Stormont unable to contain the situation, Direct Rule was imposed from Westminster in 1972 and continued intermittently and in various forms until the new Stormont Assembly emerged from the 1998 Peace Agreement.

The British government at Westminster quickly adapted the already draconian legislative regime enshrined in the 1922 Civil Authorities (Special Powers) Act (Northern Ireland) to address the inherent difficulties it saw in catching and prosecuting those deemed to be terrorists. Legislation enacted in 1973 and 1974 provided the main and de facto permanent framework for a range of oppressive legal measures until a permanent Terrorism Act was brought onto the UK statute books in 2000. The Acts introduced, among other things, additional police and army powers of stop, question, search, and arrest, seven-day detention without charge, forty-eight-hour incommunicado detention, and, in Northern Ireland only, trial by a single judge sitting alone without a jury (Diplock Courts) for a host of scheduled offenses. It further allowed for convictions on the basis of confession evidence alone, even if such confessions were made under psychological pressure. It also proscribed a number of organizations, the majority of them Nationalist, up to and including political parties such as Sinn Féin (initially the political wing of the IRA and now the political party of choice for the majority of voting nationalists in Northern Ireland).

The legislation cemented the criminalization, "Ulsterization," and normalization policies operated by successive British governments whereby politically motivated

[17] See, for example, *Interrogation Procedures in Northern Ireland* (The Bennett Report) (London: HMSO, 1979); available at hansard.millbanksystems.com/commons/1979/mar/16/northern-ireland-bennett-report; and Ireland v. UK, 5310/71, European Court of Human Rights (January 18, 1978).

violence in Northern Ireland was designated as merely criminal and, therefore, supposedly dealt with by means of the criminal justice system and the reintroduction of police (as opposed to army) primacy. Catholics, because the IRA sprang from them and because they were deemed to harbor pro-Irish (therefore anti-British) sentiments, bore the brunt of this two-tier legal regime.

Meanwhile, the IRA and other Republican paramilitary groupings orchestrated bombing campaigns killing and injuring thousands of civilians. Republicans particularly targeted police and army personnel on the basis that they were considered “legitimate targets,” and hundreds of police and army personnel lost their lives or were horrifically injured. Loyalist and Republican paramilitaries also engaged in tit-for-tat style killings whereby retaliation for an incident involving loss of life on one side of the community was swiftly followed by the killing of person or persons believed to belong to the other main religious grouping. Many in paramilitary groups were also involved in other forms of organized criminal activity.

The state security forces appeared to operate a “shoot to kill” policy over a number of years, engaged in ambush-style attacks on suspected terrorists, and colluded with Loyalist and Republican paramilitaries in the murder of Catholics.[18] Public order policing was also highly controversial and partisan, and several children, as well as a number of adults, were killed by plastic and rubber bullets over the years, many in nonriot situations.[19]

The 1998 Peace Agreement

Over these thirty years of conflict, out of a population of 1.5 to 1.6 million, around 3,800 people died as a direct result of political violence.[20] According to one report, “By 1998, thirty years after the conflict started, one in seven of the population reported being a victim of violence; one in five had a family member killed or injured; and one in four had been caught up in an explosion.”[21]

[18] See, for example, Bill Rolston, “‘An Effective Mask for Terror’: Democracy, Death Squads and Northern Ireland,” *Crime Law and Social Change* 44, no. 2 (September 2005): 181–203.

[19] See, for example, Committee on the Administration of Justice (CAJ), *The Misrule of Law* (Belfast: CAJ, 1996).

[20] McKittrick et al. concluded that from June 1966 to May 2006 there were 3,720 Troubles-related deaths, the vast majority of these civilians. More than 300 police officers lost their lives and around 740 soldiers were killed. More than 500 paramilitary members were killed. See David McKittrick et al., *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Edinburgh: Mainstream Publishing Company, 2007). In addition, more than 40,000 people were injured (approximately 3 percent of the total population). See Bernadette Hayes and Ian McAllister, “Sowing Dragon’s Teeth: Public Support for Paramilitarism in Northern Ireland,” *Political Studies* 49 (2001): 902. Most of the deaths (59 percent) were caused by Republican paramilitaries, 28 percent by Loyalist paramilitaries, and 11 percent by the security forces, according to Marie-Therese Fay, Mike Morrissey, and Marie Smyth, *Northern Ireland Troubles: The Human Cost* (London: Pluto Press, 1999).

[21] Hayes and McAllister, “Sowing Dragon’s Teeth,” 901.

It eventually became clear, even to proponents, that the "war" was unwinnable by either side. The 1998 Agreement ultimately gave official recognition to "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose."[22] The Agreement indicated the need for "parity of esteem" between the two main communities in Northern Ireland and focused almost exclusively on these two ethnoreligious identities. The Peace was, thus, framed very much in terms of how differences in belief and aspiration between these two communities could be accommodated, underpinned by the principle of consent – a term of art indicating that the constitutional position of Northern Ireland as part of the United Kingdom cannot change without the consent of the majority in Northern Ireland.

The power-sharing dimension in Northern Ireland involved a guarantee of elections by proportional representation and the creation of a twelve-member executive body comprised of politicians from different parties. A first minister and deputy first minister are jointly elected by members of the Legislative Assembly voting on a cross-community basis, and ministries are allocated according to the number of seats held by each party. Decisions in the Assembly are made by a weighted majority to ensure cross-community support. In some ways, this balancing act was a vital part in building trust and faith in a sustainable peace process. A less fortunate corollary was that it cemented two core identities as competing at the heart of the Northern Ireland peace process.[23] A not-unrelated aspect of the NI peace process has been the on-off (currently on) devolution of government to this (several times elected) Northern Ireland Assembly, with policing and criminal justice remaining, up until April 2010, matters reserved for the Westminster government.

The Belfast (Good Friday) Agreement highlighted the salience of policing in the move toward a sustainable peace. It also identified the need for "a fair and impartial system of justice" that would "have the confidence of all parts of the community." Politicians were unable to come together to "fix" policing, and as a result the agreement delegated the responsibility to an international, independent commission. This, in itself, provided some much-needed distance and objectivity.[24]

[22] The Belfast (Good Friday) Agreement, art. 1 (vi), (April 10, 1998).

[23] A survey of 14- to 18-year-olds a few years ago indicates that identity politics are still deeply ingrained. Of all young people, 42 percent identify themselves as Irish, and 23 percent as British. Marie Smyth and Mark Scott, *Youthquest 2000: Young People and their Experience of the Troubles, The Youth Quest Survey* (Derry: University of Ulster, 2000).

[24] In a parallel process, a quasi-independent Criminal Justice Review Group was set up in June 1998 to review aspects of the justice system apart from policing and emergency legislation. The group was neither international nor completely independent of government. Nor was it proactive in engaging with groups at community level. It is less well known than the Patten Commission as a result, despite the fact that it was the forerunner for important changes in the criminal justice system more broadly. See Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* (London: HMSO, 2000); available at www.nio.gov.uk/review_of_the_criminal_justice_system_in_northern_ireland.pdf. Many of the group's recommendations were legislated in the Justice (Northern Ireland) Act 2002 and the Justice (Northern Ireland) Act 2004.

The Role of the Police

The need for an independent policing commission stemmed from this briefly outlined long history of abusive, partisan policing in Northern Ireland and the context of violent civil unrest. Policing became a huge bone of contention in the ongoing conflict, symbolizing, reflecting, and exacerbating the polarization between Catholic and Protestant, Nationalist and Unionist, Republican and Loyalist.

A number of government-sponsored attempts to reform the police in the past had failed to engage effectively, honestly, and creatively with the "fateful split"[25] between the forces of law and order and Catholics.[26] Police and army personnel involved in killing civilians in contested circumstances were rarely prosecuted and only a handful were ever convicted.

The appearance of police and army operating above the law was further compounded by the fact that the police force and NI regiments of the army were drawn almost solely from one section of a divided community. The government's failure to countenance or properly investigate wrongdoing when much evidence existed of partisan policing is brought home by the fact that the only major research project into police harassment during the Troubles was commissioned by an NGO rather than government.[27] This 1994 study showed that a high proportion of young people, particularly but not exclusively Catholic, viewed routine harassment at the hands of police and army as "part of life here." It is also important to be aware that the police were in large part administered and facilitated by a civil service and legal regime that was also unrepresentative of the make-up and aspirations of the whole community in important respects.

Since Catholics, Nationalists, and Republicans viewed the police as partisan, they became increasingly alienated from them. Particularly in working class, urban areas, it was unthinkable that the RUC or British army would be approached for help. In part, this was a result of a censorial attitude in communities where paramilitaries held sway. Given the segregated nature of housing and education, in certain areas consorting or associating with "the enemy" resulted in social ostracization or punishment. Catholics, particularly working-class Catholics, did not expect the police to be interested in their problems or to treat them fairly. Further, police requested to come to Republican areas to deal with criminal activity generally did not attend. In part,

[25] The Scarman Tribunal put blame for the descent into anarchy on the "fateful split" between police and the Catholic community and policies of discrimination pursued by the Stormont regime. See *Violence and Civil Disturbances in Northern Ireland in 1969: Report of the Tribunal of Inquiry Report* (Belfast: HMSO, 1972), 15; available at cain.ulst.ac.uk/hmso/scarman.htm.

[26] See, for example, how proposals from the Hunt Commission in 1970 to disarm the police and make it more community oriented were ultimately overtaken by events as violence escalated. *Report to the Advisory Committee on Police in Northern Ireland*, Cmnd. 535 (1969); available at cain.ulst.ac.uk/hmso/hunt.htm.

[27] See Robbie McVeigh, *"It's Part of Life Here": The Security Forces and Harassment in Northern Ireland* (Belfast: CAJ, 1994).

this policy of nonresponse can be attributed to a legitimate fear of potential ambush and insufficient personnel to guarantee officer safety. In many of these areas, police appeared only in flak jackets, heavily armed and flanked by soldiers. They set up checkpoints, searched homes, and stopped, questioned, and mistreated people on a regular basis.

Within this policing vacuum, communities held together strongly and people relied on family members and neighbors for assistance and support in times of trouble. Paramilitaries were often approached to deal with crime and antisocial behavior in local communities, and insidious and invidious informal practices came to hold sway in particular areas.[28] Informal "justice" mechanisms became almost institutionalized in certain parts, with kangaroo courts, the establishment of tariffs, and the meting out of punishments from tarring and feathering to beatings, shootings in kneecaps, elbows, and ankles, exiling, and death. A looser system of paramilitary-style "justice" also grew up in certain Loyalist areas.

Any reform agenda clearly needed to tackle the issues of representation within and ownership of the police, to provide effective and impartial policing acceptable and accessible to all communities, to establish capable and transparent accountability mechanisms and a fairer system for the administration of justice, and to deal decisively with past wrongdoing. All of this needed to take place within a broader context of demilitarization and downsizing as Northern Ireland lurched toward a more peaceful dispensation.

The Patten Commission

The 1998 peace agreement set out the framework for an Independent Commission on Policing, which aimed to respond to the problems just described, among others. The commission, known as the "Patten Commission" after its chair, British politician Chris Patten, was established in 1998 and was comprised of international and local actors with a range of experience and expertise. It acted as a surrogate truth commission in some respects, eliciting the views of a wide section of the Northern Ireland populace. Its 1999 report, *A New Beginning for Policing in Northern Ireland*, contained 175 recommendations for change.

The Commission consulted widely, after an initial and arguably problematic establishment-based induction period. As well as visiting every police station and speaking to and taking the views of well over a thousand police officers, commissioners went on the road, holding public hearings in many highly segregated areas in Northern Ireland as well as having meetings in more neutral venues. The commission also made use of focus groups, previous and specially commissioned research,

[28] For fuller examination see Kieran McEvoy and Harry Mika, "Restorative Justice and the Critique of Informalism in Northern Ireland," *British Journal of Criminology* 42 (2002): 534–62; Colin Knox and Rachel Monaghan, *Informal Justice in Divided Societies: Northern Ireland and South Africa* (New York: Palgrave Macmillan, 2003).

written submissions, meetings with victims' families, academics and community representatives, monthly discussions with a number of middle ranking police officers deemed open to change, and a range of other mechanisms designed to ensure different groups and voices were factored into the process. The commission was at pains to highlight that many of its final proposals were uncontroversial and built on agreed principles across the political spectrum.

It chose the twin pillars of respect for human rights and policing with the community to base the totality of its finding. These concepts were presumed to be the core business of policing, with human rights "not an impediment to effective policing but, on the contrary, vital for its achievement."[29] To ensure objectivity and encourage broad ownership, the commission suggested that each proposal for reform should be submitted to a five-stage principled test:

1. Does the proposal promote efficient and effective policing?
2. Will it deliver fair and impartial policing, free from partisan control?
3. Does it provide for accountability, both to the law and to the community?
4. Will it make the police more representative of the society they serve?
5. Does it protect and vindicate the human rights and human dignity of all?

Within these parameters, the raft of recommendations put forward dealt with a wide range of issues, including technical capacity; organizational structure; culture, ethos, and symbols; accountability and oversight; training; civilianization; representation; downsizing; and policing with the community.

The force was to be downsized quite considerably (from 13,000 to around 7,000) through a combination of compulsory redundancies, the disbandment of the reserve, and generous voluntary severance packages for officers over fifty. Future recruitment for a time-limited period was to be conducted on a fifty-fifty basis, in that equal numbers of Catholics and non-Catholics were to be recruited into the organization from a pool of suitable candidates up until the point where Catholics made up a third of the organization.[30] Little was said about ethnic minority representation, and although Patten referred to the need to increase representation of women in the police, no particular recommendations were made to facilitate this as a priority. To alleviate a chill factor for Catholic recruitment, the name of the force was to be changed, and it ultimately became the Police Service of Northern Ireland (PSNI). Also, the oath of allegiance to the Queen was replaced by a human rights attestation, and the uniform, badge, and other symbols were also changed as part of a proposed move toward a neutral working environment. The organization was also to be extensively altered to make the police seem more accessible and community friendly. For the time being it was recommended that police continued to be armed,

[29] *Patten Report*, 18.

[30] In 1998 the percentage of RUC officers from a Catholic background was 8.3 percent; in February 2008 this figure for the full-time PSNI was 23.7 percent.

but that personal-issue firearms were not to be given to trainee officers until they had completed their training.

On the accountability level, Patten commented: "Accountability should run through the bloodstream of the whole body of a police service and is at least as much a matter of the culture and ethos of the service as it is of the institutional mechanisms."[31] For this reason, policing was to be decentralized, with rank structures flattened and greater responsibility given to local district commanders. A civilian Policing Board was recommended to oversee the police organization and to monitor the extent of its compliance with human rights. Although the chief constable was deemed to retain operational responsibility, the board was entitled and obliged to hold him or her accountable in terms of any operational matter. The board was also to be responsible for the operation of twenty-six District Policing Partnership Boards (DPPBs), which were to be based along local council lines. Both sets of bodies were to comprise elected representatives and independent civilians and to be reflective of Northern Irish society as a whole. A fully independent system for the investigation of complaints against the police by members of the public was also endorsed as a key element of security governance in the form of a Police Ombudsman for Northern Ireland.[32]

Training, education, and development was another important feature of the report with a number of recommendations dedicated to the formulation and implementation of a strategy, firmly grounded on inculcating a culture of human rights compliance into the organization.[33]

Patten recognized that the activities of Royal Ulster Constabulary (RUC) Special Branch had given particular cause for concern and recommended the restructuring of criminal investigation and intelligence gathering at the heart of the organization, as well as rotation of personnel involved in such activities. In terms of those previously responsible for serious human rights violations, the report simply stated that "bad apples should be dealt with," without indicating how or addressing the burning question as to how far this wrongdoing was institutionalized and systematized rather than a question of isolated "bad apples." Trying to straddle the divide between honoring a loyal police force and punishing a feckless one, Patten made no recommendation in terms of vetting or addressing past wrongdoing.

[31] *Patten Report*, 22.

[32] The Office of Police Ombudsman for Northern Ireland currently has a staff of 150 and a budget of £9 million. By March 2009, it had handled 26,709 complaints against police officers, averaging around 3,000 a year. In 2000, the largest category of complaint was oppressive behavior. By 2009, failure of duty was the biggest category. See www.policeombudsman.org.

[33] For more detailed commentary, see Mary O'Rawe, "Human Rights and Police Training in Transitional Societies: Exporting the Lessons of Northern Ireland," *Human Rights Quarterly* 27, no. 3 (2005): 943–68 and Mary O'Rawe, "Human Rights, Transitional Societies and Police Training: Legitimating Strategies and Delegitimating Legacies," *St. John's Journal of Legal Commentary* 22, no. 1 (2007): 199–259.

The initial response across the political spectrum was less than fulsome. For Unionists, the symbolic changes to name, uniform, and badge were viewed as offensive, and the fifty-fifty recruitment recommendation was considered unnecessary and subject to ultimately unsuccessful legal challenge. For Nationalists and Republicans, the fact that Patten had made no recommendations relating to officers who had committed serious human rights violations, as well as the weakness of provision in respect of the wholesale reform of RUC Special Branch, were sources of particular concern, especially as the "emergency" legal regime was still virtually intact, having been deemed beyond the remit of the commission. Serving police officers largely experienced Patten as a body blow. Many proposals were viewed as highly politicized and unfair.

Problematic Implementation of Patten

The implementation process itself was placed back in the hands of those who had been responsible for policing in the past. Northern Irish and British civil servants in the Northern Ireland Office (NIO) brought forward an implementation plan, and legislation was drafted that, unfortunately, marked an insufficient break with the past and did not convince Nationalist and Republican politicians to engage with the new regime.

Particularly in terms of the accountability mechanisms and processes designed to usher in policing with and for the whole community, the Patten report was "gutted." Although the Oversight Commissioner recommended by Patten was eventually appointed from overseas, his remit was in fact not to oversee the implementation of Patten, but the implementation of the government plan for the implementation of Patten – a very different creature from the original, and very much organizationally referential in terms of performance indicators.

Nationalists and Republicans were initially unconvinced that the political will really existed to ensure the mistakes of the past were not allowed to continue into the heart of the new regime. They took the dilution of Patten as proof of the government clawing back the parameters of the debate in an attempt to appease Unionists and the police.

While Nationalist and Republican politicians lobbied for further changes, in Republican areas on the ground, focus switched to the development of restorative justice mechanisms as an alternative to both official policing and paramilitary style processes for dealing with crime and antisocial behavior. Today there are currently two restorative justice umbrella groups in Northern Ireland, divided along identity lines. Community Restorative Justice Ireland operates in fourteen Republican communities, and Northern Ireland Alternatives has a presence in four Loyalist areas. Both projects were initiated by political ex-paramilitary prisoners, who still play a role in the day-to-day operation of the schemes.

Meanwhile many Unionists and Loyalists took the reforms suggested by Patten as a personal affront. They saw the organization that had protected them from terrorism being decimated. Even the award of the George Cross for gallantry to the RUC following the publication of the Patten report did little to assuage them. They engaged with the reform process as much to protect the organization from further attack and to ensure the nonimplementation of what the Democratic Unionist Party and others viewed as the more political aspects of the Patten recommendations.

Following interventions by the Nationalist (Social Democratic and Labour Party [SDLP]) and the Republican (Sinn Féin) political parties, civil society, human rights organizations, U.S. politicians, and the European Union, a massive number of changes were made to the original Police Bill, which became the Police Act 2000. A revised implementation plan was issued in 2001, and to convince Nationalists of government bona fides, further legislation was necessitated in 2003. The legislation strengthened, in particular, the powers and responsibilities of the new Police Ombudsman for Northern Ireland, which was set up to investigate complaints against the police. For example, the ombudsman now had the power to investigate and comment on policy and practice, not just individual complaints. At this point, Nationalist politicians from the SDLP took their places on the new Policing Board and the local DPPBs (now reconfigured as DPPs).

Republicans held out until 2007, when a special Sinn Féin Ard Fheis endorsed engagement with the new policing structures and processes for the first time. By this stage a number of things had changed. The PSNI had recruited a large number of Catholics. Many former RUC members had left the organization. The PSNI had a new name, new symbols, and a new human rights attestation for members. It had engaged in a process of "human-rights" and "equality" proofing all of its internal policies and procedures. It had developed and linked a human-rights-focused Code of Ethics directly into its disciplinary system. It had responded to human rights oversight and taken on board further recommendations from the Policing Board's human rights advisors. It had civilianized extensively and attempted to mainstream human rights into training for all staff. It had otherwise satisfied the Oversight Commissioner that the Patten recommendations had largely been implemented. The broader criminal justice system had also experienced major changes. It had become more human rights focused through the bedding down of the 1998 Human Rights Act and the reforms instituted on foot of the peace process. The oversight bodies, in particular, the Office of Police Ombudsman, had shown themselves better equipped to take on hard issues and challenge police authority than had previously been the case. The Public Prosecution Service, the court service, and the judiciary had been subject to several reforms. The Equality and Human Rights Commissions were up and running.

It is also the case that Sinn Féin's significant policy shift had a certain degree of inevitability about it. Their engagement in other aspects of governance and the need for a cross party multidisciplinary approach to important social issues was,

to an extent, hampered through having no direct input into policing policy and practice. Change was equally required to meet the Republican community's need for a responsive police service. According to empirical research by Jonny Byrne and Lisa Monaghan, "There was no doubt that working class communities . . . suffered from violent crime, anti-social behaviour, and a rise in the fear of crime in the years between the paramilitary ceasefires and Sinn Féin's endorsement of the PSNI."[34] This resulted in an uneasy acceptance that in some ways, and even with a growth in restorative justice mechanisms at a local community level, a formal police service actually needed to be engaged with to address issues and concerns around criminality and community safety. Not being part of the process meant that Republicans had no opportunity to shape policing or hold the chief constable to account. Joining in provided a chance to "put manners on"[35] the police, as Sinn Féin leader Gerry Adams emphasized, in a way that shouting from the sidelines or operating alternative processes could not. Sinn Féin spent many months convincing its constituency that this change was necessary and signaling that it was on the way.

The Post-Patten Legacy: Small Steps Toward Justice

Despite all the reforms, there are still difficulties and distrust continues, particularly among Republicans, as to how far things have really changed. Public Attitude Surveys certainly indicate more cross-community acceptance of the police than prior to the Patten reforms, though Protestants are still more likely to rank the organization as good and Catholics as poor in terms of performance.[36] There have been significant strides in recruiting Catholics, who now number around 24 percent of the organization, although retaining them does appear to be an issue,[37] and many of those recorded as Catholic for statistical purposes have been from Poland rather than Ireland.[38] There is still a distinct lack of representation of Loyalists and Republicans within the PSNI, and significant levels of dissatisfaction with policing at the grassroots of Loyalist and Republican areas.[39]

[34] Jonny Byrne and Lisa Monaghan, *Policing Loyalist and Republican Communities: Understanding Key Issues for Local Communities and PSNI* (Institute for Conflict Research, Sep. 2008), 114.

[35] Gerry Adams, leader of Sinn Féin, quoted in Glenn Patterson, "A Provisional Solution," *The Guardian*, January 30, 2007; available at www.guardian.co.uk/commentisfree/2007/jan/30/post1020.

[36] See, e.g., Northern Ireland Policing Board, *Public Perception of the Police, DPPs and the Northern Ireland Policing Board* (April 2009), 4; available at *www.nipolicingboard.org.uk/omnibus_survey.pdf*.

[37] British Irish Rights Watch (BIRW), *BIRW Submissions to UN Special Rapporteur on Freedom of Religion* (June 2007); available at www.birw.org/freedom%20of%20religion.html; see also Police Service of Northern Ireland (PSNI), *PSNI Equality Impact Assessment: Recruitment of Police Officers EQUIA Report* (March 2008), 65; available at www.psni.police.uk/eqia_recruitment_full_report.pdf.

[38] BIRW, *BIRW Submissions to UN*, 65.

[39] No statistical information relating to political viewpoint is sought or retained by PSNI, although empirical research would indicate the continued unlikelihood of Republicans, in particular, joining the PSNI. On the issue of dissatisfaction, see John R. Topping, "Diversifying from Within: Community Policing and the Governance of Security in Northern Ireland," *British Journal of Criminology* 48 (2008): 791.

The failure to deal satisfactorily with issues of past policing and security arrangements and the wrongs perpetrated during the conflict continued to dog the process and diminish trust in the efficacy of reforms. Chief Constable Hugh Orde, having made the case that his ability to police the present was being compromised by a failure to put the past to rest, recommended and secured funding for a police-led Historical Enquiries Team (HET) to review Troubles-related deaths from 1968 to 1998. The goal of the HET, which began its work in September 2005, is to reinvestigate where evidential possibilities exist and to provide some degree of closure to families of the deceased. The body was initially funded to the tune of £32 million and is to conclude its work within a timescale of six years. The number of deaths was originally announced by government as numbering 1,800 and, significantly, did not include killings by the security forces. Lobbying by nationalist NGOs in particular ultimately resulted in the decision to subject almost double this number of conflict-related deaths to the HET process in order to sustain faith in the process as impartial and credible.

The HET is a unique process in policing terms and has some important insights to offer in terms of dealing with difficult policing legacies. The body is concerned to meet the needs of families and to address their unresolved questions, working on the "principle of maximum permissible disclosure."[40] Unfortunately, the HET's ability to meet families' expectations is compromised by a number of factors, not least the passage of time, the judicially oriented nature of the process, and the fact that a lot of onus is put on families or their representatives to frame the "right" questions in order to pave the way for a satisfactory process. Another particular concern is that the HET in a number of respects does not meet the requirements set out for such investigative processes by the European Court of Human Rights.

The HET has now been in operation since early 2006 and has been dogged by controversy as to both its independence and effectiveness. Although it is a little early to draw many definitive conclusions as to the success of this venture, one major piece of empirical work details some important findings.[41]

The author of this work, Patricia Lundy, concludes that there is much to commend both in the concept and the process. The ability of the HET to provide a symbolic "official stamp" validating, for example, the accuracy of information gathered by NGOs and previously denied by government is in itself significant. However, among the downsides, she notes that the HET has suffered from high staff turnover, breaches of security, lack of resources, and the fact that it essentially provides a police-led, and of necessity, partial narrative. As such, the narrative the HET produces will need to be complemented (or superceded) by other, as yet nonexistent or insufficiently joined-up processes.

[40] See Historical Enquiries Team web site, "Our Approach"; available at www.psni.police.uk/historical-enquiries-team/het-our-approach.htm.

[41] Patricia Lundy, "Can the Past be Policed? Lessons from the Historical Enquiries Team Northern Ireland," *Law and Social Challenges* 11 (Spring/Summer 2009): 109–56.

The effectiveness of such a body is clearly further complicated by mistrust within and between ethnoreligious/political groups. Of fundamental concern in this regard is "the apparent strangle-hold of former RUC officers on the intelligence aspect of HET's work."[42] Lundy has found that "issues of loyalty, embedded corporate knowledge, and entrenched and deep-rooted life experiences are factors that seem to have impacted and shaped the HET process. The reliance on RUC corporate memory and the absence of a counter-discourse or counterbalancing memory is a fundamental weakness in the work of the HET."[43]

Lundy further concludes that the fact that "HET composition appears not to meet Patten recommendations that the police service be broadly reflective of the population, means in practice there is the absence of a broadly Nationalist perspective or memory informing its work. As . . . argued elsewhere, competing and contested memories, official discourse and counter-discourses impact on how the past should be remembered and is very much the site of struggle in post-conflict Northern Ireland."[44] The lack of inclusiveness has had deleterious consequences for trust building, ownership, and legitimacy, and has done little to reduce the "us-and-them" dialectic operative in Northern Ireland. She recommends external oversight as a partial remedy for some of these dynamics.

The fraught and highly controversial establishment of the HET and a small number of public inquiries into particular controversial killings has not assuaged a huge appetite on the part of Republicans, Nationalists, human rights activists, and a number of victims and their families to deal more fully with the past. The fact that the past will not just go away is illustrated in the marked rise in dissident Republican antagonism, with death threats made against Sinn Féin councilors and DPP members. In November 2007, two police officers were shot by dissident Republicans in separate incidents. Also, between June 2007 and June 2008, a number of serving police officers were advised to leave their homes because of a direct terrorist threat.

Most recently an attempt has been made to bring together all of the disparate commissions, inquiries, and other activities aimed at dealing with the past under one umbrella. In January 2009, the Consultative Group on the Past, an official body convened to canvass civil society and make recommendations for dealing with the past, delivered its final report. Its most notable recommendation was to create an official Legacy Commission, which would bring together the disparate commissions currently at work, as well as the HET. Many Unionists, however, still fail to see what is to be gained from dredging up the past. They objected vocally to the Consultative Group's recommendation that families of all of those killed during the Troubles

[42] Jane Winter, Director of British Irish Rights Watch, email message to Patricia Lundy, September 22, 2008, quoted in ibid., 35.

[43] Ibid., 37.

[44] Patricia Lundy and Mark McGovern, "The Politics of Memory in Post-Conflict Northern Ireland," *Peace Review: A Transnational Quarterly* 13 (2001): 27.

should receive a one-time "recognition payment" of £12,000, as this would have included payouts to families of terrorists.

In this context, crime reporting rates have accelerated (reaching a peak around 2002–2003), while detection rates have consistently fallen. The unrealistically high expectations of Nationalists that policing would improve dramatically after Patten have created a credibility gap between aspiration and reality. At the same time, many Unionists and Loyalists attribute the lower clearance rates to the fact that the organization has hemorrhaged experienced officers through the Patten severance scheme, at a time when their expertise was most required.

It is now ten years since the Independent Commission on Policing reported. The second Oversight Commissioner signed off in 2006 that implementation of the vast majority of the proposals (140 of 175) had been achieved and there had been substantial progress on many of those remaining.[45] The peace and security reform process has withstood all of the politicking and attacks mentioned and more, although sectarianism is still a major issue[46] and the dissident Republican threat has recently escalated. In March 2009, two soldiers were killed and two workers "collaborating" with the British State by delivering pizza to these soldiers were seriously injured. The following day the first PSNI officer to be killed in ten years was shot dead, also by dissident Republicans. In May 2009, the horrific sectarian killing, in Coleraine, of Catholic community worker Kevin McDaid by people claiming to be Loyalist paramilitaries also posed serious questions around the legitimacy, acceptability, and effectiveness of security provision.

Whatever the deficiencies in the Patten report and, more particularly, the insufficiencies of its implementation, the recent murders tell their own story. Not only has this last decade marked a break with the past (with an average of ten police officers being killed annually for each of the previous thirty years), but, in the aftermath of the police officer's murder, and those of the two British soldiers, Martin McGuinness, Sinn Féin politician and deputy first minister for Northern Ireland (and more importantly in this context former senior member of the PIRA Army Council), stood shoulder to shoulder with the chief constable of the PSNI and the Unionist First Minister to unequivocally denounce the killings as wrong. He further asked people to cooperate with the police in their search for the killers, and condemned members of the dissident Republican group, the Continuity IRA, as "traitors to the island of Ireland." After the Coleraine murder, Loyalist paramilitary spokespersons joined their voices with others demanding full cooperation with the police in the hunt for the killers, although it has been noted that First Minister Peter

[45] Office of the Oversight Commissioner, *Report of the Oversight Commissioner for Policing Reform in Northern Ireland* no. 19 (May 2007); available at www.oversightcommissioner.org/reports/pdfs/MAY2007.pdf.

[46] Witness riots in Ardoyne surrounding the contentious July 12 parade passing through the area in 2009. See "Rioters Clash with Police on Ardoyne March Route," *Irish Times*, July 13, 2009; available at www.irishtimes.com/newspaper/breaking/2009/0713/breaking69.htm.

Robinson did not mirror Martin McGuinness's fulsome condemnation in respect of this attack.[47] A further piece to this picture, however, is that the murdered man's family have launched a complaint with the police ombudsman that police did not do enough to prevent this killing. There are allegations that police officers looked on while the attack took place and that one police officer goaded Loyalists into the initial attack. If these allegations ultimately prove true, the dissident Republican narrative that the sectarian mentality of the RUC remains largely unreconstructed will be strengthened.

DILEMMAS FOR SSR IN DIVIDED SOCIETIES: LESSONS FROM NORTHERN IRELAND

The following dilemmas fall out from an exploration of the Northern Ireland scenario. To an extent, these are dilemmas that pertain to any SSR program. They do, however, take on particular characteristics and nuances in divided societies.

Generating Cooperation

Key stakeholders are often narrowly drawn at the outset of security reform processes, and dominant conflict identities frequently viewed as much more homogenous and overarching than they might actually be. SSR processes typically consult only government, political representatives, security and criminal justice sector managers, former oppositional actors, security personnel, and, generally to a lesser extent, vocal and organized elements of civil society – thus often leaving aside the views of the communities that the security forces aim to serve. Also, the police or military the main targets of reform, rather than the system as a whole.[48]

In Northern Ireland, however, community-led efforts made an important contribution to the shaping of the SSR process. In the run-up to the signing of the Belfast Agreement in 1998, a number of community conferences were held, chiefly in Republican areas. Although police and authorities did not engage by attending such events, the meetings themselves were significant for bringing working-class Republicans and Loyalists together and allowing for the sharing of experiences and the building of common ground. Loyalists did not have a monolithic view of the police and army as providers of public goods. Many working-class Loyalists had experienced the rough end of policing themselves, particularly since

[47] See for example Brian Feeney, "Blaming UDA for McDaid Killing Is Unionist Copout," *Irish News*, June 3, 2009; available at www.irishnews.com/appnews/540/606/2009/6/3/619177_383380156330BlamingUD.html.

[48] Despite extensive change within the criminal justice system, an overemphasis on the police as the most visible target of change has allowed it to pass relatively unnoticed that only 9 percent of NI prison service staff are Catholic as opposed to 80 percent Protestant, or that Catholics, while making up 44 percent of the population, make up only 30.4 percent of senior civil service staff; see *BIRW Submissions to UN*.

1985 when the Anglo-Irish agreement was signed as a forerunner to the current peace process. As Byrne and Monaghan report, throughout the 1990s, during continued interface violence involving Loyalist and Republican communities, individuals participated in interface groups and forums that helped develop relationships and sustain communications. At a time when myths and rumors were frequently the catalyst for violence, clear and trusted lines of communication were extremely important. The majority of these groups did not have any police involvement "but were responsible for successfully limiting large incidents of violence and disorder."[49]

In the wake of the 1998 agreement, however, resistance resurfaced. Various remonstrations from public representatives exhorted the 92-percent-Protestant police force to remember to whom it owed its allegiance, and the then–chief constable was equally vocal in pointing to the sacrifice and professionalism of his brave men (and women). This social pressure both cemented a sense of identification among Protestants and also furthered Catholic/Nationalist/Republican communities' alienation from the police. Following Patten, a "Save Our RUC" (Royal Ulster Constabulary) campaign gained currency among Protestant/Unionist/Loyalist communities and pro-Unionist media.

Dissident voices within working class Unionism/Loyalism found it hard to articulate their own dissatisfaction with policing during the conflict, feeling compelled to portray a united front of support for the police along traditional lines. Gradually, the tide turned from complete opposition to change within the dominant ethnoreligious/political group, to a public acceptance of the need to incorporate more Catholics into police ranks.

In part, this softening of attitudes toward change resulted from people at the hard edges of both major communities having come together to work on practical interface issues and beginning to get a sense of the experience of the "other side" during and prior to the Troubles. It is clear that grassroots and voluntary trust-building initiatives between Loyalists and Republicans to address issues of common concern allowed for the sharing of experiences and the formation of relationships. While having very different views on the legitimacy of the state, those working proactively within their different communities came to recognize that they shared many common experiences of poverty and aggressive policing. Class identification with Republicans began to facilitate the articulation by Loyalists of the fact that policing had not been all good for working-class Protestants. Those who did put forward these views frequently expressed their own ambivalence and feelings of disloyalty in doing so. However, their lead paved the way for others in varying degrees to articulate the need for reform processes to accommodate a larger degree

[49] See also Neil Jarman and Chris O'Halloran, *Peacelines or Battlefields: Responding to Violence in Interface Areas* (Belfast: Community Development Centre, 2000).

of ethnoreligious diversity and to recognize other identity-based experiences in the process.[50]

In sum, the openness to cooperation in Northern Ireland seems to have been directly linked to challenging the priority of the conflict identities and bringing other crosscutting identities into play. In particular, identifying class as a salient feature of shared experience and building consensus around an international language of human rights provided leverage to decategorize political, conflict-related identities as either all-encompassing or insurmountable.

Yet there had been another – unfortunately missed – opportunity for generating cooperation around a crosscutting identity. The Patten Commission held a number of public meetings where gender emerged as an area of identification and consensus across communities with very different political ideologies. Rather than use this consensus to build a broader equality framework, to recategorize polarizing issues as linked to the merits of a more pluralist society, the commission focused its recommendations for change very explicitly on the vexed issue of religious underrepresentation. This angle itself underplayed that the real focus of contention was the unacceptability of particular political viewpoints within and vis-à-vis the police and wider justice system. It contributed to media focus and political parties regrouping symbolically around traditional polarized positions as to whether change was warranted or not – the very thing that the commission had been set up to try to avoid.[51] Gender offered an important equality framework that many groups could have agreed on, and that could have avoided some of the most obvious resistance, but the Patten Commission chose not to use it.

The Impact of International Actors

The role of international actors in assisting or compromising the building of coalitions and cooperation is another important factor in SSR processes. When there is little trust in either the competence or the impartiality of local institutions, people may actually want outsiders to step in. For example, judgments against the state from the European Court of Human Rights and negative comments from various UN Committees and Special Rapporteurs have been important in signaling that objective, independent analysis found the system wanting. This analysis rendered it more difficult for government and its supporters to dismiss pressure for change as simply partisan.

[50] The work of human rights groups such as the Committee on the Administration of Justice and, latterly, the Equality Coalition and the Human Rights Consortium has also been significant in building alliances and providing the language of rights alongside or in place of identity categories that assist in the voicing of shared fears and aspirations.

[51] See Mary O'Rawe, "Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic," *Fordham Journal of International Law* 26 (2003): 1015–73.

This was also the case with the Patten Commission. Here, an international component was important to gain trust and break deadlock. The Patten Commission was the first-ever police reform mechanism that was not boycotted by some section of the community. It worked on the basis of good will and did what a completely local mechanism could not have done – although it importantly did have local input to ensure the commission's deliberations were fully grounded in the realities of the Northern Ireland situation. One downside was a steep learning curve for some nonnationals to build up their knowledge base of the culture in which they were operating. Another was the insufficiently recognized, extra needs to build consensus around the commission's proposals and to have them be owned by a broad cross section of the community before the commission disbanded. Since the international commissioners left the jurisdiction as soon as the report was delivered, without having sufficiently built coalitions to support its proposals, it was easier for government to dilute them after the fact. Furthermore, the commission decided not to make any pronouncement on RUC past practice for good or ill, and as a result many Protestants/Unionists remained at a loss to understand why all this change was warranted.

Whereas the existence of external mediators/brokers may be a good (and indeed necessary) thing in societies fractured by ethnoreligious/political tension, possible pitfalls must be guarded against. The provision of funding by outside donors to support particular types of projects or organizations can do harm as well as good, depending on the integrity, understanding, and inclusiveness of the funding and evaluation process. Michael Pugh[52] cautions against allowing donor power to dominate in postconflict spaces, because a hierarchy might be created whereby donors rather than internal actors delineate the field and set some of the implicit and explicit rules for engagement in SSR. The fragmented experience in Bosnia and Herzegovina and the western Balkans more generally is instructive in this regard.

Need for Broad Understanding of Security

A broad understanding of security is an important part of the SSR process. This may be complicated in societies divided along identity lines by a couple of factors. Different ethnoreligious/political groups may have different views on what constitutes security. Moreover, security forces may have traditionally been used for the protection of one section of a divided community, often through the repression/suppression of another. There are, therefore, specific conceptual and operational challenges to creating a broader definition of SSR in divided societies. A key dilemma for SSR in divided societies is, therefore, in creating consensus around what security means

[52] Michael Pugh, "Post-Conflict Rehabilitation: Social and Civil Dimensions," *The Journal of Humanitarian Assistance* (1998); available at jha.ac/1998/12/11/post-conflict-rehabilitation-social-and-civil-dimensions.

and might come to mean and why changes do not necessarily equate to losses for a previously dominant community.

In Northern Ireland, police suspicion of Republican-based community restorative justice systems and a preference for top-down initiatives has made it very difficult to create good working relationships between Republican communities and the PSNI. The civilian-based policing board has equally failed to provide legitimate and inclusive leadership in this regard, seeing its role as more "police" (as in organization) than "policing" (as in broader function) oriented and creating unnecessary restrictions on the workings of District Policing Partnerships (DPPs). Board response to restorative justice processes has also been telling, claiming that they need the support of PSNI before the Policing Board would consider funding them.

That this attitude is problematic is confirmed by a 2006 evaluation of community restorative justice schemes in Northern Ireland by academic Harry Mika. This study, the main findings of which were confirmed by two separate Criminal Justice Inspectorate reports in 2007,[53] found that community restorative justice mechanisms had led to a significant fall in the number of beatings and shootings in communities where they operated. Mika further pointed to the potential of such mechanisms to assist communities in becoming more tolerant of marginalized members of the community, including young people engaging in antisocial behavior and former combatants.[54]

Despite the empirical evidence, the Policing Board vociferously opposed calls to fund the schemes from its policing budget on the basis that this would permit community-based restorative justice to bypass the police. The Board further signaled that such schemes must give "unqualified acceptance" to the role of the PSNI before they can even be considered eligible for funding.[55]

It is clearly somewhat fanciful to set such requirements given the levels of mistrust that still exist in relation to the PSNI among some urban working-class communities in Northern Ireland. Whereas the Loyalist bodies have police officers on their management committees, Republican schemes did not see why they needed or should have to interface with the police when they were proving quite effective on their own.[56]

Those within the security sector added grist to the mill by seeing themselves as the experts in creating security and feeling unable or unwilling to conceive of real partnership with civil society actors, particularly those who had criticized or opposed them in the past. In 2006, for example, the chairman of the Police

[53] Criminal Justice Inspection Northern Ireland (CIJNI), *Northern Ireland Alternatives Report of an Inspection* (Belfast: CJINI, 2007); available at www.cjini.org/CJNI/files/99/998904e7-fa99–4c91-be56–0b5105459087.pdf; and CIJNI, *Community Restorative Justice Ireland Report of a pre-inspection* (Belfast: CJINI, 2007); available at www.cjini.org/CJNI/files/of/0fe3cbee-a06e-4659–957a-6908c032c90a.pdf.

[54] Harry Mika, *Community Based Restorative Justice in Northern Ireland* (Belfast: QUB, 2006).

[55] Frank Millar, "Policing Board Rejects British Proposals," *The Irish Times*, May 19, 2006.

[56] See, for example, McEvoy and Mika, "Restorative Justice and Critique of Informalism."

Federation, Irwin Montgomery, commented that "there can be no question of any Community Restorative Justice (CRJs) being set up which are not closely supervised by the police."[57] He continued that "no-one should have a role within a CRJ who has either a criminal or terrorist record or about whom there is intelligence of paramilitary involvement."

It is not surprising that it took a full decade for Republican schemes to finally agree to cooperate formally with the PSNI and the Public Prosecution Service in the identification of cases suitable for a community-based disposal. This process could have arrived here more quickly if crosscutting identity issues had been more creatively explored, and Patten's exhortations on the importance of policing with the community, and all that that entails, taken more seriously.

Without seeking to idealize traditional, indigenous, or community-based forms of conflict resolution, it may be that these processes should be more fully supported in security transformation processes to embrace a justice-centered, nondiscriminatory approach. However, particular regard clearly needs to be given to how such processes treat dissidents, the marginalized, and women and accommodate their different and specific visions of what security entails. Broadening understandings of security can be key to recognizing different experiences and ensuring that security and justice processes do not undermine the rights and dignity of vulnerable groups. Equally, group accommodation cannot be used as an excuse to continue less visible or more acceptable means of discrimination against a less powerful or articulate subgroup or out-group.

This is, perhaps, where a justice-centered approach to SSR can make a difference, in terms of assessing baseline equality and not allowing cultural sensitivity to trump fundamental questions of remedy and justice for victims. Policing and criminal justice reform in transitional spaces should be geared to broadening the power base for security design, regulation, and provision, avoiding the overvalorization of conflict-related identities, and establishing effective conduits through which the most marginalized in society can have their voices heard.

The Need for a Holistic Approach to SSR

This all leads back to the problem that a shared understanding of what constitutes justice and fairness in a divided society cannot be assumed and may be difficult to craft. A key issue is therefore that of setting legitimate criteria for "impartiality," "fairness," and "professionalism" in societies divided along identity lines and embedding these criteria into resistant organizations or other cultures. This process is something that can be brokered through closer attention to human rights norms

[57] Irwin Montgomery, "Address at the 34th Annual Conference," Annual meeting of the Police Federation of Northern Ireland, September 13, 2006; available at www.policefed-ni.org.uk/chair_conf06.htm.

and principles. These principles must apply not just to a police organization, but throughout the broader security and justice system. Ideally, they will be embedded in legislation at a constitutional level. Indeed, security system transformation in divided societies may well require the constitutionalizing of equality through a Bill of Rights, enacting strong equality legislation, and repealing arbitrary and discriminatory emergency legislation that, in drawing police and army powers too broadly, has diluted safeguards within the criminal justice process more generally.[58]

In Northern Ireland, a system-wide program of reform was attempted, although a Northern Ireland–specific Bill of Rights is still some way off. This program, although initiating many far-reaching reforms, has stopped short of transforming the security agenda. Sectarianism and party politics still cloud many decisions around the operation of policing and justice and its imminent devolution to Northern Irish politicians. Security is still viewed in very narrow terms, and the focus remains on the police as an organization rather than policing as a societal function. In some ways, this is due to the fact that conflict-related identities have been further cemented rather than surmounted. Empirical work done around gendered understandings and experiences[59] of security postconflict, for example, attest to the fact that security/security-related decisions remain largely in male hands and obscure gendered realities. Closer adherence to the imperatives of UN Security Council Resolution 1325 on Women, Peace and Security would be helpful in this regard.

The lack of effective policing of racially motivated hate crime is also a particular problem. It shows the potential for one out-group simply to be replaced by another, even in a so-called rights-oriented dispensation.[60]

Dealing with the Past to Build for the Future

In places such as Northern Ireland, ethnoreligious/political identity will have been essentialized on a perceptual and structural level, with different groups having competing accounts as to the extent to which their community has been victimized. Some ethnic/racial groups' self-understandings are strongly bound up with their sense of historical victimization, which they themselves might then use as a justification for wrongs done by their group to others. The significance of historical and legal accuracy and some shaping of the official conflict narrative to conform with or at least allow the experience of those at the rough end of policing is undoubtedly necessary to avoid these kinds of patterns being replicated in the future.

International standards give some assistance in this regard. The UN's updated set of Principles on Impunity are clear that family members have a right to know what

[58] See Chris Chapman's chapter in this volume.

[59] See Brandon Hamber et al., "Discourses in Transition: Reimagining Women's Security," *International Relations* 20, no. 4 (2006): 487–502.

[60] Note as an example the recent intimidation of several Romanian families in Belfast, resulting in many ultimately feeling the need to leave Northern Ireland altogether.

happened to their loved ones.[61] This is complicated when certain identity groups view their victims as more innocent than others. Here, the initial discussions around truth recovery will inevitably prove more divisive than healing initiatives, in the short term at least. In Northern Ireland, those who feel the RUC was sold out by the change process, and that its sacrifice in protecting society from terrorists has been undervalued, have very little sympathy for suggestions that allegations of past human rights abuse by the force or other security actors be further interrogated. On the other hand, quite a substantial section of the minority community still find it very hard to trust security arrangements have changed while so much information relating to the alleged running of death squads, the operation of a shoot-to-kill policy, and collusion with paramilitary groups in murder remains outside the public domain.[62] The HET has done a little, but not enough to engage these concerns.

The extent to which dealing with the past might vary from society to society, or be deemed more or less appropriate at particular junctures, will be strongly linked to the extent to which those in power see themselves as victims or recognize the victimhood of others. Sociologist Aogán Mulcahy argues that

> points of crisis [in a peace process] are often categorised precisely by the emergence of these hidden transcripts onto the public stage. Focusing on these hidden histories may shed greater light on the dynamics of police-community relations by offering an oppositional reading of events that privileges the experience of the subordinate over the rhetoric of the dominant, and that questions the "consensual basis" of authority in liberal-democratic societies.[63]

In the Northern Ireland context, the development of a shared societal consensus that the state was implicated in human rights abuse, for example, or that women suffered disproportionately from domestic violence during the conflict (something that was devalued in the face of a "terrorist threat" to be policed), could perhaps be useful in providing agreed baselines for change.[64]

[61] United Nations Economic and Social Council, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1 (February 8, 2005); available at www.flghrwg.net/reports/UN2005/impunity.pdf.

[62] For further detail around such claims see Rolston, "An Effective Mask for Terror": 181–203; John Stalker, *Stalker* (London: Harrap, 1988); Phil Scraton and Bill Rolston, "In the Full Glare of English Politics: Ireland, Inquiries and the British State," *The British Journal of Criminology* 45, no. 4 (2005): 547–64; Justin O'Brien, *Killing Finucane: Murder in Defence of the Realm* (Dublin: Gill & McMillan, 2005); and Angela Hegarty, "The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland," *Fordham International Law Journal* 26, no. 871 (2003): 1148–92.

[63] Aogán Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform* (Devon, UK: Willan Publishing, 2006), 19.

[64] See, for example, Monica McWilliams and Joan McKiernan, *Bringing It Out in the Open* (Belfast: HMSO, 1994).

Top Down vs. Bottom Up

Both top-down and bottom-up initiatives were present in Northern Ireland, but they were insufficiently integrated. Despite rhetorical commitment to democratic processes and local ownership, SSR programs are largely top down, organizational in focus, concern a relatively narrow group of actors, and are often ultimately interested in ensuring the formalism of police institutions and oversight bodies in legal and technical competence terms rather than in radically altering the reality of policing experience on the ground, both in and outside the organizations involved.

Top-down measures clearly have a place in SSR. Proactive leadership, increasing representation of previously excluded groups, formalizing lines of responsibility and accountability, enhancing managerial and external oversight, improving tactics, and increasing skills and expertise all are important. Top-down approaches also have the advantage of linking security organizations firmly into the process of change. As Laurie Nathan points out, "The security services are much more likely to resist reforms that have been imposed on them than reforms that they have helped to design. Precisely because they have the bureaucratic and informal means to prevent the proper implementation of approved reforms, their views have to be both challenged and accommodated during the design process."[65] This said, very often, only those "at the top" of such organizations have any real influence. Changes can then still be experienced as overly paternalistic or otherwise unresponsive to a range of needs and identity-based affiliations within security institutions. Subsequently, top-down measures will not necessarily impact positively and creatively on informal loyalties, identifications, and subcultures within and between organizations. Nor do they sufficiently challenge overly bureaucratic, hierarchical, and masculinized notions of security or their traditional resistance to outside input; indeed they may further cement these.

There is also the fact that police organizations are enormously expensive.[66] A key postconflict issue is whether such organizations require to be strengthened or the extent to which other policing models and processes might be supported to fulfill security goals. In Northern Ireland, an attempt to focus on policing rather than the police was lost at implementation stage, resulting in a very top-down approach.

To date, bottom-up approaches have been much less prevalent in SSR processes, partly because they require an interested and engaged civil society firstly to exist or be facilitated through capacity building and other measures and, secondly, for dissonant and different voices to be recognized, taken seriously, and provided room in the change process. Often, participatory processes grow up parallel or *in opposition to* official processes. The restorative justice movement, particularly within Republican

[65] Laurie Nathan, *No Ownership, No Commitment: A Guide to Local Ownership of Security Sector Reform* (Birmingham, UK: Global Facilitation Network for SSR, 2007), 23–24; available at www.ssrnetwork.net/documents/Publications/No_Ownership_No_Commitment_v2.pdf.

[66] The current annual policing budget for Northern Ireland is £1.2 billion.

areas of Northern Ireland, is a case in point. Local knowledge, experience, and research combined to generate a set of priorities and processes more fully in tune with local needs and realities. Involvement of civil society at all levels of the change process including needs analysis and agenda setting, design and development of training and educational initiatives, participatory monitoring, and evaluation along the lines of agreed indicators all have enormous potential to ensure that the security aspirations and needs of different identity groups are factored into the process and, ultimately, in better measure met. In particular, bottom-up approaches have the potential to be more fully aware of the differentiated needs and experiences of others, for example the poor, women, children, minorities, and other vulnerable groups.[67]

As Laurie Nathan concludes, "The underlying assumption is not that local actors will necessarily develop good policies. Rather, the assumption is that a process-oriented approach that respects and empowers local actors is more likely to yield good results in the long-term than a product-oriented approach that undermines local actors and is not sustainable."[68] This is obviously further complicated where local actors are very much divided about what needs to be done, why, and how to do it.

CONCLUSION

Northern Ireland stands at an important juncture. With policing and justice powers recently devolved back to the local legislative assembly for the first time in almost forty years, the jurisdiction is about to discover if enough has been done in terms of SSR to break apart centuries of sectarianism and mistrust and cement peace.[69] Research has pointed to an ongoing realization, including among police officers, that historical events still have the potential to undermine the future of policing in Northern Ireland if they are not addressed.[70] Recent killings of security force personnel have resulted in escalated security, and remilitarization initiatives are now more firmly in evidence. The proof of success of the security system reform project to date will lie in whether the return of such measures swells the ranks of dissident Republicans who view continued armed struggle as legitimate and necessary.

With the honeymoon period over, the role of existing community-safety and restorative-justice programs in supporting communities cannot be understated. The difficulty now is that where community expectations of policing are not met, the same individuals who encouraged others to engage with the formal policing establishment

[67] See Deepa Narayan et al., *Voices of the Poor: Crying Out for Change* (Oxford: Oxford University Press for the World Bank, 2000); and Nathan, *No Ownership, No Commitment*.

[68] Nathan, *No Ownership, No Commitment*, 3.

[69] National security and a number of related matters remain reserved to the Westminster parliament, however.

[70] Byrne and Monaghan, *Policing Loyalist and Republican Communities*.

will lose credibility, and their potential influence to cement the reform effort may be significantly diminished. Byrne and Monaghan point to the particular problem of unrealistic expectations in Republican communities, which, with no history or experience of what ordinary policing could or should look like, have tended to expect too much too soon in terms of service delivery. Equally, empirical work shows that expectations in Loyalist communities, and thereby identification with the police, have plummeted where Loyalist communities have not seen improvement in their own security and policing services. Many Loyalists are of the opinion that they are losing out and that Republican communities are being better served by the new dispensation than themselves.

A justice-centered, human rights–based approach that does not prioritize top-down and technical performance indicators – such as numbers of personnel put through a diversity training program – is a useful means of deepening awareness of what justice and security means to different groups and why. Building consensus and showing the value of broad-based ownership and respect is not easy. However, dealing with justice issues can help. Miscarriages of justice and state-paramilitary collusion are key issues through which people view the security forces. The fact that these impacted the Loyalist community has been important in helping members of that tradition firstly to believe and to accept, and then also to understand, something of what the Nationalist community has suffered in the past. That commonality of experience has assisted people in moving out of single-identity approaches to explore more cooperative forms of work.

4

Staging Violence, Staging Identities: Identity Politics in Domestic Prosecutions

Christiane Wilke

Trials for major human rights violations have frequently captured public attention and imagination. The 1963–1965 Frankfurt trial for crimes committed in the Auschwitz Extermination Camp was a focal point in the West German political landscape – despite or because of the trial's shortcomings. The 1985 trial of the Argentine juntas in Buenos Aires was broadcast on TV – without sound – and remains a key reference in Argentine political and legal culture. The 1995–1997 Berlin trial of the East German politburo members responsible for the policy of shooting people at the Wall provided a stage for trial participants and commentators to redefine their relationship to the vanished (East) German Democratic Republic (GDR) as part of a larger societal contestation about the relationship between East and West Germany.

Transitional justice mechanisms have been seen as theatrical performances of state power, legality, and norms.[1] They have been analyzed for their use of history, their commitment to legality,[2] and their pedagogical aptitude.[3] Yet the relationships between trials, the spaces of performance they offer, and various forms of identity politics that respond to experiences of violence are less well understood. This essay examines how participants in trials stage and represent identities based on ethnicity, race, region, or political affiliation. Trials reenact periods of violence and state repression in order to submit them to authoritative judgment. There are roles to

[1] See Catherine Cole, "Performance, Transitional Justice, and the Law: South Africa's Truth and Reconciliation Commission," *Theatre Journal* 59 (1997): 167–87; and Julie Stone Peters, "Legal Performance Good and Bad," *Law, Culture and the Humanities* 4 (2008): 179–200.

[2] Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, IN: Notre Dame University Press, 1997); and John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton: Princeton University Press, 1997).

[3] See Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction, 1997); Devin Pendas, *The Frankfurt Auschwitz Trial, 1963–1965* (Cambridge: Cambridge University Press, 2006); and Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge, MA: Harvard University Press, 2005).

be played in trials: judges, prosecutors, defendants, defense lawyers, and victim-witnesses, for example. In domestic trials, the main audience is composed of the country's residents. This audience is asked to follow the trial that unmasks the country's recent history and to identify with some characters, stories, and norms over others.

Two main problems emerge here: first, how do the roles and scripts available to trial participants – judges, prosecutors, and defendants as well as survivor-witnesses – enable and constrain them in talking about the identities that were interwoven with state repression? And second, which dynamics of identification occur between the audience and various participants in the trial? Is the audience drawn into reflecting on its own complicity in the violence and its prior relationships to trial participants? Or is it enticed to blame the defendants for all evils, express disgust at them, and distance "the nation" from those who have once acted in its name? Trials raise issues of identities at different levels of individual (legal) performance and collective identification.

This chapter focuses on three modes in which trials for state repression deal with identities: making sense of the victims' identities, explaining the motives of the perpetrators, and serving as a process through which national publics negotiate the problem of collective complicity with past crimes. How are victims' identities understood and represented in trials? In courts, victims' identities are articulated by actors with specific legal and social agendas: the prosecution and the judges. The prosecution's main goal, however, is not to remember the victims or to dignify them, but to articulate a set of criminal charges against the defendants and to contextualize these charges in a way that makes the trial acceptable to the wider population. These imperatives often lead the prosecution to sidestep or downplay identities that victims of repression had developed, which may have run counter to the collective identities that authorities imposed on them. Second, how are perpetrators' identities and affiliations represented? In trials, the perpetrators' motives and identities are reconstructed by their defense teams, who often portray the defendants as exemplary citizens and defenders of the nation. But the perpetrators' identities are also assessed by the prosecution and the court – who tend to portray the perpetrators as evidence of social pathologies that are not representative of the nation's proud traditions. Third, how is the audience drawn into the drama of the trial? Which identifications and identities are proposed and remodeled through trials? I argue that through representations of the collective identity of the nation, trials have the potential either to engage citizens in reflection on their own complicity in past crimes or to allow for a facile distancing from the indicted perpetrators. The different actors in the trials ask the audience to identify with the victims or the perpetrators of violence. The nation of "bystanders" might feel pity or contempt for the perpetrators, be ashamed or oblivious of their own complicity, and regard the victims as suspicious, tragic, or heroic. These dynamics of identification exceed the purely legal outcomes of the trial and may have lasting consequences on political culture. These questions

that frame my inquiry are based on the assumption that legal processes are not merely contestations about rational arguments, but also arenas in which subjectivities and identities are shaped.[4] Although law has limited ways of seeing and narrating injustices, its work is not confined to the production and application of rules. Instead, law brims with life, narratives, and drama. The question is, then, what these stories, characters, and dramas do in each instance of transitional justice.

Three clusters of domestic prosecutions for state repression and political violence provide the case studies for this essay: West German trials of Nazi perpetrators in the 1960s, the Argentine trials of military officers after the fall of the 1976–1983 dictatorship, and the trials of the former East German political and military elites in unified Germany. Within each of these larger episodes, I focus on one prominent trial: the 1963–1965 Auschwitz Trial, the 1985 trial of the juntas in Argentina, and the 1995–1997 trial of the East German politburo. These trials provide spotlights on three different periods of transition in which trials were dominant strategies for confronting past injustices. In all cases, there were relatively few resource constraints on the number and shape of trials. Thus these cases can show the cultural work of trials in circumstances in which trials – rather than truth commissions – have to bear the burden of clarifying and judging the past. The selection of cases also helps show that state repression – as well as attempts to judge it – is much more intimately tied to the crafting of collective identities than often assumed. In all three cases, the trials shaped and responded to identities in different ways: Nazi Germany had pursued a project of national purity understood in racial terms that defined and excluded "non-Aryans" such as Jews and Eastern Europeans on the basis of characteristics that were understood as "race." In postwar West Germany at the time of the Auschwitz trial, nationhood was no longer defined in racial terms. Instead, it was largely understood as "ethnic" – with ideational continuities between the earlier racial thinking and the postwar constructions of Jews and Germans as "ethnic" communities. How, then, did postwar West German society understand the racial distinctions at the basis of the violence on trial?

The 1985 trial of the juntas in Argentina raised questions about collective complicity with an abusive regime. In their violent campaign against the "subversives" from 1976–1983, the armed forces claimed to have defended the nation against terrorists. But who were the thousands of people who were "disappeared" by the armed forces? Would the court recognize the disappeared as subversives and threats to the nation? Or would they be understood as legitimate political opponents of the dictatorship? Or would they appear as innocent victims of human rights violations? The trial of the juntas shows how an identity imposed by the state – in this case, one that turned mainly young political activists into "terrorists" – may be too politically divisive in the immediate aftermath of a regime to deal with in the context of prosecutions.

[4] See Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), 28, 37.

Instead, in the trial we see different strategies for reconstructing the victims as innocent persons in ways that sidestep questions about collective identities and political commitments. The context of the trial – in which social and political divisions were still fresh – constrained the availability of images and languages for talking about the identities of the victims at all, whether the identity imposed by the state, or the identities they may have themselves held.

The trial of the East German politburo members involved identities on a different scale. The shootings of East Germans who attempted to cross the border during the Cold War were the ostensible subject of the trial. The trial itself, however, provided the legal context for the assertion of a subnational East German political identity in the wake of unification. The trials of the East German elites who held highest responsibility for the border policy were part of a larger project of delegitimizing the East German GDR. The defendants, who had not enjoyed a great deal of popularity while the GDR still existed, objected to this delegitimation and invoked a defiant East German identity. To them, the very fact that they were on trial was a reflection and reenactment of the quasi-colonial mode of unification, which was dominated by West German norms and institutions. The trial became a focal point for asserting an East German political identity based on broader social grievances, and it revealed the limits of this kind of identity politics.

IDENTITIES AT WORK: POLITICAL VIOLENCE AND ITS LEGACIES

In examining the intersection of identities and domestic prosecutions, I focus on identities understood as politicized identities. Three premises are important at this point: first, there are many kinds of identities, including ethnoreligious and ethnonational identities that are examined in many contributions to this volume. Second, all forms of state violence are based on and shape politicized identities. And third, although the politicization of identities is inescapable, there are important differences in the ways identities are shaped, accommodated, or repressed in law and politics.

What are politicized identities, and why can the identities analyzed here be called politicized? Politicized identities matter for politics; they are those identities on the basis of which people act and think in matters pertaining to the distribution of goods and resources as well as struggles over power, security, and what they think of as the common good.[5] Politicized identities form only one part of people's identities and identifications: persons are born into, are socialized into, struggle against, or opt for various activities, positions, and commitments that shape their lives and become part of their identities. Everyone is situated differently regarding identity markers such

[5] This discussion of identities is based on Courtney Jung, *Then I Was Black* (New Haven: Yale University Press, 2001); and Carolin Emcke, *Kollektive Identitäten: Sozialphilosophische Grundlagen* (Frankfurt/Main: Campus, 2000).

as gender, class, sexuality, ethnicity, religion (through upbringing, rebellion against it, or choice), language, body shape, race, political ideology, cognitive capacities, place of birth – and some of these markers change over the course of one's lives. These complex identities take different meanings over time, and they need not be experienced as politically salient. Identities become politicized only if they are mobilized to make a difference in politics: if claims on the basis of religion are used in politics, for example, religion becomes a politicized identity. This also entails defining the group boundaries in exclusionary ways: for example, if religion is mobilized against sexual diversity, queer people of faith are being defined out of the faith group. Politicized identities emerge within specific contexts and rely on sets of "available ideologies"[6] to give meaning to them and to create, shape, and justify their respective political claims. "Political entrepreneurs"[7] construct their own universe of identities, values, and history on the basis of a preexisting cultural repertoire of available ideologies. Some of these identity constructions resonate with a wider public. In each of the three cases examined here, state repression relied on the politicization of identity categories. These categories resurfaced in the trials since they were invoked in the arguments of the prosecution and the defense and found their way into the courts' judgments.

Collective identities do not emerge in isolation but in dialogue with others inside and outside one's relevant identity groups. If identities are formed not only by group members but also by outsiders who perceive, label, recognize, or stigmatize the group members, we need to note that collective identities are not individual choices but products of intersubjective recognition and misrecognition. Many groups of people who make identity claims have been subject to state repression, societal misrecognition, and stigmatization. Some identities are therefore "imposed identities" to the degree that they are developed on the basis of (or in response to) state classification, repression, or violence. Those who are subject to such identity impositions can turn these "imposed identities"[8] into sources of positive identification or solidarity. The attacked identity might become more important precisely because it is under siege. For example, Hannah Arendt wrote about her experience as a German Jewish woman after the Nazi rise to power in 1933: "If one is attacked as a Jew, one must defend oneself as a Jew. Not as a German, not as a world-citizen, not as a bearer of the Rights of Man, or whatever."[9] Thus, a social context of violence and state repression easily leads to more rigid and less fluid and overlapping identity formulations. In the early period of the Third Reich, for example, many Jews turned from assimilationist ideologies to Zionism and its emphasis on Jewish solidarity as

[6] Jung, *Then I Was Black*, 17.
[7] Ibid.
[8] Carolin Emcke, "Between Choice and Coercion: Identities, Injuries, and Different Forms of Recognition," *Constellations* 7 (2000): 485.
[9] Hannah Arendt, "Interview with Günter Gaus," in Peter Baehr, ed., *The Portable Hannah Arendt* (New York: Penguin, 2003), 12.

a response to the unraveling of assimilation and the reality of social segregation. They understood themselves as Jews in ways that responded to the social context of anti-Semitism but were not fully determined by this context.

The identities of, for example, Jews in Germany and leftist Peronists in Argentina were formed to no small extent in response to violence and repression. Jews in postwar Germany could not simply continue to live forms of German-Jewish identity that were commonplace before the rise of the Nazi state in 1933. Being Jewish in postwar Germany meant having to deal with the legacy of the Holocaust, and the legacy of having been defined by the state (and the majority of the population) as being racially different from "the Germans."[10]

Violence and repression, then, rely on and shape political identities. They tend to solidify and emphasize certain identities by making alternative identity constructions unavailable and unlivable. If violence can create a rigid grid of political identities – if genocide is, "after all, an exercise in community-building"[11] – the forms of identities built through violence need to be addressed, questioned, and unsettled.

How do criminal trials deal with politicized identities? Some of the most basic questions in criminal trials – who killed whom, and why? – can be used as an invitation for talking about the perpetrators' motivations and ideology, their perception of the victims as a group, and the victims' self-identifications. Depending on the body of law that governs the trial, the "groupness" of the victims – their status as an ethnic, religious, racial, or political group – can become a major point of debate: the definition of genocide in Article 6 of the Statute for the International Criminal Court, for example, requires not only that the victims form a "ethnic, racial, religious" group, but also that the perpetrators intend to "destroy" the group "in whole or in part." The victims' chosen or imposed identities become crucial for the charge of genocide or crimes against humanity.[12] These categories of international criminal law are based on the recognition that some forms of state repression should not be compartmentalized into individual acts of murder, assault, and deprivations of liberty because such individuation obscures not only the magnitude of the crimes but also the targeting of victims on the basis of ascribed identities. Thus, individual acts are judged not only as cases of torture or murder, but also as components of larger patterns of violence or state repression.

Identity categories are not only inscribed into the language of criminal law; they also matter in the testimony of witnesses, especially survivor-witnesses. How did they understand the state repression that targeted them? Which identity categories do they use for talking about themselves, their associates, and the people who brutalized

[10] See Lynn Rapaport, *Jews in Germany after the Holocaust: Memory, Identity, and Jewish-German Relations* (Cambridge: Cambridge University Press, 1997).

[11] Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families* (New York: Farrar, Strauss & Giroux, 1998), 95.

[12] See Doris Buss, "The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law," *Windsor Yearbook of Access to Justice* 25 (2007): 3–22.

them? And how do they "perform" as witnesses? Do they appear uncertain, combative, vindictive, compliant, or incoherent? The embodied language of witnesses always carries references to identities that are interwoven with the state repression to which they are testifying.[13]

Which were the basic legal frameworks that governed the three trials analyzed here? How were identity categories inscribed in the charges? These trials took place after the introduction of international criminal law in the context of the trials at Nuremberg and Tokyo, but they were nonetheless conducted on the basis of ordinary domestic law. In the cases of the Auschwitz trial and the Argentine trial of the juntas, the choice of domestic law over international criminal law had the effect of obscuring exactly these collective and identity-based dimensions of the violence that international criminal law was meant to highlight. The indictment in the Auschwitz trial, for example, charged the commission of murder, not genocide. The perpetrators' ideology and plan to kill members of a particular group were thereby sidelined. This effect might not have been intentional, but it coincided with widespread societal perceptions of the causes and form of Nazi violence. The Argentine juntas were convicted of homicides, deprivation of liberty, and torture rather than crimes against humanity. Here, too, the sum of individual crimes charged by the prosecution did not add up to the larger picture of violence and repression that created and targeted specific identity groups.

All trials for major human rights violations will have legal frameworks and available narratives that are interwoven with different claims about identities; and the participants will perform identities in order to support their chosen narratives, act "in character," and entice identifications from the trials' audiences. The question is not whether trials for state repression engage with identities, but how they do so.

AUSCHWITZ ON TRIAL

The Frankfurt Auschwitz trial of 1963 to 1965 was a focal point in the West German prosecution of Nazi perpetrators.[14] The Auschwitz trial was a counterweight to the trial fatigue of the 1950s; and it was the most noticeable of the "big trials" – the others being the 1958 *Einsatzgruppen* trial in Ulm and the 1981 Majdanek trial in Düsseldorf. The Auschwitz trial marked a peak in West German public attention to trials for Nazi atrocities. It brought images of suffering and cruelty in concentration camps to a West German audience that had largely confined its appreciation of wartime suffering to the plight of German civilians.

Why did the courtroom proceedings for the officers who ran the most notorious Nazi concentration camp start no sooner than eighteen years after the liberation of

[13] See Cole, "Performance, Transitional Justice, and the Law."

[14] See Marc von Miquel, *Ahnden oder Amnestieren? Westdeutsche Justiz und Vergangenheitspolitik in den sechziger Jahren* (Göttingen: Wallstein, 2004), 146.

Auschwitz in 1945? The first major trials for Nazi criminality were conducted by the Allied powers in Nuremberg from 1945 on. These trials focused on the charges of war crimes – including mistreatment and executions of prisoners of war – rather than on crimes committed outside of the direct context of the war, such as many of the massacres of Jewish civilians. In the concept of crimes against humanity, the judges in the Nuremberg trials had legal conceptual tools for judging the crimes of the Holocaust, but they used them only sparingly.[15] Indeed, the perception of the Holocaust as a central point of moral and legal concern regarding the World War II period emerged only in the early 1960s with the trial of Adolf Eichmann in Jerusalem and the Frankfurt Auschwitz trial. Thus, the Auschwitz trial was not one of the earliest trials of Nazi perpetrators, but one of the first large trials to focus specifically on the Holocaust.

Toward the end of the 1940s, West German courts took over an increasing share of the prosecutions from the Western Allied powers. The Allied prosecutions formed the numerical majority: in the years immediately following the war, Allied courts indicted 90,000 Germans for crimes committed during the war, and they convicted 5,025 persons. These convictions represent the majority of all criminal convictions for Nazi crimes in West Germany from 1945 to 1965: about 6,500 convictions were handed down in total.[16] Given the widespread participation of German citizens in the crimes of the war and the Holocaust, the overall number of criminal convictions should be considered remarkably low. The numbers of indictments and convictions indicate that West German courts, staffed predominantly by judges and prosecutors who had faithfully served the Nazi State, were reluctant to pursue and judge Nazi perpetrators.

The West German prosecutions of Nazi perpetrators were part of the regular judicial system. No special prosecutorial agencies were established until 1958, when the Ludwigsburg Central Office started to centralize investigations into Nazi criminality. As a consequence, West German trials for Nazi criminality in the 1950s did not follow a consistent prosecutorial strategy. The reluctance of local prosecutors to initiate investigations had several sources: for one, many local prosecutors had scant knowledge of the precise contours of Nazi criminality, and those who knew what happened had too little interest in initiating investigations. In addition, jurisdiction for investigations was assigned according to the location of the crime. The main sites of the genocide against the European Jews – the massacres in Poland and the Soviet Union as well as the concentration and extermination camps in Poland – were located outside the normal scope of any West German prosecutor's jurisdiction. The Cold War division of Europe further complicated access to the sites, to witnesses, and to archival material.

[15] See Lawrence Douglas, *The Memory of Judgment* (New Haven: Yale University Press, 2001).

[16] Jeffrey Herf, "The Holocaust and the Competition of Memories in Germany," in Dan Michman, ed., *Remembering the Holocaust in Germany, 1945–2000* (New York: Peter Lang, 2002), 12.

From the late 1950s on, however, some West German prosecutors, including Fritz Bauer, started to pursue larger "crime complexes." These investigations led to the 1958 Ulm trial of the *Einsatzgruppen* and the 1963–1965 Auschwitz trial in Frankfurt. Prosecutions in both cases started after unsolicited tip-offs by survivors, and they developed into larger cases because individual prosecutors took initiative in bringing these cases to the courts and to wider public attention. In the case of the Auschwitz trial, organized advocacy by Auschwitz survivors, most prominently Hermann Langbein, the head of the International Auschwitz Committee, also played a crucial role.

Fritz Bauer, the attorney general of Hesse and one of the few Jewish German jurists who returned from exile, was outspoken about the need to face the "murderers in our midst."[17] In 1959, Emil Wulkan, an Auschwitz survivor, handed documents from Auschwitz that he had acquired in the immediate postwar period to Bauer.[18] The documents confirmed testimony crucial to a case investigated in Stuttgart against Wilhelm Boger, one of the most brutal torturers at Auschwitz.[19] Bauer had the case moved to Frankfurt. The prosecution then assembled a case against twenty-four suspects, seventeen of whom (in addition to three others) would become the defendants in the Auschwitz trial.[20]

The indictment against "Mulka and others" was filed on April 16, 1963. Robert Mulka had been the adjutant to the camp's first commander, Rudolf Höß. The "others" were former SS officers who had occupied a range of different positions in the camp. One inmate "Kapo" was also indicted. Two key groups stood out: the SS medical personnel who had selected and killed inmates deemed "unfit for work"; and the members of the "Political Section" whose responsibilities included investigating and punishing infractions of camp rules.[21] The members of the "Political Section" tortured many inmates to death. The brutality of these killings – inmates were injected with lethal substances, executed, beaten, and tortured to death – contrasted with the more bureaucratized killing process of the gas chambers and slow physical destruction through forced labor and deficient nutrition that claimed the majority of victims at Auschwitz. These methods of killing, however, seemingly required less personal and intentional involvement by the camp personnel than the gratuitous violence involved in torture, beatings, and individual killings.

Like all West German trials of Nazi perpetrators, the Auschwitz trial was conducted on the basis of the German criminal code. To be sure, the charter for the Nuremberg Tribunal had opened the possibility of adjudicating crimes that targeted members of identity-based groups on the basis of concepts such as "crimes against humanity." These concepts seemed more suitable for evaluating crime complexes such as the killings at Auschwitz than standard criminal law. The incorporation of

[17] See Pendas, *The Frankfurt Auschwitz Trial*, 51–2.
[18] Ibid., 46.
[19] Ibid., 26.
[20] Ibid., 50.
[21] Ibid., 99.

the categories of crimes against humanity and genocide into the German criminal code after the war, however, had only *prospective*, not *retroactive* effect: German courts can therefore use the charge of genocide against perpetrators of genocides that postdate this incorporation, but not against perpetrators of the Holocaust. Since the murders at Auschwitz were committed before the codification of the concept of "crimes against humanity," the majority of West German postwar jurists argued, the application of these new concepts would be retroactive and therefore illegal: the perpetrators could not have been aware of the specific threat of punishment on the basis of "crimes against humanity."[22] This restrictive interpretation of the prohibition on retroactive punishment has been seen as a purposeful mechanism for evading judgment: many of the jurists who advocated this theory of nonretroactivity had occupied positions of influence in Nazi courts and legal education.[23] The rigidity of German legal methodology has also been cited as an explanation for the restrictive interpretation of the prohibition on retroactive punishment. In short, West German postwar jurists were not ready to follow the international move toward exempting genocide, war crimes, and crimes against humanity from the scope of the prohibition on retroactive punishment.[24]

Given the self-imposed restraints of the West German postwar legal order, the prosecution and the court had to understand the operation of Auschwitz and the participation of the defendants through the lens of ordinary legal concepts such as "murder" and "accessory to murder." Murder, according to the German criminal code, is a qualified form of homicide. To count as murder, the homicide has to exhibit certain characteristics, for example, having been committed from "bloodlust," sexual motives, material greed, or base motives; in order to conceal or enable another crime; in order to exploit the victim's state of defenselessness and lack of suspicion; or in an especially cruel manner.[25] The court saw many killings at Auschwitz as murders because they had been committed for base motives in the form of "racial hatred."[26] The homicides at Auschwitz turned into murders, therefore, because most of the victims were Jews, because the perpetrators hated Jews as an inferior "race," and because this "racial hatred" constituted a base motive. The Jewishness of many of the victims was important to the court, but only insofar as it was distorted and represented in the perpetrators' "racial hatred." When the victims' identities were discussed, they were consequently largely seen through the lenses of the perpetrators' ideologies. The court rarely engaged with the victims' and survivors' experiences and understandings of what it meant to be Jewish.[27]

[22] See Christoph Burchard, "The Nuremberg Trial and Its Impact on Germany," *Journal of International Criminal Justice* 4 (2006): 800–29; and Pendas, *The Frankfurt Auschwitz Trial*, 11.

[23] See Burchard, "The Nuremberg Trial," 810–12.

[24] See ibid.

[25] See Kerstin Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen* (Tübingen: Mohr Siebeck, 2002), 35.

[26] See ibid., 45–9.

[27] Pendas, *The Frankfurt Auschwitz Trial*, 266.

Understanding the construction and attribution of "racial hatred" is crucial to understanding both the judgment on Auschwitz and the reactions to it. First, how did the court distinguish a perpetrator from an accomplice of homicide? German criminal law and doctrine at the time of the trial demanded that for a person to be considered a perpetrator, they must have "wanted the deed as their own."[28] It was the *will* that separated the perpetrator from the mere accomplice. The court distinguished between two types of homicides at Auschwitz: on the one hand, the killings of individual inmates; on the other hand, the larger operation of the camp, including the "selections" at the ramp and the killings in the gas chambers. In the first type of homicide, an identifiable suspect directly caused the death of an identifiable inmate. The individuality of the killing could offer evidence of the perpetrators' mind and motivations. In the second type of case, a number of SS officers participated in a military-bureaucratic procedure that was designed to result in the deaths of an undetermined number of unnamed victims. In this case – more representative of the genocidal general operations of the camp – each participant's motivation, agency, and causal contribution to the fate of the victims was harder to evaluate. As a result, the defendants who were charged with individual murder of the "individual atrocity" type were much more likely to be convicted, and more likely to be convicted as a perpetrator rather than an accomplice.[29] The mandated punishment for perpetrators of murder was life in prison. Accomplices could be sentenced to terms as high as perpetrators, but the courts of that era sentenced accomplices to relatively short prison terms. The distinction between a perpetrator and an accomplice of murder has important implications for the sentencing. It is based on an assessment of the defendant's motivation, in particular the absence or presence of "racial hatred" as a motivation for the crime.

Second, how did the court "find" the "racial hatred" that distinguished willing accomplices from genuine perpetrators? The court determined that a small circle of "main perpetrators," including Hitler and Himmler, had set the conditions for the emergence of Auschwitz as a death camp.[30] Beyond the circle of the "main perpetrators," the court looked for evidence of unusual brutality, sadism, or publicly voiced anti-Semitism as indications that SS officers had internalized the anti-Semitic motives of the "main perpetrators." Thus, individual brutality rather than bureaucratic cooperation was seen to reveal racial hatred. The court accordingly convicted those who had personally tortured or abused inmates as *perpetrators*: their cruelty, often witnessed by others, provided sufficient evidence of their hatred.[31] By contrast, among those fourteen defendants who were convicted for participating in "selections" on the ramp or within the camp, eleven were convicted as *accomplices*, and only three were found to be perpetrators. Within the larger universe of West German

[28] See ibid., 61–71.
[29] See ibid., 241.
[30] See Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen*, 45.
[31] See Pendas, *The Frankfurt Auschwitz Trial*, 241.

trials for concentration camp crimes, the Frankfurt court's decision does not stand out in this regard: overall, about 20 percent of the defendants were convicted as perpetrators, and 80 percent as accomplices.[32]

Third, what were the effects of the court's attributions of racial hatred? The distinctions between perpetrator and accomplice, based on small differences in inferred attitudes, yielded significant differences in sentencing: defendant Hofmann, for example, was sentenced to life in prison as a perpetrator for participating in selections because he had "affirmed [*bejaht*] the mass killings of Jewish people and made it his own project [*zu seiner eigenen Sache gemacht*]."[33] All other defendants who were found to have killed with their own hands – including former inmate Kapo Emil Bednarek – were likewise convicted as perpetrators and sentenced to life in prison. Yet Robert Mulka, the adjutant to Camp Commander Höß and a superior to Hofmann, was found to have been a mere accomplice in the killing operations: the court found that he was subject to the general "unprecedented mental confusion" of the time and, as a result, indoctrinated rather than convinced of the motives behind the killings. Mulka was sentenced to seven years in prison.

In general, defendants with higher levels of academic education had better chances of convincing the courts that they had acted from other motivations than anti-Semitism, and that they had maintained a "decent" inner disposition in spite of their external conduct that constituted active participation in genocide.[34] The base motives required for murder were more easily seen in less-educated persons who were more likely to have killed with their own hands.[35] Anti-Semitism was thereby retroactively externalized from German middle-class society and turned into a lower-class phenomenon. It was perceived exclusively as a problem of personal attitudes and not as an institutionalized ideology and structural driving force behind the establishment of Auschwitz and other death camps.[36] The court's externalization of anti-Semitism and responsibility to perpetrators who appeared less educated and more readily violent resonated with the predominantly middle-class West German public during and after the trial: those who observed the trial through the media distanced themselves from the "beasts" like Wilhelm Boger whose brutality they could not recognize as representative of a wider problem. The SS functional elites – the bureaucrats, doctors, and pharmacists – could more easily convince the public that they were caught up in a system that exploited their expertise – rather than having been driving forces in this system. Reports on the trial "largely emphasized the grotesque, 'incomprehensible' brutality of the most sadistic events described at the trial."[37] Thus, the court's assumptions about class, ideology, and identifications

[32] Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen*, 177.
[33] Quoted in ibid., 46.
[34] Ibid., 263.
[35] Ibid., 224–45.
[36] See Pendas, *The Frankfurt Auschwitz Trial*, 79.
[37] Wittmann, *Beyond Justice*, 176.

congealed into a narrative in which anti-Semitism appears as a close cousin of sadism rather than as the driving force of the Nazi state.

The understandable focus on some perpetrators was accompanied by a curious disinterest in the victims, who were represented as passive, innocent figures who were acted on by "monsters" like Kaduk and Boger. Their experiences, their identities, and their life stories after Auschwitz were usually not reported. A somber and self-reflective comment on the trial published in a German leftist intellectual journal, for example, managed to stress the need for further judicial and public inquiry into Nazi crimes without ever mentioning that the majority of those who perished in Auschwitz were Jews and that Auschwitz was part of a genocide. The article was completely silent on the victims' identities; it talked only about "inmates" of the camp and "witnesses" at the trial.[38] Thus, although the Auschwitz trial helped bring a set of images associated with Auschwitz and the Holocaust into wide public circulation and counteracted the exclusive focus on German suffering under Allied bombings and expulsions, these images of concentration camps had particular limitations. They did not question the categorizations that treated "German" and "Jewish" as mutually exclusive categories, and they often did not mention that the majority of the victims were killed for being Jewish at all.

The Auschwitz trial does not appear to have increased the West Germans' empathy with the victims. Nor did the trial convince its audience of the need to conduct more trials for similar offenses: whereas in 1958, 34 percent of West Germans proposed to end the trials for Nazi atrocities, this number had risen to 69 percent in 1965, at the time of the Auschwitz trial.[39] Although newspaper coverage of the trial was extensive, most Germans did not follow the trial with great interest or much attention.[40]

The trial did, however, spark other ways of reflecting on Nazi injustices and the limited success of the prosecutions that extended into the debates about culture and memory of the late 1960s and 1970s: Peter Weiss's 1965 theater play based on verbatim transcriptions of parts of the trial created a stir precisely because it placed the perpetrators of the genocide in the midst of the West German society. An exhibition on the Auschwitz Concentration Camp in a Frankfurt church accompanied the trial. In 2004, the Auschwitz trial itself became the object of a larger public exhibition in Berlin. Just as Auschwitz has come to symbolize the Holocaust, the Auschwitz trial with all its limitations and silences has become a crucial symbolic marker in the German politics of memory. It stands for the attempt to break the juridical and public silence on the Holocaust as well as for the ambiguities and limitations inherent in this attempt.

[38] Georg Groeninger, "Der Auschwitz-Prozess und seine Lehren," *Blätter für deutsche und internationale Politik* (1/1965): 73–8.

[39] Von Miquel, *Ahnden oder Amnestieren*, 144.

[40] Pendas, *The Frankfurt Auschwitz Trial*, 255.

The Auschwitz trial did not displace prior ideologies about suffering, nationhood, and identities. Yet it ultimately offered an occasion for West German society to reflect on the meaning of their inherited and chosen identities by confronting them with the murderers in their midst, with evidence of the links between respectable society and the genocide, and with the (more implicit) evidence of the ongoing complicity with (or at least indifference to) the careers of Nazi perpetrators. The trial provided scripts and materials for later subsequent challenges to identities and family narratives: it left many people untouched, but it was also a galvanizing point for a younger generation that saw the traditions and identities of German mainstream society as inextricably connected to Auschwitz and forged new transnational ties, social movements, and identifications in response.

Although the Auschwitz trial may have contributed to reshaping the identifications and commitments of many West Germans,[41] it left the fundamental distinction between Germans and Jews intact, and it tied West German identity to Jewish identity in a "negative symbiosis," as Dirk Moses writes.[42] In response to the Holocaust trials, the distinction between Germans and Jews was reformulated from its racial understanding into the distinction between the collectivities of victims and perpetrators: now Jews were different not because of race, but because they are linked to the victims of the Holocaust, whereas Germans dwelled in the lineage of the perpetrators of the Holocaust.[43] As a result, the boundaries of the identity groups are formulated in ways that do not allow fluidity or overlap. In public discourse, according to Moses, "Germans and Jews are invariably juxtaposed as if they do not mix, like oil and water," and as if the tens of thousands of German Jews did not exist.[44] Thus, the fundamental assertion of Nazi policy – that one cannot be German and Jewish – had an afterlife beyond the Auschwitz trial.

In addition, West German identities were shaped around the question of how to deal with the Nazi past. As such, they were inevitably tied to (imagined) Jewish identities. In West German discourses, the Nazi past often appeared as a moral stain that focused on political identities: whereas cultural conservatives aimed to resurrect the glorious German past before the "fall" of the Holocaust, many leftists and liberals adopted the "stain" of the past as a centerpiece of their subjectivities.[45] This constellation of identities tied to one another in a "negative symbiosis" is slowly unraveling with generational change, Eastern European Jewish immigration to Germany, and new approaches to identity politics.

[41] Bauman, "Strangers," 26.

[42] Dirk Moses, *German Intellectuals and the Nazi Past* (Cambridge: Cambridge University Press, 2007), 16.

[43] For Jewish identity constructions in West Germany during the 1980s, see Rapaport, *Jews in Germany*.

[44] Moses, *German Intellectuals and the Nazi Past*, 16.

[45] See Moses, *German Intellectuals and the Nazi Past*, 15–37.

THE POLITICS OF NOT TALKING ABOUT POLITICS: THE TRIAL OF THE JUNTAS IN ARGENTINA

On September 11, 1985, prosecutor Julio Strassera started his closing statement in the trial of the members of the three juntas that had ruled Argentina from 1976 to 1982 in a military dictatorship. He declared, "The community of Argentina in particular, but also the universal legal conscience," have tasked him with reclaiming justice on behalf of those who were tortured, murdered, or disappeared.[46] Strassera's invocation of the Argentine community supported by a global legal conscience represented a common rhetorical strategy used throughout the trial: refuting the juntas' claim to represent the "true" Argentina. In June 1976, junta leader Rafael Videla proclaimed, commenting on the complaints about thousands of disappearances, "Argentine citizens are not victims of the repression. The repression is against a minority that we do not consider Argentine."[47] The 1985 trial was meant to counter such claims and to reimagine the disappeared as belonging to the nation.

At the conclusion of the trial, Videla was convicted of 66 aggravated murders, 4 cases of torture followed by death, 93 cases of torture, 306 aggravated deprivations of liberty, and 26 robberies. Videla did not win the struggle for public sympathy and identification at the trial. This does not mean, however, that the dictatorship's victims won this struggle: the reimagination of the disappeared as members of the Argentine nation relied on specific, narrow framings of their identities. The disappeared were portrayed as family members, abstract human beings, and innocent victims – rather than as political activists or members of social movements. Although this framing made it easier for the public to identify with the disappeared, it also revealed the limits of the representations that emerged at the trial.

Upon taking office in December 1983, President Raúl Alfonsín instructed the Supreme Council of the Armed Forces, the highest military court, to investigate and try the nine members of the three military juntas.[48] The supreme council developed some investigative activities during 1984 but declined to find the juntas responsible for any crimes. As a result of an appeals process that had been legislatively modified by the postdictatorship congress, the case was transferred to a civilian court: the Federal Appellate Chamber of Buenos Aires. All judges serving in this chamber had been newly appointed by President Alfonsín in anticipation of the trial.

The chamber acted swiftly: the defendants were indicted in February and March 1985, and the first hearing of the trial took place on April 22, 1985. The hearings were very well attended, and a weekly "Newspaper of the Trial" (*El Diario del Juicio*) that reproduced testimony, statements, and documents, along with more conventional

[46] Quoted in *El Diario del Juicio*, No. 20 (October 8, 1985), 1.

[47] Quoted in Patricia Marchak, *God's Assassins: State Terrorism in Argentina in the 1970s* (Montreal: McGill-Queen's University Press, 1999), 151.

[48] On the organization of the trials and the political rationale, see Carlos Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), 67–90.

reporting, sold up to 200,000 copies each week.[49] The closing statements were held in September and October 1985, and on December 9, 1985, the chamber announced the verdict. The written judgment ran to approximately 1,600 pages and was made available to the public in a two-volume book. Five of the nine defendants were sentenced to prison terms ranging from four-and-a-half years to life.

The trial of the juntas marks one of the few cases in which the democratic judiciary of a country has sat in judgment on the same country's deposed military leaders. Commentators on the trial, such as the columnists for *El Diario del Juicio*, took considerable pride in the fact that the new government, fragile as it sometimes seemed, mustered the political strength, legal resources, and rhetorical energy for the "trial of the century." The trial was intended to serve as a history lesson, mark the military dictatorship as a moral aberration in Argentine history, rehabilitate the disappeared, and impress empirical and moral truths about the recent past on the wider population. The trial marked a sea change, but it also pointed to the fragility of the new political arrangements that made the trial possible: trials of further members of the armed forces led to increasing military unrest and to an end to most prosecutions in 1987. Under pressure from the army, the next president, Carlos Menem, pardoned those who had been convicted in the "trial of the century." And, as the next section will show, the language that was used for talking about the disappeared at the time of the trial reveals the continued grip of the military's ideologies on Argentine society at the time of the trial.

The identities of many who were disappeared were shaped through the experiences of political violence and opposition to prior military dictatorships. The violence of the early 1970s and the state repression that started in 1975 and escalated with the military coup in 1976 were products of the violent mobilization of different political identities: left, right, nationalist, Peronist, and Catholic. The military junta that took power in 1976 claimed to start a "process of national reorganization" in order to "purify" the nation of "subversive" elements.[50] The juntas banned political activities and started a broad campaign to "annihilate subversion."[51] This policy included the abductions of persons labeled "subversive" as well as their internment in a network of about 340 clandestine detention centers. Those who were abducted often disappeared: the authorities refused to acknowledge their detention or give the families any information about the whereabouts of the missing persons. Between 10,000 and 30,000 persons remain permanently disappeared.[52]

[49] Emilio Mignone, *Derechos humanos y sociedad: el caso argentino* (Buenos Aires: CELS, 1991), 157.

[50] See Diana Taylor, *Disappearing Acts: Spectacles of Gender and Nationalism in Argentina's "Dirty War"* (Durham, NC: Duke University Press, 1997).

[51] See Marchak, *God's Assassins*, 7.

[52] The lower number is given by The Argentine Forensic Anthropology Team (EAAF) on the basis of the Truth Commission Report, case-by-case analysis, and forensic evidence. See EAAF, *Country Report Argentina 2006*, Pt. I; available at eaaf.typepad.com/cr_argentina/. The higher number is customarily given by human rights organizations.

Many Argentine citizens had originally supported the coup: the country had experienced military dictatorships before, and the situation in 1975–1976 seemed to require a firm hand. With relative economic prosperity and calm following the coup, many were unwilling or unable to see the military's project of sweeping authoritarian social transformation (or "reorganization") as repressive. Fear of and respect for military authorities, mixed with suspicions about the guerrillas and leftist groups, led the majority of the population to stay silent about the military's violence that they either saw or suspected. In addition, the military organized the disappearances in ways that combined public displays of force against ostensibly armed terrorists with deniability of the actual disappearances. As a result, many people stayed silent in the face of state propaganda, militarization, and state violence.

The first voices to raise the alarm about the disappearances came from relatives of the victims who organized themselves in the newly formed human rights organizations such as the Permanent Assembly for Human Rights (*Asamblea Permanente por los Derechos Humanos*, APDH) and the Center for Legal and Social Studies (*Centro de Estudios Legales y Sociales*, CELS). A number of the mothers of the disappeared formed the group Mothers of the Plaza de Mayo (*Las Madres de Plaza de Mayo*), which staged the first events to raise public awareness of the disappearances. Sidestepping the identity of "subversives" that had been imposed on activists, these groups relied on two dominant themes and modes of argument: kinship and human rights.[53] The vocabulary developed by these groups shaped the legal representation of the disappeared after the end of the dictatorship. How did these discursive choices emerge, and which other representations did they preclude?

The Mothers of the Plaza de Mayo and other groups of relatives mobilized discourses of family and kinship in order to assert that the disappeared were simply normal people who had been unjustly taken from their loving parents, spouses, siblings, and children.[54] The family was posited as a nonpolitical central unit of Argentine life; the damage to the families allowed the relatives to sidestep the question about the guilt or innocence of the disappeared activists whom the military deemed "subversives." For example, a 1982 brochure by two human rights organizations of relatives of the *desaparecidos* stressed the relative innocence of "family members" of activists who "were united by common experiences, in many cases nurtured by the same faith, . . . shared affections and dreams, perhaps sometimes also ideals or ideologies."[55] In reclaiming the *desaparecidos* as family members, the

53 Elizabeth Jelin, *State Repression and the Struggles for Memory* (London: LAB, 2003), 55.

54 Taylor, *Disappearing Acts*, 185–206; and Elizabeth Jelin, "Victims, Relatives, and Citizens in Argentina: Whose Voice Is Legitimate Enough?" in Richard Ashby Wilson and Richard Brown, eds., *Humanitarianism and Suffering: The Mobilization of Empathy* (Cambridge: Cambridge University Press, 2008), 177–201.

55 Asamblea Permanente por los Derechos Humanos (Delegación Neuquén), Familiares de Víctimas de la Represión, *Exigimos justicia porque queremos la paz* (Neuquen, 1982), 13.

pamphlet distinguished between "activists" who were the primary targets of the military, and "family members" who were merely subject to collective punishment. Although the pamphlet admits the possibility that family members share "perhaps sometimes . . . ideals or ideologies," it insists that everyone has the right "to be judged on the basis of their own actions" – as if the activists' "own actions" constituted a guilt that should not cast a shadow on their families. The justified outrage at the treatment of "innocent" family members obscured the reason for the suffering of many of the disappeared: the fact that they were political and social activists, which was widely equated with being "subversives" or "terrorists." In describing the disappeared as members of families, these organizations avoided dealing directly with the imposed identities that helped legitimate the military's actions in the first place.

The second strategy for talking about disappearances centered on human rights claims. Unlike the language of kinship, a human rights framework considers persons as abstract human beings, not primarily as members of organic family units. The advantage of the human rights framework in courts and advocacy work is that it allows general, universal claims about human dignity and rights, and that it considers the suffering, rights, and responsibility of each person individually. At the same time, this approach has its limits: although it advocates the rights of abstract human beings, justifications for violence are often based on depicting particular groups of people as threats or subhuman beings who are not entitled to rights.[56] Human rights language encounters limits when the humanity of victims of state repression is categorically denied. In addition, human rights language is ill-equipped to represent collective identities and experiences of violence.[57]

The human rights movement used human rights language strategically in order to achieve a depoliticizing effect: instead of arguing about the definition of subversion, they reclaimed the disappeared as human beings without specific characteristics. For a number of the key figures in local human rights organizations – for example, Emilio Mignone of CELS – the language of law and rights grew out of their professional roles as lawyers. In addition, human rights could be tied to different normative systems such as Catholic ethics,[58] the liberal constitutional tradition in Argentina, and the international human rights system. It could also link the concerns of the relatives with the transnational human rights organizations such as Amnesty International, and regional human rights bodies such as the Inter-American Commission on Human Rights, which provided material resources and symbolic recognition from abroad. At the same time, a human rights framework was nonpolitical enough to be viable

[56] See Ratna Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side," *Sydney Law Review* 28 (2006): 676.

[57] Julie Taylor, "Body Memories: Aide-Memoires and Collective Amnesia in the Wake of the Argentine Terror," in Michael Ryan and Avery Gordon, eds., *Body Politics: Disease, Desire, and the Family* (Boulder, CO: Westview, 1994), 197.

[58] See Mignone, *Derechos Humanos*, 75.

within the Argentine domestic context in which political activities were largely curtailed. To human rights activists, many of whom were parents of young political activists who had disappeared, human rights language offered the possibility of defending their children in a framework that resonated with their broader ethical concerns, was politically "safe," and did not make it necessary to mention or defend their children's politics. As a result, the human rights framework made it possible to speak about the disappeared, but it did not make it possible (yet) to speak of experiences and identities that had fueled the political violence of the 1970s.

The human rights framework was taken up by the democratic government of Raúl Alfonsín, which succeeded the juntas in 1983. Here, it was the language of law, of political compromise, of counting all deaths equally, and of abstracting death from the political matrix in which the victims and perpetrators had acted. How did the trial of the juntas engage with the victims' political identities? Overall, the prosecution and the court deemphasized the political identities of the disappeared. The trials did not frame the military and the disappeared as "actors in highly political dramas where they had represented clashing worldviews and collective strategies for implementing them," but rather as "innocent or transgressing individuals with individual rights and obligations."[59] The military's violence appeared not as targeting persons and groups that the state labeled as "subversive," but rather as fanatical and overreacting and ultimately randomly targeting innocent citizens. The stress on the arbitrariness of the armed forces' violence thus downplayed any group coherence of the targets of state repression.[60]

The testimonies by survivors and relatives of the disappeared allow further insight into the difficulties of talking about political identities at the time of the trial. Observers noted that "politico-ideological questions were considered inappropriate" during the trial.[61] Yet this was not due to a conspiracy of silence. The trial records suggest that many witnesses found it difficult to talk about political identities, and that to admit political activism was to invite suspicions and scrutiny. Other witnesses wanted to talk about identities and affiliations as part of their testimony, and they were stopped by the court. Most of the insistent questions about the witnesses' or their relatives' political identities were asked by defense lawyers. They tried to prove that at least a substantial number of the disappeared were in fact subversives. Missing "subversives," in this logic, are only "presumably disappeared";[62] and witnesses who turn out to be "subversive" or have links to "subversives" are not trustworthy. The judges usually blocked these questions in order to – as the judges framed it – protect the witnesses from making self-incriminating statements and to weed out hearsay, not to silence the witnesses. Yet, in this logic, protecting the witnesses sometimes required silencing them.

59 Taylor, "Body Memories," 197.
60 See ibid., 198.
61 Ibid., 196.
62 Questioned by Jaime Prats Cardona, quoted from *El Diario del Juicio*, no. 7 (July 9, 1985), 155.

The questions about witnesses' political identities and commitments emerged in a context in which these commitments still carried the tinge of moral suspicion and illegality. Some witnesses, especially parents of the disappeared, "conceded" political activities of the disappeared only reluctantly. Estela Carlotto, member of the Mothers and the Grandmothers of the Plaza de Mayo, answered the first question about the "activities" of her disappeared family members in a decidedly nonpolitical way: "Well, my family consists of four children, my husband, and me. My husband is a chemical engineer . . . and my three younger children were students; my daughter, too, the oldest one, only that she was married and of course did not live in my house." In response to the court's more specific question about the daughter's "other activities," she adds, "well, my daughter was . . . she participated in activities of the Peronist University Youth, and she studied."[63] Other witnesses, particularly those who were survivors of clandestine detention centers, were more forthcoming about their political commitments. Many self-identified activists maintained that they had ceased all political activities in 1974 or 1975 – before the coup – and should not be considered to have been politically active during the time of the dictatorship.[64]

The judges also contributed to the perception that past political activity was suspect: when witness and ex-*desaparecido* Mario Villani was asked by a defense attorney which "political ideas" he meant when he said that he did not stop voicing them in the mid-1970s, the judge intervened. Prefacing the question with the reminder about the right to avoid self-incrimination, the court rephrased the defense attorney's question about "political ideas" into the question about whether "you belonged to an organization of the illegal type, any illegal organization."[65] In a context in which many political identities still carried the stigma of illegality and subversion that the armed forces had attached to them, it did not strike the court as unreasonable to translate a question about political beliefs into an apparently more precise question about belonging to an illegal (terrorist) organization. Talking about activist identities was still dangerous at the trial of the juntas, but these dangers were not simply products of the human rights language that carves out a space of rights separate from politics. Rather, the violent constructions of national identity by the military regime against anything they considered "political" left their trace on the trial of the juntas. Individual rights, but not the identities inhabited by the disappeared and the political activism once targeted as "subversive," were rehabilitated at the trial.

Only in the 1990s did former activists, detainees, and friends of the disappeared start to offer more complex, more political accounts of the conflicts of the 1970s.[66] These currents of memories about identities mirror the generational shifts in the experience of state terrorism: the dictatorship targeted mainly younger people who had been socialized into the radical political activism of the late 1960s and the early

[63] Quoted from *El Diario del Juicio*, no. 4 (June 18, 1985), 90.

[64] See testimony of Alejandra Naftal, quoted from *El Diario del Juicio*, no. 15 (September 3, 1985), 334.

[65] Quoted from *El Diario del Juicio*, no. 5 (June 25, 1985), 118.

[66] Jelin, *State Repression*, 55.

1970s. The parents of politically active youth saw these radical politics with more skepticism and distance.[67] Thus it is not surprising that parents of the disappeared might not have wanted to discuss their children's political activities. Political identities are often tied to experiences – of revolutions, violence, or social movements – that members of some generations react to in specific ways. Undoing the violent impositions and stigmatizations of identities takes time. Categories provided by the human rights framework can be useful and indispensable for making legal and political claims. Here, they helped constitute the figure of the disappeared. Yet we should not make the mistake of equating the language in which we seek to describe and represent ourselves and others to courts and the public with adequate accounts of who we are.[68] There will always be a gap between the representations of the dead and disappeared that appeal to the court and its audience, and the identities and experiences of those whose victimization is represented to others.

In the years since the trial, the long-assumed link between politics, subversion, and criminality has slowly been severed. When politics was no longer seen to equal subversion, these "innocent victims" were slowly afforded more complex portrayals that took stock of the experiences and commitments of these activists. These portrayals were necessary for a deeper engagement with the roots and legacies of the political violence of the 1970s. Associations of victims' relatives and human rights advocates struggled to decriminalize politics and to establish spaces in which past, present, and future identities can be explored more fully. These spaces depended on social activism and the gradual delegitimation of the military in political life – through trials but not through trials alone.

BETWEEN UNIFICATION AND IMPOSITION: THE TRIALS OF THE GDR POLITICAL ELITES

Whereas the Auschwitz trial and the trial of the juntas are noteworthy for the ways in which they engaged with identities imposed by the state, the trial of the East German politburo members merits attention primarily for its contribution to shaping a new, subnational collective identity at the time of the trial. The defendants addressed their East German audience in order to convey that they are being tried on behalf of *all* East Germans. For the defendants and their attorneys, German unification was an imposition – victors' justice writ large. The space in the courtroom was used to express, in the words of one attorney, "the depressing feeling that the accused and the majority of the GDR population have that the FRG is now sitting in judgment on them"[69] – referring to the German Democratic Republic (GDR, East Germany) and the Federal Republic of Germany (FRG, West Germany). The prosecution,

[67] See Marchak, *God's Assassins*, 148.

[68] See Judith Butler, *Precarious Life: The Power of Mourning and Violence* (New York: Verso, 2004), 25.

[69] Plädoyer Wissgott, quoted in Redaktion "Neue Justiz," ed., *Der Politbüro-Prozess: Eine Dokumentation* (Baden-Baden: Nomos, 2001), 191.

in turn, used the trial as a stage for affirming and celebrating German unity. The prosecution and the defense thus competed for the public's identification by offering two mutually incompatible narratives of nationhood.

Two distinct contexts shaped the trials of the East German military and political elites. First, in 1989, civic protests from the East German population gradually forced the one-party regime out of power. Only weeks later, the first former GDR officials were indicted for offenses ranging from electoral fraud to police brutality. In short, there was a domestic transition from one-party rule to a broad-based coalition of new parties and social movements. Second, these changes revived common dreams of a unified German state. The unification of the two German states took place in October 1990, roughly one year after the end of one-party rule in East Germany. Unification was made possible by the 1989 civic protests in the GDR, which had not, however, initially aimed for a national union with West Germany. The majority of the prosecutions for GDR governmental criminality took place in a unified Germany. Unification changed the legal framework for the prosecutions, their political rationale, and the makeup of the institutions involved in them. Although the Unification Treaty mandated that acts committed in the GDR would be judged in reference to GDR law, the courts reinterpreted GDR law to suit West German legal values.

The government expected the prosecutions to be part of the process of unification, which was dominated by West German political elites. In September 1991, Minister of Justice Klaus Kinkel told an audience of judges that they had a "very special task": the courts had to contribute to the larger project of achieving "the delegitimation of the SED-system [the ruling party of the GDR]."[70] The judges whom Kinkel addressed were almost exclusively West German: East German judges were subject to vetting procedures and retraining before they would be allowed to act as judges in unified Germany. The organization and purpose of the prosecutions mirrored the larger process of unification: it was led by West German judicial elites who occupied themselves with investigating and judging East German governmental criminality. Given the dominant attitudes on unification, the courts' understandings of the emergence, life, and disappearance of the GDR could be expected to validate the dissolution of the "criminal" East German state into the enlarged and normatively superior Federal Republic of Germany.

The politburo members on trial in 1995–1997 were charged with homicide in the cases of four young men who were shot by border guards when they crossed the Wall separating the GDR from West Berlin. The four young men and many others tried to cross the border irregularly because GDR citizens were restricted in their international travels. Since 1961, when the physical structure of the Wall was built, about 900 people died in attempts to cross the border illegally. Some of them

[70] Klaus Kinkel, "Begrüßungsansprache vor dem 15. Deutschen Richtertag am 23. September 1991 in Köln," *Deutsche Richterzeitung* (January 1992), 5.

drowned in the Baltic Sea, others were killed by antipersonnel mines, and yet others were shot by border guards. The politburo had occupied the top position in the chain of command that led to the killings. The trial of its members had been preceded, however, by a significant number of trials of lower-ranking military personnel for the same type of offenses. Between 1989 and 1999, 670 trials for governmental criminality were conducted. Among the 420 trials that ended in judgments, 151 concerned the border shootings.[71] In the border shooting cases, 53 persons were acquitted and 98 persons convicted, 11 of whom served prison terms. The trials took place within the normal judicial system, but the investigations were partially centralized in federal and provincial special prosecutorial offices.[72]

In earlier cases on the border deaths, the Federal High Court (*Bundesgerichtshof*, BGH) had developed a legal standard for evaluating border shootings that combined the commitment to the application of GDR law with normative resources for condemning the Wall: the justifications for the shootings provided by GDR law should be reinterpreted "in a manner that accommodates human rights."[73] The infusion of GDR law with a version of human rights that centered on civil and political rights by FRG courts regularly resulted in decisions that condemned the border guards who shot at escapees for using disproportionate amounts of force. After all, the BGH reasoned, the escapees merely wanted to cross a border without permission, so killing escapees was so grossly disproportionate to the offense that the guards should have known better.[74] From the perspective of the FRG courts, the GDR's interest in guarding the "intra-German" border against GDR citizens did not weigh heavily enough against the escapees' right to physical integrity and life. Predictably, the GDR officials on trial valued the integrity of the border – symbolizing the integrity of their lost state – much higher. The decisions on the border shootings therefore hinged on evaluations of the legitimacy of the GDR/FRG border itself: the higher the legitimacy of the border, the more justifiable would violence securing the border appear.

These judgments found not only that the shootings were illegitimate, but they also implied that the border between the FRG and the GDR did not have a secure legal footing. Many East Germans objected to this logic. Their identities were tied to the border in complicated ways: the border represented the state that they had inhabited, it had limited many of them in their plans and ambitions, and it was the site of the most obvious violence that the GDR committed against its citizens. Yet in the figure of the young border guard tasked with defending the physical integrity

[71] See Klaus Marxen and Gerhard Werle, *Die strafrechtliche Aufarbeitung von DDR-Unrecht: Eine Bilanz* (Berlin: Walter de Gruyter, 1999), 199, 202, 210.

[72] See John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton: Princeton University Press, 1997), 66–72.

[73] Bundesgerichtshof, 5. Strafsenat, Urteil vom 3.11.1992. BGHSt 39, 1, 13–15.

[74] Bundesgerichtshof, 5. Strafsenat, Urteil vom 3.11.1992. BGHSt 39, 1, 14–15.

of his country, many East Germans (regardless of their personal relationship with the border) found a person they could identify with. Like the border guards, they suddenly had to explain themselves to others for decisions they had taken in a much different context. The question was, however, whether the widespread identification with the border guards would translate into identification with the former political elites in the politburo trial. It should be noted that East German disquiet about these earlier trials was also partly motivated by the notion that only lower-level perpetrators would be held accountable by the unified regime, whereas the leaders might get away unscathed. The politburo trial may have occurred too late to fully unsettle this view.

At the time of the politburo trial, established BGH jurisprudence condemned the border shootings as excessive violence. Thus, it was generally expected that the members of the politburo would be convicted. The decision presented few legal surprises. Egon Krenz was sentenced to six years and six months in prison, and Günter Schabowski and Günther Kleiber were each to serve three years in prison. The court conceded that when the defendants assumed their offices, the border policing system had already been in place. Yet they had done nothing to modify this system, and thus negligently accepted the deaths that they knew would result from the orders given to the guards.[75] The deaths were unjustified, the court explained in reference to prior BGH decisions, because "the refugees wanted nothing else than to cross the border between the GDR and the Federal Republic without endangering or violating any recognized legal goods."[76] The border, we can infer, does not represent a "recognized legal good."

The public interest arose because the trial offered a stage for celebrating and contesting unification. The prosecution – idealistic, righteous, and uncritical of the West German legal and political dominance – faced defendants who tried to resurrect a defiant identification with a state that no longer existed. These performances spoke to the anxieties of the larger publics in both parts of Germany. Among the defendants, Krenz – who had been the de facto head of state of the GDR for a short period – was the most eager to present himself as the representative of former GDR citizens disadvantaged by unification. Yet Krenz would not have been so convincing in his criticisms of "political justice" and "victors' justice" at his trial and in the political context at large if it had not been for the ideological inflection of the trials by the West German judicial personnel. The commitment to applying GDR law to the border shootings was transparently superficial, and the minister of justice had already announced that the trials should contribute to the delegitimation of the GDR. The prosecution, embarrassed by this apparent political directive, tried to

[75] Landgericht Berlin, Strafsache gegen Schabowski, Kleiber und Krenz, Urteil vom 25.8.1997. Quoted in Redaktion "Neue Justiz," ed., *Der Politbüro-Prozess*, 348.

[76] Landgericht Berlin, Strafsache gegen Schabowski, Kleiber und Krenz, Urteil vom 25.8.1997. Quoted in ibid., 499.

deflect this "task": lead prosecutor Jahntz asserted "there is no need to delegitimize something that no longer exists."[77]

Throughout the trial, Krenz positioned himself as the official representative and defender of the GDR and its population: he deflected the charges against him as allegedly representative of a rhetorical indictment of the GDR and the majority of the former GDR citizens. Krenz's key complaint was that the shootings at the Wall were evaluated according to standards that had been developed for Nazi atrocities – most famously, legal theorist Gustav Radbruch's formula, developed in 1945–1946, that unbearably extreme injustice can never constitute valid law – and were thus unsuitable for the comparatively mild policing of the border. These standards were, Krenz complained, also applied in a retroactive manner. In a gesture that claimed solidarity with and from the entire GDR population, Krenz argued that this legal interpretation represented the exclusion of all East Germans from crucial constitutional guarantees.[78] For the prosecution, in contrast, the legal standards were as unproblematic as the mode of unification: the trial was not a case of victors' justice, but the defendants were indeed "losers" to a popular revolution based on universal principles. The legal standards on which the trial was based were derived from "natural law" and firmly anchored in the "legal cultures of the occident" and therefore "nothing new for people in civilized legal systems."[79] From this perspective, the introduction of FRG legal norms did not appear as an imposition or a case of victors' justice because these norms were self-evident and preexisted in the "community of civilized nations" to which the GDR had claimed to belong.[80] Unification, in this logic, was the process by which the majority of the GDR population decided to end the state that was "the other dictatorship on German soil" and join the FRG and its firm commitments to the universal principles of human rights as already expressed in preexisting FRG law. In this account, there was no place for a separate East German political identity, for seeing the GDR borders as "recognized legal goods," or for a reading of human rights law that might have taken account of different conceptions of human rights in the GDR.

The defense tapped into widespread feelings of marginalization among former GDR citizens and tried to unite them as victims of the symbolic violence of unification.[81] Krenz's attorney Wissgott claimed that in spite of the commitment to the rule of law and the evaluation of the acts according to GDR law, "in terms of

[77] Plädoyer Staatsanwaltschaft, quoted in ibid., 20.

[78] Statement Krenz, quoted in ibid., 278.

[79] Plädoyer Staatsanwaltschaft, quoted in ibid., 22.

[80] Plädoyer Staatsanwaltschaft, quoted in ibid., 21.

[81] See Paul Cooke, *Representing East Germany since Unification: From Colonization to Nostalgia* (New York: Palgrave, 2005), 4–34; and Mary Fulbrook, "Aufarbeitung der DDR-Vergangenheit und, innere Einheit' – ein Widerspruch?" in Christoph Klessmann, Hans Misselwitz, and Günter Wichert, eds., *Deutsche Vergangenheiten – eine gemeinsame Herausforderung: Der schwierige Umgang mit der doppelten Nachkriegsgeschichte* (Berlin: Ch. Links Verlag, 1999), 290.

substance, the application of GDR law was a mere fiction in the case of my client,"[82] and, he added, "it has also been a fiction for the majority of the GDR population."[83] The "majority of the GDR population," whose presumed solidarity Krenz and his lawyers invoked, had in fact taken to the streets in 1989 in order to oust Krenz and his party's leadership. Most East Germans also seem to have disapproved of the violent border policing before 1989. Indeed, the trials might have succeeded in garnering more retroactive approval for the Wall and the killings than ever existed while the GDR was still intact.

The "East German" identities that emerged after unification were predominantly not based on genuine desires to turn back the clock. Rather, they should be understood as reactions to the Western-dominated mode of unification that was mirrored in the transitional justice policies. Identity appeals were channelled through the organizational networks of the Party of Democratic Socialism (*Partei des demokratischen Sozialismus*, PDS), the renamed successor party of the GDR's former ruling party SED.

The PDS, which had expelled the defendants and former politburo members Krenz, Kleiber, and Schabowski from their ranks early on, appealed to many East Germans' experiences of economic and cultural marginalization within unified Germany. The PDS and its social allies were the only actors that articulated specific East German policy demands and identity claims. Their comparative success was due to their ability to appeal to experiences and identities that mattered to many East Germans who were faced with unprecedented economic insecurity and the devaluation of their achievements and lives – in 1994 the PDS campaigned on the slogan "my biography does not begin in 1989."[84] Public reaction to the trials and to their former leaders must be understood in the light of these grievances. East Germans were not likely to find that the crimes of their former leadership – however unsympathetic that leadership was – would be adjudicated according to laws that they felt comfortable with. Yet this lack of a standard of judgment that was "one's own" was only part of a larger process of social and political disenfranchisement.

Ultimately, however, the PDS's political success in mobilizing a particular East German identity was limited for two reasons. On the one hand, the PDS discourses excluded the former opposition as well as the many victims of GDR state repression, effectively reducing the representation of the GDR to its former social elites and pliable citizen-subjects. At the trials and elsewhere, this coalition could elicit identification from many East Germans, but certainly not from all of them. On the other hand, the PDS and its allies ran against a discourse of German unity that demanded "inner unity" in the form of East Germans' assimilation to West German

[82] Plädoyer Wissgott, quoted from Redaktion "Neue Justiz," ed., *Der Politbüro-Prozess*, 190.

[83] Ibid.

[84] Quoted in Cooke, *Representing East Germany*, 50.

cultural norms and did not recognize a legitimate space for "East German" particular interests and identities. Many citizens who were sympathetic to current PDS policies were put off by the politics of identification with the former GDR elites. Having the choice between building a coalition on the basis of resentment and forging new ties on the basis of current policy positions, the PDS predominantly chose the latter. The PDS has since joined with other leftist parties and movements and has become a genuinely "unified" – if internally fissured – German leftist party. The appeals to East German identities sustained the PDS for more than a decade, but the electoral future of its successor is based on its ability to fill a larger gap in Germany's political left.

The trial of the East German politburo was never only about the defendants: the defendants represented the dissolved GDR state, and the trial was meant to replay and celebrate unification. Precisely because the trial was intended to declare the GDR an illegitimate state, it became an important stage for contesting the mode of unification. The defendants had been part of the political elite that had been pushed out of power by the GDR citizens in 1989. Yet the hardships of the early 1990s allowed the defendants to appeal to the people who had once driven them out of power, convincing many that the trial was emblematic for the marginalization and stigmatization of East Germans at large. Although these identifications were quite powerful throughout the 1990s, the coalitions that furthered and embodied these identifications have been reshaped. The political parties and social movements that mobilized around East German political identities soon looked for alternative ways of framing their perceptions of injustice without an overt reliance on regional or quasi-ethnic allegiances. Ultimately, most East Germans did not want to be addressed as East Germans first and foremost – and certainly not by the same people whom they had once pushed from the center of political power.

TRIALS, IDENTITIES, AND THE PROJECT OF RECONCILIATION

Criminal trials for state repression restage the violence for a broad audience and submit it to judgment. The legal judgment is only one aspect of such trials, which have broader educational and transformative goals. The question posed in this chapter is whether or not trials for systematic or massive abuse have effects for the politicized identities that were at the heart of the violence, and that may still be operative in the postrepression period. The cases discussed have shown that trials are limited in their capacity to generate reflection on collective complicity with systematic or massive abuse and to unsettle identity categories. There are three key aspects of these constraints.

First, as we saw in the case of the Auschwitz trial, the audience may dissociate itself from the perpetrators, and thereby fail to reflect on their own complicity and involvement in the crimes on trial. The public's dissociation from the perpetrators in the Auschwitz trial was based on a narrow and misleading account of the shape and

sources of the violence at Auschwitz. By emphasizing the individual and capricious violence of some perpetrators, the court made the system of the death camps recede behind spectacular descriptions of sadism. The crimes became literally unimaginable and unthinkable, and the asserted motivation of the perpetrators consequently moved into the realm of the pathological: anti-Semitism understood as an irrational lower-class phenomenon, tied to sadism and cruelty. The links between respectable German mainstream society and Auschwitz were obscured by the court and the media coverage of the trial. Yet, critics of the trial questioned precisely this focus on sadistic excesses. Subsequently, the material generated in the trial was open to challenges and evaluations by social critics and intellectuals – ensuring judgment on the judgment.

The Auschwitz trial allowed West German society to distance itself from the perpetrators by showing a commitment to prosecuting "the murderers in our midst." Over the long term, public reflection on the trial and its findings through cultural events and memory projects may have contributed to a broader engagement with Nazi crimes. What remained, however, was the conceptualization of (West) German identity as distinct from Jewish identities: the West German discourse on dealing with the Nazi past called for reconciliation between "Germans" and "Jews," implicitly denying any overlap between these two identity categories. Thus, the distinction between "us" and "them" that was cemented through Nazi legislation and genocide was not sufficiently troubled in the aftermath. To be sure, the move from indifference to shame regarding the Holocaust was a valuable change in West German political culture. Yet by adopting a posture of taking responsibility for the Holocaust as a cornerstone of national identity, West German political culture reiterated a sharp distinction from, and dependence on, a Jewish identity that is likewise tethered to the Holocaust.

Second, there may be instances, such as the Argentine trial of the juntas, in which the audience identifies with schematic representations of the victims. Identification with victims is unlikely to lead to reflection on collective complicity when victims are stripped of their distinctive identities – the stigmatizing criteria that made them targets in the first place, and with which the public at large may still be very uncomfortable. In the 1985 trial of the juntas, for example, we see the recognition of the figure of the disappeared in a judicial forum. Yet the disappeared that are recognized at the trial were only abstract representations of the people who were abducted, tortured, and killed by the military. For judicial purposes, the court did not need to know much more than the victims' names and evidence of the crimes committed against them. Moreover, the prosecution tried to get the broader national audience to recognize the disappeared as their fellow citizens, to identify with the disappeared, or to recognize themselves as potentially disappeared. Argentine citizens were addressed as both passive spectators – first of the violence and later of the trial – and as the ultimate victims of the dictatorship. The prosecution's and judges' stress on the randomness of the military's violence suggested that the armed forces

attacked the body of the nation under the pretext of continuing to fight guerrilla groups.[85] Ordinary citizens do not appear as accomplices but as metaphorical or potential victims of the military. Given the demonization of "subversion" and the criminalization of dissident political action under the dictatorship, rehumanizing the victims was an important step. Yet the distinctiveness of the disappeared was lost in these efforts to represent them. The erasure of their political commitments and identities from the court record helped reconstruct them as citizens, but not (yet) as complex persons whose identities were an important factor in the abuse they received.

These representations of the disappeared offer glimpses into the larger problems of representing and performing victimhood. Victims are rarely central at trials. They are spoken for and about, and they can appear as witnesses. Yet in order to make sense of and judge the violence, courts craft broader images of the victims. In many trials, survivor-witnesses find that they are not invited to talk about their experiences in a vocabulary and narrative form they find appropriate. Instead, survivor-witness testimony is often constrained, interrupted and redirected by questions, and gathered for purposes that are of little concern to the survivors themselves. Some trials might be more accommodating of survivor-witness testimonies that do not fit the scripts that are expected. Yet all trials will face the problem that witness testimony is received not (or not only) in an atmosphere of emphatic listening, but in the context of a criminal case in which much is at stake for the defendants and the prosecution. Witness testimony placed in an adversarial context necessarily becomes part of the courtroom contestations about narrative, causation, and responsibility. None of the trial participants has an institutional interest in listening to survivor-victims for their own sake, but most of the participants might want to use parts of witness testimony to further their own goals at the trial and beyond. There is a well-founded fear that "the translation of human suffering into the language of law and rights will always satisfy the interests of legal authorities more than those who are called to narrate their pain."[86] Truth commissions have been proposed as better spaces for testifying and witnessing. To be sure, truth commissions should not be idealized; they also tend to fit testimonies into larger narratives of violence and redemption.[87] Yet there is a need for spaces – such as certain versions of truth commissions – in which testimony is welcome but not directed, and in which testimony does not serve anyone's ends but can help everyone understand the complexities of identities and commitments of those who suffered violence and state repression.

Third, actors within trials may be very effective in dividing the national audience, especially through making appeals that resonate with a general sense of identity-based discrimination. That is, trials are spaces in which different actors compete

[85] For the imagery of nationhood and body in Argentina, see Taylor, *Disappearing Acts*.

[86] Katherine M. Franke, "Gendered Subjects of Transitional Justice," *Columbia Journal of Gender and Law* 15, no. 3 (2006): 821.

[87] See Claire Moon, *Narrating Reconciliation: South Africa's Truth and Reconciliation Commission* (Lanham, MD: Lexington Books, 2008).

for the attention and identification from different parts of the audience. This aspect was most clearly visible in the politburo trial. Here, the prosecution used the trial to restage for a national audience what it perceived as a successful national unification. The defense, on the other hand, addressed an East German audience troubled by social change and the loss of political voice in the unification process. The defendants portrayed themselves as representatives of the losers of the transition – a dynamic that could also be observed in the trials of Slobodan Milosevic and Saddam Hussein.

Trials restage violence for distinct audiences. Yet in research on trials, the audience remains literally in the dark. On the one hand, trials are meant to do justice, and not to entertain, educate, or invite identification. Yet trials become drama even before they are dramatized in theater plays, movies, and television shows. As a result, we need to know more about the different audiences of trials. Some of the trials have immediate courtroom audiences, composed mostly of professionally interested observers, relatives of victims, families of the defendants, activists showing solidarity with the victims or the defendants, and the occasional civic-minded resident of the city in which the trial is held. Most people's engagements with the trials are mediated: they read the special newspaper coverage on the trial, they watch news segments on television, or they hear about the trial in local discussion panels. In many cases, such as the politburo trial, the presumed main audience of the trial is national. And yet the "nation" is precisely what is problematic in these contexts: the trial became part of a belated contestation over the shape of the nation and the mode of unification. Different parts of the audience "read" the play differently, and trial participants play to these particular audiences. Trials, then, are spaces in which different actors compete for the attention and identification from an audience that is never singular and predictable. No single actor can be sure that their narrative, their offers of identification, their judgments of praise and condemnation, will resonate with a specific audience.

Interestingly, none of the three postwar domestic prosecutions for state violence had audiences that were confined to one nation state. The Auschwitz trial took place in West Germany but was followed intensely in Israel and East Germany, among other states. The Argentine trial of the juntas found a broader indirect audience among the human rights organizations and Argentine exiles. And the politburo trial took place at a time in which the human rights movement interested in prosecutions for state crimes was already thoroughly transnationalized. From this perspective, there are no purely domestic trials. The transnationalization of the trials' mediated audiences can have different effects: different audiences might see widely divergent "stories" and judgments in the trials, or they might find commonalities in talking about the same set of events. Yet there is a potential danger if trials play largely to an audience that has no direct stake in the trial: international trials have already been criticized for satisfying the needs of the elusive "international community" more than the questions and concerns of those who lived with the violence. Domestic trials are not immune from this problem or perception, as the trial of Saddam Hussein

has shown. Here, a global audience raptly watched a trial restaging the violence of the Iraqi regime that was brought down and replaced with a violent occupation while insisting that the trial should serve the educational and emotional needs of the divided Iraqi population. Watching trials for major human rights violations is not wrong. Yet all audience members should consider how and why the trial captures their attention, which techniques are employed by the participants, and how their own identifications and identities are shaped in response to the restaging of violence that they are witnessing.

These three findings suggest that trials alone may do little to break down hardened identity categories that thrive on oppositions, and in some cases (like the politburo trial) may even help create identities of resentment in the short term. Yet politicized identities are inevitable, and trials will engage with them in some form. Although I have shown that trials are richer in stories and drama than they are often made out to be, I have also highlighted ways in which the logic of law helps impose identity categories in order to describe state repression. The identity performances we see at trials are limited and instrumental: they are meant to further the goals of trial participants, and they are better at capturing the vocabularies and identities that emerged from the periods of violence than at imagining ways of unsettling these identities. In the end, trials can only stage, express, and embody what is thinkable and profitable to do on a national stage at a particular point in time. Trials can be valuable precisely for their obvious limits. When critics discuss shortcomings of trials, they continue the debate about past and future identities;[88] and they take part in imagining political communities they want to live in.

[88] See Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004).

5

International and Hybrid Criminal Tribunals: Reconciling or Stigmatizing?

Cécile Aptel

In contexts marked by the occurrence of atrocities and crimes, the judicial systems of the affected countries may be unable or unwilling to investigate and judge those responsible. This is particularly true in divided societies, split along ethnic, religious, linguistic, or other identity lines. In such contexts, law enforcement institutions, including the police, prosecutors, and courts, are often themselves marked by identity-based tensions or divides. By their very composition, functioning, and limitations, they often reflect the society in which they operate, for better or for worse.

This chapter will concentrate on cases in which the international community intervenes in the prosecution of those responsible for international crimes committed against the members of an identity-based group.[1] This intervention may be through the provision of international support to the domestic judicial systems, or by complementing or temporarily replacing domestic criminal systems with international or hybrid jurisdictions. In the cases of both the former Yugoslavia and Rwanda, new international criminal tribunals were established by the United Nations Security Council in the early 1990s to bring to account those responsible for the crimes committed in these countries. In Bosnia-Herzegovina, so-called hybrid chambers, mixing national and international elements, were later created. The establishment, funding, and operations of the federal domestic court in which these chambers sit have been facilitated by strong international support and involvement.

In the former Yugoslavia in general, and in Bosnia-Herzegovina in particular, ethnoreligious identities that were made politically salient by opportunistic leaders played a key role in the crimes that victimized the region's people beginning in the

* The author wishes to thank Paige Arthur for her outstanding support and substantial contribution to successive drafts of this chapter, as well as Pablo de Greiff and Bogdan Ivanisevic for their comments.

[1] The term "international community" is loosely used in this chapter to characterize states and/or different regional or international organizations.

early 1990s. Yugoslavia, a multiethnic and multireligious society, began to disintegrate in the 1980s as nationalist politics rose among its diverse groups. Despite the high number of interreligious marriages, historical experiences and religious faith had continued to shape ethnic identifications along religious lines. During World War II, crimes had notably been committed by the Croatian nationalists (*Ustashas*), who sent Serbs, Jews, and Gypsies to concentration camps, and by Serbian royalists (*Chetniks*), who, among others, targeted Muslims in Eastern Bosnia.[2] Although in Croatia, Bosnia-Herzegovina, and Serbia, people broadly spoke the same language and shared many cultural traits, they were identified, and defined themselves, as "Croat" if Catholic, "Serb" if Orthodox, and "Muslim" or "Bosniak" if Muslim. In the former Yugoslavian Republic of Macedonia and in Kosovo, the religious division matches a linguistic divide between the Albanian-speaking population, which is predominantly Muslim, and the Slavic-language-speaking Orthodox Christians.

Shortly after the International Criminal Tribunal for the former Yugoslavia (ICTY) was established, its first president, Antonio Cassese, noted that

> an internecine strife is under way, aggravated by ethnic and religious conflict, with the result that inter group hatred takes the form of ethnic cleansing, genocide, mass rape and other manifestations of large scale and widespread breaches of human rights. Ethnic hatred springs afresh to turn friend to foe and places the claims of ancient blood above those of common humanity and decency. . . . The unbearable abuses perpetrated in the region have spread terror and deep anguish among the civilian population.[3]

Indeed, the conflict in the former Yugoslavia was not merely one between the armies of belligerent "breakaway" states, but rather of paramilitary groups and regular armed forces involved in targeting and terrorizing groups of civilians on the basis of their ethnoreligious identity. The widespread use of so-called ethnic cleansing – a policy of forced expulsion and systematic deportation of the members of a particular group by the combatants of another group from what the latter considered "their" exclusive territory – was the underlying objective of most fighting.[4] Some of the images of camps of skeleton-like prisoners were reminiscent of the images of the Nazis' extermination camps. Bosnia-Herzegovina, geographically located at the heart of the Balkans, and where the Bosniaks, Bosno-Croats, and Bosno-Serbs were not only

[2] See Damir Mirkovic, "Ethnic Conflict and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia," *The Annals of the American Academy of Political and Social Science* 548, No. 1 (1996): 191–9; and Raju G. C. Thomas, "History, Religion and National Identity," in Raju G. C. Thomas and H. Richard Friman, eds., *The South Slav Conflict: History, Religion, Ethnicity and Nationalism* (New York: Garland Publishing, 1996), 25.

[3] First annual report of the president of the ICTY to the United Nations General Assembly, A/49/342-S/1994/1007, August 29, 1994; available at www.un.org/icty/publications-e, 75.

[4] On ethnic cleansing, see Drazen Petrovic, "Ethnic Cleansing – An Attempt at Methodology," *European Journal of International Law* 5, No. 3 (1994): 1–19.

substantially represented, but also politically organized, paid a particularly heavy price.

In Rwanda, the terrible crimes committed in the 1990s and in particular in 1994 were also clearly linked to group identifications. There are three main groups in Rwanda: Hutu, Tutsi, and Twa, the latter being a tiny minority. Traditionally, the distinction among them was based on lineage and clans, as well as on lifestyle, as Tutsi tended to be herders, Hutu agriculturalists, and Twa potters.[5] The Tutsi constituted a sort of an aristocracy, with a king ruling over the entire country. In exceptional cases, one could move from one group to another, depending notably on one's status, social position, marriage, and ties to the monarchy.[6] In 1932, the colonial Belgian authorities permanently identified every Rwandan as belonging to one of the three groups, which they labeled "ethnic" groups. Apparently, some families were arbitrarily declared "Tutsis" because they owned more than ten cattle. It became mandatory for every Rwandan citizen to carry an identity card that included an entry for one's ethnic group (*ubwoko* in Kinyarwanda and *ethnie* in French). This ethnic reference on identity cards was maintained until 1994, when it was used to identity many of the Tutsis targeted during the genocide.

European colonial powers "racialized" the difference between Hutu and Tutsi during the colonial era, a move that reflected racial concerns prevalent in Europe at the time. In the process, Hutus were constructed as indigenous to Rwanda while Tutsis were deemed to have migrated from North-East Africa, thus being "extra-indigenous." These constructs ultimately played a part in the crimes committed against the Tutsis in 1994. Many Tutsi corpses were thrown into rivers leading to Lake Victoria and, ultimately, the Nile, so that they would, according to those who killed them, "return where they were from."

As African countries moved toward independence, political developments in Rwanda followed ethnic lines, with the emerging political parties differentiating themselves through ethnic categories. In 1959, just before the country became independent, the death of the Tutsi monarch sparked a cycle of ethnic violence in which many Tutsis were killed and others forced to flee, notably in neighboring Uganda. In the following years, many crimes and abuses were committed against the Tutsis who had stayed in Rwanda, and a quota system for civil service positions linked to the proportion of each ethnic group in the population was put in place by the government, leading to Hutu dominance. In 1963 alone, an estimated ten thousand Tutsis were killed, leading to the mass exile of many others.[7] On October

[5] See, for instance, Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995); Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (New York: Zed Books, 2000); and Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999); available at www.hrw.org/legacy/reports/1999/rwanda.

[6] The primary source of identification in traditional Rwandan society may have been on the basis of belonging to a given clan, each comprised of both Tutsis and Hutus.

[7] Des Forges, *Leave None to Tell the Story*.

1, 1990, the Rwandan Patriotic Front (RPF), formed predominantly by Tutsi exiles, launched an attack from Uganda. Subsequent negotiations led to a cease-fire in July 1992. In Rwanda, the weakened political establishment, in particular the president and his entourage, encouraged an anti-Tutsi propaganda campaign as an attempt to consolidate its power.[8]

On August 4, 1993, the government and the RPF signed the Arusha Peace Accords, linked with the deployment of a United Nations peacekeeping operation in Rwanda (UNAMIR). This fragile peace accord fell apart on April 6, 1994, when the aircraft carrying the Rwandan president was hit by a missile over Kigali and crashed, killing all aboard. Within a few hours, members of the Rwandan army and Hutu *Interahamwe* militia erected roadblocks and started killing many Tutsi and moderate Hutu politicians, including the Hutu prime minister, Agathe Uwilingiyimana. The constitutional vacuum thus created enabled the formation of a self-proclaimed "Hutu-power interim government," which masterminded and executed widespread and systematic killings of Tutsis over several months.[9] Following the murder of ten Belgian blue helmets in mid-April, the UN Security Council decided to reduce UNAMIR to 450 troops, leaving Rwandans, in particular the Tutsis, at the mercy of those intent on exterminating them. According even to the most conservative estimates, half a million persons were killed that year, predominantly as part of the genocide targeting the Tutsis.[10] In July 1994 the RPF took control of Kigali and, in essence, of the country, halting these killings. Hundreds of thousands of Rwandans, predominantly Hutus, fled to neighboring countries, notably the Democratic Republic of the Congo (then Zaire), starting a huge humanitarian crisis. Cross-border conflict between RPF forces and those of the exiled army and militia has continued throughout the 1990s and into the 2000s, fueling other massacres and crimes in the Democratic Republic of the Congo.

Thus, in both Rwanda and the former Yugoslavia, the situations in the early 1990s were characterized by terrible crimes that systemically targeted people on the basis of their identity. In both cases, the international community responded by establishing or supporting tribunals to prosecute and try those responsible for these crimes.

Given the deeply politicized and polarized nature of identity-based divisions in Rwanda and in the former Yugoslavia, as well as the enduring albeit shifting political relevance of these divisions, it is important to examine how these tribunals are dealing with the identities most salient to the crimes. Questioning the degree to which criminal justice may or may not serve as a venue for contesting and

[8] Ibid.

[9] For a more detailed historical account, see Judgment, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96–4-T, September 2, 1998, 78–111.

[10] See "'Genocidal Slaughter' Claims as Many as 1 Million," *UN Chronicle* 31, December 1994, 12, cited in Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (Irvington-on-Hudson, NY: Transnational Publishers, 1998), 61; and Michael N. Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca, NY: Cornell University Press, 2002).

dispelling identity categorization, this chapter analyzes whether and how these jurisdictions have addressed identities and how they may have affected broader social perceptions of them. Given, however, the fact that trials are still ongoing and research on such effects is scarce, this analysis will necessarily be suggestive rather than conclusive.

This chapter begins by assessing the relationship between identity and criminal accountability. It then reviews the political context that led to the establishment of the tribunals, their organization and modalities of operation, and their prosecutorial policies – in each case, highlighting the role of identity in these facets of the tribunals' work. It concludes by identifying ways in which fostering individual criminal accountability for identity-based crimes ultimately may serve reconciliation.

IDENTITY-BASED CRIMES AND CRIMINAL ACCOUNTABILITY

International or hybrid tribunals have been created in response to the commission of heinous international crimes: genocide, crimes against humanity, and war crimes. Genocide and crimes against humanity are intrinsically linked to identity, for their legal constitutive elements require the targeting of specific human groups. Genocide is defined as a crime committed with the intent to destroy an ethnic, racial, religious, or national group.[11] Similarly, some definitions of crimes against humanity, and in particular when constituted by persecution, presuppose a discriminatory intent.[12] Although discrimination of a group is not a legal requirement for war crimes, in practice, and in particular in the context of the former Yugoslavia and Rwanda, war crimes have often targeted members of particular groups, or disproportionately affected certain groups.

Thus, international crimes typically occur in societies or communities where conflicts among groups divided along identity fractures have become deeply polarized. When international or hybrid jurisdictions are established to try these crimes, it is relevant to examine the link between these courts and the identity issues at the source of – or at least deeply related to – the commission of the crimes.

On Identity

Individuals are unique in their identity, each being made up of various layers of identities. Identities are not necessarily exclusive of one another: simultaneously,

[11] See the provisions contained in Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, reproduced verbatim in the statutes of the ICTY, ICTR, and of the International Criminal Court.

[12] A discriminatory requirement as an element of the offense of crimes against humanity is explicitly required under the ICTR statute. However, under customary international law and as underlined by the jurisprudence developed by the ICTR and ICTY, this is currently only a legal requirement for persecution as a crime against humanity.

one has a national identity, a linguistic identity, a religious identity, a class identity, and a gender identity, to name but a few.

A pathological focus on only one of these characteristics is what seems to define situations where identity-based crimes are committed. In these cases, this single affiliation – for instance, ethnic identity – is perceived as the only meaningful one. As highlighted by Amin Maalouf, taken in isolation and ascribed as the predominant one, a single factor of a person's identity is then considered to constitute *the* identity.[13] When identity-based crimes are committed, individuals are then merely defined as members of a group, reducing their multifaceted individuality to a monolithic, collective identity. Those targeted are labeled as belonging either positively to a group – "the Jews," "the Tutsis," "the Muslims" – or as belonging to a group defined negatively – "the foreigners," that is, all those who do not have "our" nationality.

Ivana Franovic has described this process in the former Yugoslavia:

> One of the consequences of the war in the region of former Yugoslavia is that we stopped being human beings and started to be recognized instead only as "Serbs," "Croats," "Bosniaks," "Albanians," "Macedonians." It was of no importance whether we felt this way or whether we actually *had* those kinds of identities. Others *knew* better than ourselves who we were – and Serbness, Croatness, Bosniakness started to be something that would not wash off. At the same time, some of us have been bearing that *marker* with awkwardness and even shame due to the crimes and misdeeds of some members of the group that we [are supposed to] belong to.[14]

When taken to an extreme, such collective identities are based on the reverse principles of absolute inclusion or exclusion: one either forms part of the group or does not. There is no middle way, and those arguing against this are cast as traitors. Collective identity intrinsically lessens the unique characteristics of each individual so as to have them fit within a group, defined on the basis of a rigid set of characteristics, prevailing over all other components of identity.

Thus, identity is, if not generated, at least reinforced by social constructions of difference. The processes by which a particular identity might become "the identity" have been analyzed by psychologists, sociologists, political scientists, and historians. They include the determination and use of official categories, which are often sanctioned by the states and enable the development of quota systems and other policies of exclusion. They also include propaganda campaigns and elite manipulation. Such political ploys often channel and magnify fears about the targeted group, which may be depicted as benefiting from certain advantages and is often portrayed as fomenting

[13] Amin Maalouf, *Les identités meurtrières* (Paris: Grasset, 1998).

[14] Ivana Franović, *Dealing with the Past in the Context of Ethnonationalism: The Case of Bosnia-Herzegovina, Croatia and Serbia* (Berghof Research Center for Constructive Conflict Management, Occasional Paper No. 29, October 2008); available at http://www.berghof-center.org/uploads/download/boc29e.pdf.

plans to "take over," thus justifying policies of discrimination and exclusion. These factors often create the context and preconditions for mass crimes to be committed. As noted by Patricia Weitsman,

> During wartime, questions of identity become outlined in sharp relief. Under conditions of threat, persecuted groups, or any social group, have a heightened sense of self. These groups will draw together, become more cohesive, and validate their identity. The source of cohesion and disintegration in any societal group derives from sentiment, and discourse provides an extremely powerful way to manipulate and construct sentiment. As we construct our enemies – or our "others" – our ethnicities, races, citizenships, and religions all become tools of exclusion.[15]

Identity, Systemic Crimes, and Accountability

For those committing identity-based crimes, this restrictive understanding of identity enables them not only to stress the differences between the groups ("us" and "them") but also to deny other identities that are possibly shared between them and those they victimize (for example, to share a language and many cultural practices, or to hail from the same village). This oversimplification of what constitutes identity helps explain how neighbors who had previously lived in harmony and formed friendships may turn against each other. Identity categories are manipulated to appear fixed, and conflicts are understood to have primordial roots, even when in fact they may be of quite recent vintage.

In the context of the perpetration of such crimes, the identity of the victims is thus primarily defined by others. Interestingly, this is reflected in some legal definitions and the case law developed by international tribunals, for instance, concerning genocide. For a crime of genocide to be established legally, it does not matter whether or not victims themselves value the identity ascribed to them or feel part of the targeted group; instead, what matters is that it is conceived as such in the mind of the perpetrators, who target individuals on the basis of this perceived identity.[16] Nonetheless, in many contexts, particular collective identities will have important meanings to the victims themselves, and not just to others. The imposition of a collective identity on the victims may also reinforce their sense of belonging to this particular group. For criminal accountability, however, there is a clear distinction between "objective" and "subjective" identity, and only the former matters. In short, criminal categories such as genocide and crimes against humanity are concerned only with the social construction of identity.

In analyzing the intersections between accountability mechanisms, on the one hand, and identity-based crimes, on the other, this chapter approaches the issues

[15] Patricia A. Weitsman, "The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda," *Human Rights Quarterly* 30 (2008): 568.

[16] See the interesting jurisprudential developments of the ICTR on this question: Judgment, *Prosecutor versus Georges Rutaganda*, Case No. ICTR-96–3-T, 6 December 1999, 55–58.

from two angles: first, the way in which identities are implicated in the establishment and operation of these mechanisms; and second, whether these mechanisms have effects for the identity-based perceptions and grievances that were at the heart of the crimes they try to judge.

CONTEXT OF ESTABLISHMENT

Examining the political circumstances and modalities that led to the establishment and also shaped the mandates of the criminal jurisdictions is an important starting point when reviewing how these courts dealt with the identities most salient to the crimes. To date, when the international community elects to involve itself in the prosecution of international crimes, it has so far adopted one of two approaches: the models of ad hoc international criminal tribunals or of hybrid – or mixed – tribunals.

The International Tribunals

The lack of progress toward peace in the former Yugoslavia, and the wish to demonstrate that the international community was not idly standing by while atrocities were being committed against thousands of civilians, prompted the Security Council to establish in 1993 the ICTY, mandated to try the war crimes, crimes against humanity, and genocide committed in the former Yugoslavia since January 1, 1991. In the preamble of Security Council Resolution 827 (1993), the ICTY was expressly tasked to deter further crimes as this would "contribute to ensuring that . . . such violations . . . are halted and effectively redressed." It was hoped that by bringing to justice those accused of massacres and similar egregious violations of international humanitarian law, both belligerents and civilians would be discouraged from committing further atrocities, and that the ICTY would "contribute to the restoration and maintenance of peace."[17]

The attitude that each country and party to the conflicts in the former Yugoslavia developed in response to the creation of the ICTY was highly predictable, and depended on whether or not they perceived themselves as threatened by the court. Only Bosnia-Herzegovina, as represented by the government in Sarajevo, initially supported the ICTY, whereas Slovenia remained neutral and somewhat supportive, although it refrained from engaging too closely with it. The Yugoslav authorities, and the Republika Srpska (the Serb-dominated entity in Bosnia-Herzegovina), showed hostility and initially did not recognize the jurisdiction of the ICTY, even stopping it from opening an office in Belgrade.[18] Croatia's attitude was ambiguous at best, and

[17] Resolution 827. The Security Council had regularly discussed the conflict in the former Yugoslavia, and had set up, in October 1992, a Commission of Experts. Known as the "Bassiouni Commission" after the name of its chair, Cherif Bassiouni, it had provided evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law.

[18] Pierre Hazan, *Justice in a Time of War* (College Station, TX: Texas A&M University Press, 2004), 108.

turned antagonistic when the ICTY started to investigate the allegations of crimes committed during the conflict for the control of the so-called Krajina (Croatian territories that had been held by Serb breakaway forces).[19] If the attitude of each of these countries has evolved over time, it is clear that the cooperation they extended to the ICTY – for instance, to arrest the accused – has remained subject to what each perceives as its strategic political and security interests. To a large extent, each state and government has tried to justify the violence against other groups as "self-defense" and thus not criminal.

A year after it had established the ICTY, the Security Council was severely criticized for its treatment of the situation in Rwanda. The general view at the time, expressed by the secretary-general, was that if the United Nations had been unable to stop the killings, then "the international community at the very least must ensure that those individuals responsible for unleashing and instigating this cataclysm are brought to Justice."[20] The Rwandan legal system was unable to cope with such cases: the domestic judicial system had effectively been destroyed, through the targeting of judges and lawyers as part of the mass killings, and the fleeing of many others to neighboring countries. In addition, Rwanda had formally requested the creation of an international tribunal in a letter to the Security Council of September 28, 1994, as well as before the UN General Assembly.[21]

Following these pleas, as well as the reports of two UN commissions, the Security Council finally decided to act in the Rwandan case as it had done for the former Yugoslavia. By Resolution 955 (1994), the council established the ICTR, with its own specific jurisdiction, trial judges, deputy-prosecutor, and registry, but sharing common organs with the ICTY, including the appeals chamber. The ICTR also shared the chief prosecutor with the ICTY until its statute was amended in 2003. Similar to the ICTY, the ICTR is competent to try three categories of international crimes: genocide, crimes against humanity, and war crimes, although the latter are defined differently, to encompass serious violations of international humanitarian law committed in conflicts that are not international.

Despite its initial requests, the RPF-led government of Rwanda subsequently raised several objections to the establishment of the ICTR and ultimately voted against the adoption of Resolution 955, arguing notably that capital punishment should apply before the ICTR, and that those sentenced to imprisonment should serve their sentence in Rwanda.[22] Rwanda was also deeply unsatisfied with the temporal jurisdiction of the ICTR, which was given the power to try persons responsible

[19] Ibid.

[20] See the remarks of the then UN secretary-general Boutros Boutros-Ghali, *Report of the Secretary-General on the Situation in Rwanda*, Doc. S/1994/640 (1994), 43.

[21] See Letter of the Permanent Representative of Rwanda to the UN Addressed to the President of the Security Council (UN Doc. S/1994/115); and UN Doc. A/49/PV.21(1994), 49th Session, 3453rd meeting, 5.

[22] Statement by Ambassador Bakuramutsa, Rwandan Representative to the United Nations, Summary record of the 3453rd meeting of the Security Council (8 November 1994), Doc. S/PV.3453. Rwanda was serving as a nonpermanent member at the Security Council in 1994.

for crimes committed between January 1 and December 31, 1994. This time frame, from the government's perspective, would not cover the lengthy period during which preparations for the genocide were made. It also left open the possibility of trying crimes committed after the RPF seized power in July: the Rwandan government wanted to ensure that the ICTR's activity focused squarely on prosecuting Hutu *génocidaires* – and not crimes allegedly committed by Tutsi-led RPF forces.

The fact that both of these tribunals were effectively imposed on the states and warring parties of the former Yugoslavia and Rwanda would have specific consequences both for the tribunals' operations and for their capacity to interact with and influence domestic audiences, as reviewed in the following sections.

The War Crimes Chamber of the Court of Bosnia-Herzegovina

Just as concerns over capacity, political interference, and local identity-based biases animated the decision to establish ad hoc international tribunals, they also helped drive the creation of a specialized War Crimes Chamber in the court of Bosnia-Herzegovina.

The 1995 Dayton Peace Accords, freezing the fruits of ethnic cleansing campaigns, divided Bosnia-Herzegovina into two so-called "entities": the Federation of Bosnia-Herzegovina and the Republika Srpska – each with its own government, parliament, and judiciary – as well as the Brčko District. There are in Bosnia-Herzegovina ten cantonal courts and five district ones, as well as the Basic Court of the Brčko District.[23] The two entities, only loosely federated, for some time developed parallel political and legal institutions. The weak central state was somewhat countered by the existence of an ad hoc international institution responsible for overseeing implementation of the civilian aspects of the Dayton accords: the Office of the High Representative (OHR). This office had broad powers to intervene in the country's politics, which continues to be predominantly dominated by nationalist parties.

Up to the early 2000s, efforts to prosecute war crimes in each entity encountered a tangle of courts and different criminal codes, not to mention varying levels of political will to undertake prosecutions in the first place. In the early 2000s, all judges and prosecutors were vetted through a massive international-sponsored program. Efforts were made to distribute Bosniak, Bosno-Croat, and Bosno-Serb judicial personnel throughout the entities, despite attempts by nationalist political parties to influence the reappointment process.[24] However, owing notably to inexistent or ineffective witness protection programs, victims and witnesses often feared traveling outside their

[23] This reflects the fact that the Federation, dominated by Bosniaks and Bosno-Croats, is divided into ten cantons, whereas the Republika Srpska, run by Bosno-Serbs, comprises five districts.

[24] See Alexander Mayer-Rieckh, "Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina," in Alexander Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: SSRC, 2007), 201–3.

entity to testify. Thus, although Amnesty International estimated in 2002 that some ten thousand people in the country might reasonably be expected to have committed or ordered the commission of grave international crimes, Katie Zoglin noted that by 2003 only seventy to eighty cases had been prosecuted or were underway.[25] This gap was particularly noteworthy in a country whose population has expressed a strong desire for accountability for the grave crimes committed during the war.[26]

In this context, OHR deemed it important to foster the rule of law, increase the transparency of justice, and dispel notions of ethnic bias in the prosecutions, so as to enhance the overall level of public trust in the judicial system. In 2003, it proposed amendments to the legal system and structure of Bosnia-Herzegovina, including the adoption of a new criminal code and criminal procedure code, and the creation of a specialized "War Crimes Chamber" within the Court of Bosnia-Herzegovina (WCC). Although the federal-level court of Bosnia-Herzegovina was created in 2000, its powers initially extended only to judgments regarding constitutional and administrative issues, not to criminal matters.

The WCC came into existence through the adoption of national legislation and is therefore a national institution operating under the laws of the state of Bosnia-Herzegovina. The ICTY actively supported this creation as a means to build judicial capacity for taking over some of the middle-ranking cases that the international tribunal would not be able to try as part of its completion strategy.[27] The ICTY participated in working groups aimed at establishing the WCC and preparing the ground for a smooth transfer of cases to the domestic courts of Bosnia-Herzegovina.[28] The Section of the Criminal Division for War Crimes and the Appellate Division for War Crimes of the Court of Bosnia and Herzegovina, as it is officially named,

[25] Katie Zoglin, "The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?" *Human Rights Quarterly* 27 (2005): 49–50. According to her, by 2005, "Virtually all of these trials have taken place in the Federation [of Bosnia and Herzegovina] and have been against the ethnic minority in that region. The RS [Republika Srpska] has held one war crimes trial against Bosnian Serb suspects, which began in 2004."

[26] According to a June 2005 UNDP opinion poll on public perceptions on justice in Bosnia-Herzegovina, 65 percent said that "individuals who caused unjustifiable harm should be held accountable, without exception," with an additional 19 percent saying that "only those who committed actual war crimes should be held accountable." See Early Warning System, *Justice and Truth in BiH – Public Perceptions* (EWS, 2005); available at http://www.undp.ba.

[27] Resolution 1503 (2003) of the United Nations Security Council endorsed the completion strategy presented by the ICTY for investigations to be completed by 2004, trials by 2008, and appeals by 2010. In order to achieve this timeline, cases concerning middle- to low-ranking accused indicted by the ICTY can be transferred for trials to national judiciaries, in particular those of the countries of the former Yugoslavia, and in particular to Bosnia-Herzegovina where many of the crimes investigated by the ICTY took place.

[28] Report of the ICTY 2003 A/59/215-S/2004/627. The ICTY participated in the establishment of adequate legislative and institutional frameworks, and worked with other international and regional organizations, to ensure that the proceedings before domestic institutions can be internationally monitored. It provided inputs on legal framework to ensure admissibility of ICTY evidence and, more generally, suggested reform of the laws and criminal procedure code.

was formally inaugurated on March 9, 2005.[29] The choice made to use the term "war crimes" in the official titles of the relevant sections of the WCC has labeled them in a constrictive manner, whereas the court's mandate in fact extends to other categories of crimes, including genocide and crimes against humanity.[30]

Joint Characteristics

Although the circumstances of the establishment of each of the three courts differed greatly, they all nonetheless share important characteristics. They deal with crimes that have an important identity-based dimension. They were established mainly out of the will of the international community, with very limited involvement – if any – of both the governments and the civil societies of the countries concerned. The people of these countries, and in particular the victims, were not consulted and had in fact very little opportunity to provide input. When the governments of the countries concerned got involved, they were often hostile and followed a logic of protecting the perceived strategic interests of one's own ethnic or national community. This context has largely influenced not only the respective set-ups of each court, but also subsequent operations, major policy decisions, and the way they are perceived by the communities concerned. Created through a "top-down" approach, without much local buy-in, which would have required taking stock of different levels of interest and of skepticism of the various communities, the capacity of these tribunals to influence the divided societies where the crimes were committed, notably to foster reconciliation, may, as a result, have been limited from the very start.

ORGANIZATION AND MODALITIES OF OPERATIONS

As a step in reviewing how the three jurisdictions dealt with the identities most salient to the crimes, this section seeks to analyze their respective capacities to understand the complexities of identity politics in the countries concerned, and how this identity politics may have shaped their functioning.

Justice is an abstract concept, even at the national or domestic level. International or internationalized justice, irrespective of its particular modalities, is even more abstract. International justice is based on the concept of the universality of "Justice" and is concerned with crimes that are of such gravity that they are deemed to be of

[29] The criminal division and the appellate division of the Court of Bosnia-Herzegovina consists of three sections: one for "War Crimes," one for "Organized Crime, Economic Crime and Corruption," and one for "General Crime."

[30] See Articles 171 to 179 of the Criminal Code of Bosnia and Herzegovina, Article 13 of the Law on Court of Bosnia-Herzegovina, and Article 23 of its Criminal Procedural Code. The jurisdiction of the court encompasses domestic criminal offenses, defined in the Criminal Code and other laws of Bosnia-Herzegovina as acts that either endanger the sovereignty, territorial integrity, political independence, national security, or international personality of the country, or may have serious repercussions or detrimental consequences to the economy of the country.

direct concern to humanity as a whole. As such, criminal justice, and international or hybrid criminal justice mechanisms to enforce it, are primarily understood to constitute universal models prevailing over the whole of humanity. They are constructed through depersonalized models that, theoretically, could and should apply to anyone without consideration for individual identities. Are their procedures adequate in cases where identity-based divisions are at the heart of the crimes? To what extent have international and hybrid jurisdictions grasped the complexities of the contexts in which they operate, as well as the varying needs of the victims they serve? This section reviews their locations and composition, the languages they use, and their outreach and communication efforts, with the aim to answer these questions.

Location

The imposed character of the two international tribunals was reflected in the choice to seat them outside of the countries concerned. At the time of establishing the ICTY, the Security Council did not consider locating it in the former Yugoslavia an option, as fighting was ongoing, which would have threatened its security. In addition, making a choice in terms of its location would have implied choosing as a host one of the "parties" or "sides" to the hostilities, running the risk of possible interference. The decision to locate the tribunal in The Hague would weigh heavily on the various perceptions that the people of the former Yugoslavia would have of the ICTY being a "distant" and to a large extent "foreign" court. Initially, no field office was established in the former Yugoslavia, and it was only progressively that such offices were opened in Zagreb, Sarajevo, Belgrade, and Pristina.

The United Nations also decided that the ICTR should be headquartered outside Rwanda, despite the official Rwandan position that the ICTR should be based on Rwandan territory.[31] Conditions in Rwanda in 1994 and 1995 were such that it would probably have been a major security and logistical challenge to locate the ICTR there, and ensuring the safety of witnesses was a particular concern. Nonetheless, in 1995, the prosecutor of the ICTR, Richard J. Goldstone, decided to open a field office in Kigali, supported by UNAMIR, to conduct investigations even before the ICTR officially opened in Arusha, in Tanzania. Although this presence in Rwanda greatly facilitated investigations, it also placed the jurisdiction in a greater state of dependence vis-à-vis the Rwandan political leadership, notably to guarantee the security and confidentiality of its operations.

An unexpected consequence of locating the headquarters of the ICTY and ICTR outside of the countries directly concerned has been to give leeway to the governments concerned and their state-sponsored media to frame information about the tribunals for domestic publics. One key outcome in the former Yugoslavia has been

[31] Statement by Ambassador Bakuramutsa, Rwandan Representative to the United Nations, Summary record of the 3453rd meeting of the Security Council (8 November 1994), Doc. S/PV.3453.

that nationalist politicians could use the trials as proclaimed evidence of further group "victimization" at the hands of "foreign powers."

The WCC, as a domestic federal jurisdiction, was automatically established in Sarajevo, the capital of Bosnia-Herzegovina. The deeply divided nature of the country that has resulted notably from the ethnic cleansing campaigns means, however, that there is with the WCC, as with the other federal institutions, a difficulty in reaching Bosno-Serbs. The capital of the Republika Srpska is in Banja Luka, and, in the light of the prevailing nationalism, many people there still resent the institutions of Sarajevo, despite their plural composition.

Adding to this sense of distance was the allegation that the building where the WCC is located, a former military barracks used by the Bosnian army during the war, had been a site of ill-treatment of Bosno-Serbs. The creation of the court thus immediately elicited opposition from a Bosno-Serb association of former camp inmates.[32] Since the location was primarily decided by OHR and other international personnel, it is perhaps unsurprising that the potentially negative impact of this symbolic consideration among the Bosnian Serb community was not foreseen.

Composition

The ICTY and the ICTR, which are purely international courts, are composed only of international judges, both at the trial and appeals level. Although the statutes of these courts do not explicitly provide that the judges should not hail from the countries concerned – that is, the former Yugoslavia or Rwanda – they stipulate that the judges "shall be persons of high moral character, impartiality and integrity," which has been interpreted as excluding senior officials from the region either because they risk being biased, or being perceived as biased, or open up the court to such criticism. Similarly, they have had only international chief prosecutors and registrars.

The statutes of the ICTY and ICTR are also silent as to the required nationalities of the professionals and support personnel assisting the judges, prosecutors, and registrars. The practice from the start, however, had been to recruit only international personnel for any substantive positions. Notable exceptions include interpreters and translators, staff to support victims and witnesses, and those locally recruited to service the Office of the Prosecutor of the ICTR in Kigali, and the ICTY field-offices.

Progressively, the policy of pure internationalization of nonsupport staff has been marginally softened. At the ICTY, analysts specializing in areas such as the politics, history, or military of the former Yugoslavia were recruited to support the so-called Leadership Research Team of the Office of the Prosecutor, responsible for providing,

[32] Bogdan Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (New York: International Center for Transitional Justice, 2008), 33–4; available at www.ictj.org/images/content/1/0/1088.pdf.

for example, analysis of political links among the accused. These analysts predominantly hail from the former Yugoslavia. At the ICTR, the progress was slower, and the first Rwandan nationals hired by the prosecutor joined only in 2002.

In terms of the defense counsel assisting the suspects and accused, the situation differs between the ICTY and ICTR. At the ICTY, the defense teams have usually included one defense counsel from the former Yugoslavia, generally from the same country as the accused, and also from the same ethnic or religious background. Several of these defense teams, especially in the early years of the ICTY, played on "ethnic divisions," arguing or implying that the accused had been unfairly singled out for reasons of ethnicity. In contrast, at the ICTR, it is seldom the case that accused have had Rwandan lawyers in their defense team. An example is Yusuf Munyakazi, a Hutu politician and militia leader, who requested the assistance of lawyer Callixte Gakwaya from the Bar of Kigali, a Tutsi.

The statute of the WCC explicitly provides for a mixed composition, involving both international and national judges for an initial phase, as well as international and national personnel, including investigators and prosecutors. The court panels for both the War Crimes Chamber and the Appeals Chamber are composed of three judges each. Two of these judges are international and one is a national of Bosnia-Herzegovina.[33] As a rule, the national judge is the president of the panel. It was envisaged that the mixed composition would reduce perceptions of ethnic bias and help restore public confidence in the judiciary. As one of the judges noted, "Here, public opinion is not ready to accept that it is an impartial court if it is only composed of national judges."[34] An international judge agreed that international status served "to bring the expertise of conducting trials and to give the assurance to the international community and to Bosnians that judges are not susceptible to [outside] influence or threats."[35] Indeed, according to a United Nations Development Programme opinion poll conducted in 2005 on public perceptions on justice and truth in Bosnia-Herzegovina, 47 percent said they had confidence in neither the laws nor the judges applying them, and another 20 percent said they had confidence in the laws but not in the judges.[36]

[33] The national judges are appointed by the High Judicial and Prosecutorial Council on Bosnia-Herzegovina, and the international judges are appointed by the High Representative.

[34] Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina*, 11.

[35] Ibid.

[36] Opinion poll conducted by the United Nations Development Program on public perceptions on justice and truth in Bosnia-Herzegovina in 2005. See *Justice and Truth in BiH – Public Perceptions*, UNDP, 2005, cited by Ivanisevic, ibid. Moreover, in a recent survey on the question of staffing a proposed truth and reconciliation commission, 50.5 percent of people in Bosnia and Herzegovina thought that such a commission should be comprised of "only international personnel" or "both local and international personnel," whereas 42.8 percent thought it should be "only local personnel." See UNDP Early Warning System, *Justice and Truth in Bosnia and Herzegovina: Public Perceptions* (Sarajevo: UNDP, no date), 17. For anecdotal evidence, see Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina*, 11.

The Office of the Prosecutor of the WCC is also of mixed composition. The chief prosecutor, from Bosnia-Herzegovina, has two deputies: one national and the other international. Their staff is also mixed. It is foreseen that the War Crimes Chamber and the Appeals Chamber as well as the Office of the Prosecutor will progressively be composed first of a majority and then exclusively of domestic judges and prosecutors.[37] Generally in the WCC, all support positions are occupied by national staff, although for a short initial period, international personnel, including a chief registrar, were international.[38]

To be authorized to appear before the WCC, defense counsel must be admitted to practice in Bosnia-Herzegovina, thus practically restricting them to nationals of the country. In exceptional circumstances, foreign lawyers may act as defense counsel, for example, on the grounds that this arrangement would be fairer to the accused.

Hiring nationals of the countries where communal divisions are strong can be an endeavor fraught with risks to perceptions of the tribunals' impartiality. This fact was borne out at the WCC, where Bosno-Serb victims groups initially complained about the lack of prosecutions for crimes committed against Serbs, especially in Sarajevo and in the northwest of Bosnia-Herzegovina. The predominance of Bosniaks among the WCC staff was invoked as evidence of ethnic bias.[39] This was also the case at the ICTR, which has often been suspected by Rwandan victims' groups of having Hutu *génocidaires* among its ranks. In 2001–2002, two defense investigators were found to be on a list drawn by the Rwandan authorities of those wanted for the most serious genocide crimes in Rwanda. One of these investigators was charged with rape, which caused uproar since he was working on an ICTR case including sexual violence charges. Subsequently, other defense investigators as well as interpreters have come under fire when Rwandan NGOs IBUKA and AVEGA alleged that they have family ties to the accused on trial at the ICTR.[40]

Of particular importance in Bosnia-Herzegovina is the issue of balance of representation among the national staff of the three different ethnoreligious groups. Indeed, hybrid jurisdictions generally face the particular problems of recruiting the "right ratio" of international and national officials and of staff from different ethnic or ethnoreligious communities. But is there a "right" ratio? It seems unrealistic to assume that there is some magical mathematical solution to the problem of representing various identity groups in any institution, and an adequate representation depends on many factors. The president of the WCC is a Bosniak, and initially, its

[37] Office of the High Representative, 2004, "War Crimes Chamber Project: Project Implementation Plan Registry Progress Report."

[38] Ibid.

[39] Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina*, 34.

[40] Binaifer Nowrojee, "We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence" (paper presented at the Colloquium of Prosecutors of International Criminal Tribunals, Arusha, Tanzania, November 25–27, 2004), 22 and fns. 101, 102.

prosecutor was a Bosno-Croat and the Head of the High Judicial and Prosecutorial Council, responsible for the appointment of national judges and prosecutors, a Bosno-Serb. This initial structure corresponded to the usual mathematical way used to establish a "balanced" representation of the three different ethnoreligious groups in most institutions of Bosnia-Herzegovina. This approach is not without its critics. Bosnian political scientist Zlatko Hadzidedic has argued that this insistence on a balanced representation does not recognize "Bosnian citizens as free and equal, irrespectively of their ethnic, religious, tribal, or class identities. On the contrary, these . . . have only recognised Bosnians as divided into separate ethnoreligious camps, not recognising their common Bosnian identity, and hardly even recognising their common Bosnian *citizenship* (the concept which in Bosnia, and probably only in Bosnia, paradoxically, has never been treated as equivalent to the concept of *nationality*)."[41] The fundamental problem with such a strategy is that it may ultimately freeze the divisions at the origin of many grievances and crimes.[42]

Languages and Culture

In analyzing the capacity of the courts to understand the complexities of identity politics in the countries concerned, and how this identity politics may have shaped their respective functioning, language, often a key marker of identity, is of particular interest.

The choice of the official languages of each court may not be neutral. Beyond financial considerations, pleading for the minimum number of languages to be used so as to minimize the cost of translation and interpretation, there is also an identity dimension. This is particularly reflected in the case of Rwanda. Since 1994–1995, there has been an important divide among the educated elite, including lawyers, prosecutors, and judges, between those who were primarily taught in French, and those taught in English. The former corresponds to the Rwandans, both Hutu and Tutsi, who were generally educated in Rwanda, whereas the latter is mainly formed of the children of Rwandans – mainly Tutsis – who had fled Rwanda and moved to English-speaking neighboring countries, including Uganda, Kenya, and Tanzania.[43] It is in this context that the importance for the ICTR to conduct its proceedings in its two official languages should be assessed and praised.

[41] Zlatko Hadzidedic, "The Constitutional Debate in Bosnia-Herzegovina," Bosnia Institute, August 2, 2006; available at www.bosnia.org.uk/news/news_body.cfm?newsid=2217.

[42] For Zlatko Hadzidedic, "It has already become a commonplace to say that Bosnia-Herzegovina is an 'ethnically divided society.' However, it has never been examined to what extent its constitutional models – both current and past – have played a major role in promoting and furthering such a division. Any constitutional model that endorses ethnic division as its fundamental principle inevitably perpetuates ethnic division on the societal level, thereby structurally and institutionally pushing society's members into separate ethnic camps. Such a model is not 'made for dealing with ethnically divided societies' – it is made for furthering and fixing ethnic division in society." Ibid.

[43] With the exception of the DRC – formerly Zaïre – predominantly a French-speaking country.

Nevertheless, the fact that much of the court proceedings in jurisdictions such as the ICTR and the ICTY take place in "international" languages *other* than the ones spoken in the countries affected by the crimes, such as Kinyarwanda, renders them less accessible to the local populations and particularly the lesser educated among them. This undoubtedly negatively impacts on any edification and social effects the trials could have, and in fact may have helped nationalist politicians in their efforts to frame the work of the tribunals as evidence of alleged "foreign intervention" and "victimization" of their own group.

Additionally, international staff typically have neither the linguistic skills nor the cultural knowledge necessary to have a sophisticated understanding of testimony. Most, if not all, international personnel are unable to communicate directly with victims, witnesses, suspects, and the accused. This is true not only for the international judges, but also for the prosecutors, investigators, defense counsel, and even the prison wardens. Instead, they must operate through interpreters.[44]

In addressing this challenge, the ICTY and the ICTR both made recourse to translators and experts in local culture and history. The ICTR also made use of linguists in order to unpack the rich euphemisms of Kinyarwanda. An example of how challenging it can be to fully comprehend a culture as it is expressed through a language is found at the ICTR, where during the Akayesu trial, three successive witnesses made reference to a statement by the accused, according to which he had publicly declared: "Iyo inzoka yiziritse ku gisabo, nta kundi bigenda barakimena," translated as: "If a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash."[45] It subsequently appeared that this Rwandese proverb was used to indicate that even pregnant women, including those of Hutu origin, should be killed if the fetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father's group of origin.[46] As such, this statement was particularly important, as it demonstrated the intent of the accused to exterminate the Tutsi group in its entirety, since even fetuses considered Tutsis were to be destroyed. Yet it could have been easily misunderstood

[44] This has been particularly problematic for the ICTR, as Kinyarwanda is not an international language. Thus, in the early years, with no interpreters trained to provide simultaneous interpretation of Kinyarwanda into or from English or French, the two official languages of the ICTR, only consecutive interpretation was available to the tribunal. This obviously reduced the pace of trials, and, even more important, the flow of testimony, which had to be regularly interrupted to enable interpretation. See Erik Møse and Cécile Aptel, "Trial without Undue Delay Before the International Criminal Tribunals," in Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking, and Nicholas Robson, eds., *Man's Inhumanity to Man* (The Hague: Kluwer Law International, 2003).

[45] Judgment, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96–4-T, September 2, 1998, para. 121.

[46] The chamber noted that "in the context of the period in question, this proverb meant that if a Hutu woman married to a Tutsi man was impregnated by him, the foetus had to be destroyed so that the Tutsi child which it would become should not survive. It should be noted in this regard that in Rwandese culture, breaking the 'gisabo,' which is a big calabash used as a churn, was considered taboo. Yet, if a snake wraps itself round a gisabo, obviously, one has no choice but to ignore this taboo in order to kill the snake." Ibid.

and its particular significance to demonstrate the intent of Akayesu to destroy the Tutsis as a group missed.

Beyond these practical issues is also the question of cultural sensitivity. Cultural barriers are particularly problematic during the investigative phase, when investigators go into the field to meet victims and witnesses. These delicate interviews often require the understanding of subtle nuances, especially when traumatized victims are recounting their ordeals. In most cultures, difficult, sometimes taboo messages are communicated through euphemisms. Such terms have been especially prevalent in cases of rape tried before the courts.[47]

In an oral culture such as exists especially in the Rwandan countryside, there is the problem of making distinctions between what was actually witnessed and what was heard at second hand. In the Akayesu case, the court noted that

> most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else. Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener.[48]

Cultural sensitivity was also an issue at the ICTR for another reason: in the course of the so-called Butare trial, in a 2001 session, the judges apparently started to laugh during the testimony of a rape victim. Ostensibly, the judges were laughing at the cross-examination technique of the defense counsel or possibly out of embarrassment. Whatever the reason, the incident was widely reported, and the damage both to the victim and to the image of the court had been done. This incident, along with scandals concerning Rwandan nationals at the ICTR (including the one already mentioned in which individuals were found to be on the official Rwandan list of persons suspected of genocide), provided one of the grounds for two important survivors' groups in Rwanda, AVEGA and IBUKA, to stop cooperating with the ICTR in 2002.[49]

[47] In the Akayesu case, the ICTR noted that "the terms *gusambanya*, *kurungora*, *kuryamana* and *gufata ku ngufu* were used interchangeably by witnesses and translated by the interpreters as 'rape'. . . . The word *gusambanya* means 'to bring (a person) to commit adultery or fornication.' The word *kurungora* means 'to have sexual intercourse with a woman.' This term is used regardless of whether the woman is married or not, and regardless of whether she gives consent or not. The word *kuryamana* means 'to share a bed' or 'to have sexual intercourse,' depending on the context. It seems similar to the colloquial usage in English and in French of the term 'to sleep with.' The term *gufata ku ngufu* means 'to take (anything) by force' and also 'to rape.'" Ibid., 152.

[48] Ibid., 155.

[49] Alison Des Forges and Timothy Longman, "Legal Responses to Genocide in Rwanda," in Eric Stover and Harvey M. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (New York: Cambridge University Press, 2004), 54. See also Nowrojee, "We Can Do Better," 23.

Outreach and Communication[50]

The amount and type of information available about a jurisdiction and its case law is an important factor affecting how they are understood and interpreted within divided societies. If accurate information is not available, the potential for the trials to break down divisive collective identities is limited. Facts and judgments that result from the trial process often contradict nationalist histories supporting divisive versions of collective identities. If the jurisprudence is not known to the public, there is no opportunity for a jurisdiction to have a positive impact.

A lack of accurate information about the trials leaves space for manipulation by nationalist politicians, who may use it to create fear or distrust of other groups. In the former Yugoslavia, nationalist politicians used the ICTY and its cases to reinforce the sentiment of collective victimhood among many Serbs, portraying Serbs as victims of the international community, and construing allegations of crimes as acts of self-defense.

The full importance of interactive communication in the countries directly concerned was not realized in the early years of the ICTY and ICTR, when the courts primarily aimed their communications efforts at a broad international public with the goal of raising the tribunals' profiles and legitimacy, and ensuring their own survival against a great deal of skepticism. There were no programs specifically designed to reach people in the countries directly concerned. It was only when the courts were confronted with the reality of the lack of information and prevalence of misinformation in the former Yugoslavia and Rwanda that the importance of public perception in these countries was recognized.

In 1999, under the leadership of former president Gabrielle Kirk McDonald, funds were secured to develop an outreach program consisting of activities targeting specifically the people of the former Yugoslavia.[51] Similar programs were developed at the ICTR shortly thereafter.[52] The latter opened an information center located in Kigali in September 2000 (named *Umusanzu mu* Bwiyunge, or "contribution to reconciliation") with the task of disseminating information.[53] These programs

[50] The author would like to thank Maya Karwande for her research support for this section on outreach and communication.

[51] On the origins of the ICTY outreach program, see L. Vohrah and J. Cina, "The Outreach Programme," in R. May et al., eds., *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001), 547–57.

[52] On the ICTR outreach program, see Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme," *Journal of International Criminal Justice* 3, no. 4 (2004): 950–61.

[53] On average, the center now receives 100 visitors per day, mostly students. The staff of the center is also responsible for the implementation of the ICTR outreach program in Rwanda. This is constituted by a yearly awareness-raising workshop presented throughout the country, which gives the opportunity to Rwandese to ask questions. The ICTR also organizes trainings of the professional legal community in Rwanda on judicial-related activities, and invites groups from Rwanda to its headquarters in Arusha, such as religious leaders, journalists, lawyers, registrars, students, professors, etc. The ICTR is planning to extend its outreach activities in Rwanda and is considering opening ten new documentation centers across Rwanda. Interviews conducted at the ICTR Information Centre in Kigali on March 27, 2007.

were motivated by the fact that local populations remained largely ignorant of the courts' work and therefore more at risk of uncritically believing the criticisms of these jurisdictions by manipulative politicians. Effectively communicating lengthy judicial processes and complex legal judgments to the general public is challenging. The task becomes even more hazardous when, in addition, these proceedings reveal the truth about crimes committed by political and military leaders widely considered as "heroes" by a segment of the population. The courts reviewed here have constantly had to counterbalance the propaganda efforts orchestrated by local media heavily influenced by politicians. In the former Yugoslavia, throughout the 1990s politically motivated editors would cast the news such that, irrespective of the messages the ICTY intended to convey about its work, members of their own ethnic group would be portrayed as heroes and innocent victims, and other ethnic groups as bloodthirsty criminals. In Rwanda, the ICTR has also been subject to the good will of media largely subjected to governmental control, which has limited its impact and controlled its image.

Despite these enormous communication challenges, outreach programs carried out by the courts themselves have remained limited. Even as outreach activities have grown, they have never been integrated in the normal budget of the courts and remain to date funded only through trust funds receiving voluntary contributions. As a consequence, the personnel working to design and implement these programs are not fully considered as staff of the courts, thus perpetuating the impression within the courts that outreach is not really part of the core or normal functions that the tribunals should serve. This structure limits the effective implementation of outreach, as resources, institutional commitment, and participation of judges and prosecutors depend on good will rather than being construed as part of the actual mandates of the courts.

The WCC has learned from these experiences. Recognizing the postconflict identity-divisions in Bosnia-Herzegovina, a Public Information and Outreach Section was included in the initial structure of the WCC.[54] Later, in 2006, a "Court Support Network" of local NGOs and victims associations was created, aiming to develop a two-way communication between the court and the population and to support victims and potential witnesses.[55] However, funding for the program was limited, and many early initiatives were curtailed. The Public Information and Outreach Section seems not to have developed a clear communication strategy and did not respond to direct attacks by politicians, as happened in 2006 when Serb politicians accused the court of bias in indicting only Serbs.[56]

[54] Court of Bosnia-Herzegovina, *Project Implementation Plan Progress Report* (March 2004), 4; available at www.registrarbih.gov.ba/index.php?opcija=sadrzaji&id=19&jezik=e.

[55] Activities included arranging visits to the court, distributing brochures, establishing a phone number for information, and arranging public events for discussion. *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina* (February 2006), Human Rights Watch: 38–39.

[56] Maja Milavic, "Court Faces 'Political' Smears" (BIRN Justice Report September 8, 2006); available at www.bim.ba/en/26/10/948.

Nevertheless, operating in this mostly alienating context, the courts' outreach efforts might be credited with progressively changing the divisive discourses that were often hostile to the work of the courts. Through interactive public discussion, partnerships with civil society, and an active voice in the media, outreach programs have helped make space for a more constructive dialogue, and it is now at least conceivable for most people in the former Yugoslavia and in Rwanda that leaders of one's own group could have committed international crimes.

DEFINITION AND DELIMITATION OF THE PROSECUTORIAL STRATEGIES

As the crimes over which the international and hybrid courts have jurisdiction are crimes that for the most part target individuals on the basis of their identity, it should be asked whether these jurisdictions have addressed identity-related issues through their respective prosecutorial policies. This question is particularly relevant in the light of the independence of the international prosecutors, who, within their given mandates, have unfettered discretion in defining their prosecution policies and strategies.

Prosecutions at the WCC

Because the WCC forms part of the domestic judicial establishment of Bosnia-Herzegovina, its prosecutor, although being statutorily independent, is nonetheless subject to the prosecution policies defined by the relevant responsible authorities and is to act whenever a crime falling within the court's mandate is committed, thereby limiting its powers in terms of "prosecutorial strategy."

The WCC is competent for three different types of cases: war crimes cases in Bosnia-Herzegovina; highly sensitive cases chosen amongst those initiated by entity courts before 2003; and cases transferred by the ICTY, either under Rule 11 *bis*, or for those where no indictment has been raised. The prosecutions before this hybrid court are therefore somewhat determined by the prior prosecutorial decisions made by the ICTY.[57]

Most of the WCC's early cases were against Bosno-Serbs: between September 2005 and November 2006, twelve out of thirteen trials involved Bosno-Serb defendants.

[57] Ten individuals have fallen under the Rule 11 *bis* category, and two have been tried in first instance proceedings; alternatively, forty individuals could be investigated for whom no indictment has been raised at the ICTY. The cases transferred from the ICTY represent, however, a limited number of the cases to be tried before the WCC, as some 13,000 suspects of war crimes were identified during the period 1992–2006, according to a 2006 report prepared by the High Judicial and Prosecutorial Council of Bosnia-Herzegovina entitled "Capacity Assessment Analysis of the Prosecutor's Office, Courts and Policy Bodies in BiH for Processing War Crimes Cases"; available at www.ohr.int/other-doc/hr-reports/default.asp?content_id=31003). Although approximately fourteen transferred ICTY war crimes cases will be tried at the WCC, cantonal and district courts throughout the country will remain responsible for trying thousands of other war crimes cases.

As already mentioned, Bosno-Serb victim groups initially complained about the lack of prosecutions for crimes committed against Serbs. It is difficult to assess whether or not this lack reflected ethnic bias. Indeed, the predominance of cases concerning crimes against Bosniaks mirrors the fact that Bosniak victims outnumbered victims of other communities during the war, and also that they were possibly more diligent and better organized, both during the war and in its aftermath, in accumulating evidence about the crimes. Over time, the prosecution has diversified the cases, in terms of the crimes charged, the geographical areas in which they allegedly occurred, and, more importantly, in terms of the ethnicity of the accused.[58]

THE PROSECUTION STRATEGIES OF THE ICTY AND THE ICTR: PURSUING THE "BIG FISH"?

Because international tribunals have been given limited resources and capacity to do justice, their prosecutors have had to select the few cases that could be investigated and prosecuted. The prosecution policy officially put forward by all international prosecutors has been to concentrate on those bearing the highest level of responsibility for the crimes that were committed.[59] This is coherent with the precedents of the International Military Tribunals established after World War II, and also with the place of international criminal courts in transitional justice contexts.

In practice, however, the international prosecutors have not always strictly followed this policy of pursuing the "big fish" for a range of reasons, including the difficulty of arresting high-level suspects who in many cases still held power and were revered as heroes by their respective communities. Thus, the first trials that took place concerned middle- to low-ranking individuals: at the ICTY, Dusko Tadic, who was president of the local board of the Serb Democratic Party in Kozarac, Bosnia-Herzegovina, and at the ICTR Jean-Paul Akayesu, mayor of Taba, a small commune in the Gitarama Prefecture.

As of 1998, a new prosecutorial strategy was put in place, in particular at the ICTR, where the cases concerning several accused were joined so as to better demonstrate the links between their respective crimes, the planning and conspiracy behind the crimes, and also to speed up the trials.

Two fundamental reasons have impeded the successive prosecutors in pursuing the "big fish." First, the set-up of international tribunals makes them reliant on states' cooperation to gather critical evidence and make arrests. As is well known, the arrest of fugitives, such as Bosno-Serb leader Ratko Mladic, has been a considerable concern for the international tribunals. Second, it is also generally accepted that some lower-ranking criminals who manifested particular cruelty or viciousness – for

[58] Ivanisevic, *The War Crimes Chamber in Bosnia and Herzegovina*, 44.

[59] Carla Del Ponte, "Prosecuting the Individuals Bearing the Highest Level of Responsibility," *Journal of International Criminal Justice* 2, no. 2 (2004): 516.

instance, by having raped or tortured a considerable numbers of victims – should also be tried by international courts.[60]

In addition, efforts were made to identify certain specific criminal policies and patterns. A relevant case concerns the systematic policies of rape and massive sexual violations committed both in Rwanda and in Bosnia-Herzegovina. The international tribunals exploited their statutory norms to further the fight against these crimes. Not only did the two international tribunals advance encompassing definitions of rape and sexual violence, but they also established these offenses as international crimes: the ICTY sanctioned rape and sexual violence as crimes against humanity, and the ICTR was the first court to recognize that rape can also constitute genocide.[61]

Beyond this particular example, the international tribunals are not necessarily the best means to identify policies and criminal patterns. Their limited jurisdiction, restricted to physical persons, impede the prosecutions of entities, including militias or companies.

Defining the Perpetrators: Dispelling Collective Responsibility?

International justice can be construed as a means not only to make individuals accountable for their crimes, but also to move away from collective responsibility for such crimes. This view is based on the assumption that a trial, conducted impartially, not only punishes the guilty leaders, but also by the same token liberates the rest of society of the burden of responsibility by individualizing guilt.

As Antonio Cassese underlined in his first report to the United Nations General Assembly as president of the ICTY,

> If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, "collective responsibility" – a primitive and archaic concept – will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.[62]

[60] See Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (Yale University Press, 2000); and Del Ponte, "Prosecuting the Individuals Bearing the Highest Level of Responsibility," 516.

[61] The ICTR strategy in terms of the prosecution of rape and sexual violence has been severely criticized. See, for instance, Binaifer Nowrojee, who believes that sexual violence was not prioritized at the ICTR "because if there is one charge on which the accused have always refused to plead guilty when they have acknowledged their involvement in other crimes, it is sexual violence." Nowrojee, "We Can Do Better," 17, 19.

[62] First annual report of the president of the ICTY to the United Nations General Assembly, A/49/342-S/1994/1007; available at www.un.org/icty/publications-e, 16.

Others consider that, although individuals guilty of crimes should certainly be held accountable, the individualization of guilt is problematic. They argue that prosecuting those most responsible may effectively extinguish criminal – if not moral – responsibility for the crimes of the many collaborators and bystanders who may have actively or passively aided – or who otherwise did nothing to stop – the crimes.[63] Erin Daly and Jeremy Sarkin have noted that

> trials collectivize innocence, which may or may not reflect the actual reality. While it is usually true that not everyone within a group committed atrocities in the same degree, and therefore not everyone should be equally castigated (and some should in fact be honoured for their resistance), it is also true that men and women who get tried rarely acted alone; they were effective only because they had significant support networks within their government or organization and within the population at large that stood by and watched.[64]

In any case, there remains a vigorous debate both concerning the desired outcome – individualization of guilt or a more robust understanding of society-wide complicity in crimes – and concerning whether trials have the capacity to achieve those outcomes on their own.

In the context of Rwanda, where the crimes committed were systematic and involved a considerable number of perpetrators, the ICTR explicitly attempted to dispel collective responsibility of "all the Hutus."[65] Indeed, ICTR prosecutors and judges purposely avoided referring to the crimes committed "by the Hutus."

However, in practice, the ICTR has directed all its efforts toward the investigation and prosecutions of crimes committed by Hutus, to the exclusion of any other perpetrators. To date, all the Rwandese who have been publicly indicted by the ICTR are Hutus. Furthermore, although the ICTR does not usually specify the ethnic identity of those it charges in their indictments or in their judgments, such identity has been regularly mentioned during the trials. For example, during the reading on December 3, 2003 of the summary judgment rendered by the ICTR in the case *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze* – better known as the "Media case" concerning, notably, the creation and programs of the Radio Télévision Libre des Mille Collines – there were 82 references to "'Hutu" and 184 references to "'Tutsi."[66]

[63] For a concise overview of the issues, see Mark Osiel, "Why Prosecute? Critics of Punishment for Mass Atrocity," *Human Rights Quarterly* 22 (2000): 125–8; and for a defense of prosecutions as moral theater that forces people to reflect on their own complicity in mass crimes, see Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction, 1997).

[64] Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies* (Philadelphia: University of Pennsylvania Press, 2007), 175.

[65] See notably Laity Kama, "L'expérience du Tribunal pénal international pour le Rwanda dans la perspective de l'institution de la Cour pénale internationale," *Campagne internationale pour l'établissement de la Cour pénale internationale*, No Peace Without Justice, 41–52, 1998.

[66] Summary available at www.ictr.org.

Although most of those who orchestrated and planned the terrible crimes committed in Rwanda in 1994 were Hutus, some Tutsis and Twas also participated in the commission of the genocide and perpetrated atrocities.[67] Yet the ICTR did not charge any of them. An illustration is the case of the president of the *Interahamwe* militia, Froduald Karamera, a Tutsi, who participated in the genocide but was not charged by the ICTR, whereas his deputy, George Rutaganda, was tried and convicted in Arusha. Instead, Karamera was arrested, tried, and convicted in Rwanda: he was ultimately sentenced to death and executed in Kigali in April 1998.

In addition, despite the indications that successive prosecutors may have been investigating members of the RPF for crimes they allegedly committed, there has been no public indictment so far concerning these crimes.[68] As seen above, the opposition of the Rwandan government to the establishment of the ICTR was notably grounded on its apprehension that the court may investigate such allegations.

Finally, the successive ICTR prosecutors also never exercised the part of their mandate over crimes committed in the territory of countries neighboring Rwanda by Rwandan nationals in 1994. These were crimes committed, for example, in the refugee camps around Goma, where reports indicated that the former Rwandese political and military leadership involved in the genocide against the Tutsis had initiated a reign of terror over the mainly Hutu population in the camps.

Many analysts worry that the impact of these limited prosecutions – that some qualify as "one sided" – may undermine the capacity of the ICTR to positively impact on the reconciliation in Rwanda and beyond, in the Great Lakes region of Africa.[69] Trying those responsible for the genocide against the Tutsis, characterized as "the crime of crimes" by the ICTR judges, lies at the heart of the mandate of the ICTR. Carla Del Ponte noted when she was the ICTR Prosecutor, "Investigating and prosecuting the persons bearing the highest responsibility in the genocide committed against the Tutsis is and remains, without any ambiguity, the core of the mandate of the ICTR. This is unquestionable. But should one victim, any victim, of any crime such as genocide, and also crimes against Humanity and war crimes remain deprived of Justice?"[70]

Refraining from even investigating allegations of other crimes forming part of the ICTR mandate has apparently led to a perception among some both in Rwanda

[67] See, for example, Des Forges, *Leave None to Tell the Story*; Filip Reyntjens, *Rwanda: Trois jours qui ont fait basculer l'histoire* (Brussels: Institut africain-CEDAF, 1995).

[68] On this subject, see, for instance, the letter addressed to the UN Security Council by Human Rights Watch on October 25, 2002; available at: www.hrw.org/press/2002/10/noncooperation-ltr.htm.

[69] See, for example, Des Forges, *Leave None to Tell the Story*; and Thierry Cruvellier, *Le Tribunal des Vaincus, Un Nuremberg pour le Rwanda?* (Paris: Calmann-Lévy, 2006).

[70] Carla Del Ponte (presentation, All Party Parliamentary Group on the Great Lakes Region and Genocide Prevention, Westminster, London, November 25, 2002).

and outside that the ICTR is "victors' justice," and biased against Hutus.[71] In this framework, in stressing the Hutu identity of the perpetrators, the ICTR may unintentionally be reinforcing a sense of collective responsibility. This was the point that the first defendant before the ICTR, Jean-Paul Akeyesu, tried to exploit when he argued that he was a scapegoat, who found himself before the tribunal "only because he was a Hutu and a bourgmestre at the time of the massacres."[72] Although it is clear that Akayesu was indicted on the basis of evidence of crimes that he was ultimately found guilty of having committed as a result of a fair trial, he attempted to use the ambiguity created by selective prosecutions.

The ICTY prosecution strategy has been fundamentally different, with successive prosecutors ensuring that leaders of each ethnoreligious group would be indicted.[73] This prosecution policy has led to two different sets of criticisms.

First, the ICTY was criticized when it indicted some individuals coming from those groups considering themselves "victims," such as Bosniak military officers, including for instance General Sefer Halilovic, who was the commander of the Bosnian forces during the war. The prosecutor of the ICTY was criticized when she indicted the prime minister of Kosovo and one of the top KLA leaders, Ramush Haradinaj, known to be protected by a number of key Western leaders and seen as essential to the stability of Kosovo by the leadership of the UN Mission in Kosovo (UNMIK).[74] In such cases, because of its deliberate efforts to be perceived as "even-handed" in its indictments, the ICTY was accused of being more inspired by the desire to balance the responsibility among ethnoreligious or national groups, rather than prosecuting those bearing the greatest level of responsibility. Is a careful "balancing" of the number of accused from different groups an adequate strategy? Is it appropriate? In an extreme form, such a policy ultimately replicates the politics of identity that factored into the crimes in the first place. Second, this policy has not dispelled the negative feeling of some nationalist groups' representatives, notably Serbs, who consider that Serbs have been disproportionately indicted. The ICTY has been repeatedly criticized for being "anti-Serb" in Serbia and the Republika Srpska. According to a 2006 poll, 63 percent of those interviewed in Serbia had no confidence that the ICTY would try defendants of Serbian nationality impartially and only on a basis of proven facts. Of those, 44 percent considered that the number of Serbs accused reflected the bias of the ICTY in respect of defendants of Serbian nationality as compared to others.[75]

71 Cruvellier, *Le Tribunal des Vaincus*.

72 Judgment, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96–4-T, 2 September 1998, 35.

73 See, for instance, Hazan, *Justice in a Time of War*, 180ff.

74 Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor* (New York: Other Press, 2009), 298.

75 "Public opinion in Serbia – Views on domestic war crimes judicial authorities and the Hague Tribunal," jointly conducted by the OSCE and the Belgrade Center for Human Rights, December 2006, 39.

This criticism reached its apex after NATO's Operation Allied Force in the Federal Republic of Yugoslavia, and in particular in Kosovo, when the ICTY prosecutor indicated publicly that the ICTY would not commence a criminal investigation "in relation to the NATO bombing campaign or incidents occurring during the campaign."[76]

Selective prosecutions may in certain circumstances facilitate the construction of a "victim" identity among perpetrators, alleging directly or implicitly that they are persecuted because of their identity, thus creating the potential for a vicious dynamic. But conversely, by assigning clear criminal responsibility to individuals, international prosecutions may facilitate the progressive recognition that war criminals who claim to defend their group are no heroes, just criminals.

Defining the Victims: Perpetuating Divisive Categories?

Although the international prosecutors and judges have refrained from explicitly labeling a "category of perpetrators" along identity lines, they have occasionally referred to the collective identity of the group of the victims. As mentioned earlier, defining such categories of victims is necessary in order to establish an international crime such as genocide. These categories are not established in a political vacuum, however – a fact that has facilitated politics of victimhood in both Rwanda and the former Yugoslavia.

There are several mentions in the ICTR indictments and judgments of the "genocide against the Tutsis," including in the very first judgment against Akayesu.[77] The fact that the ICTR has effectively refrained or been prevented from prosecuting crimes other than genocide may serve to reinforce an implied hierarchy among victims, in which genocide victims take top rank, and other victims have no status at all. Similarly, the ICTY has made many references to the crimes endured by the Bosniaks. This has led a commentator to argue that "the Bosnians, the principal victims of the conflict, actively support the work of the ICTY to cement their identity as victims and to signify to the world the weights of the suffering they endured."[78]

Referring to collective identity even in this sense – to categorize the victims – can be problematic. Although crimes were committed overwhelmingly against Tutsis in Rwanda, who were targeted precisely because of their Tutsi identity, it would be important for perceptions of fairness that the ICTR address the crimes committed against others, notably the moderate Hutus killed in early April 1994 for being perceived as traitors.

[76] ICTY, "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia," June 13, 2000, at para 91.

[77] Judgment, *Prosecutor versus Jean-Paul Akayesu*, Case No. ICTR-96–4-T, September 2, 1998, 128.

[78] See, for instance, Hazan, *Justice in a Time of War*, 180.

A particular example of the lack of focus of the ICTR prosecution on crimes that did not target the Tutsis concerns the case of Bernard Ntuyahaga. The indictment initially prepared against him by the ICTR prosecutor on September 26, 1998, charged him with the murder of Agathe Uwilingiyimana, the prime minister of Rwanda, and of the ten Belgian UNAMIR peace-keepers responsible for her protection. A well-known and respected opposition leader, Agathe Uwilingiyimana, a Hutu, was probably raped and tortured before being killed, and her naked dead body was apparently left in a street of Kigali with a sharp object inserted in her vagina. A few months later, the prosecutor sought leave to withdraw this indictment, on the view that Ntuyahaga could be tried in either Rwanda or Belgium.[79] The fact that the ICTR prosecutor did not deem the case against the person allegedly responsible for the assassination of such a key political figure as sufficiently important to proceed with may unfortunately be indicative of the limited priority given to crimes committed against moderate Hutus.

Investigating and Prosecuting Rape

Rape and other sexual crimes have been committed on a widespread scale in both the former Yugoslavia and in Rwanda, particularly against women and girls. It has been demonstrated by several authors that embedded in rape policies are important and often deeply rooted assumptions about identity, including gender identity, and also extending to ethnicity and race.[80]

In terms of gender identity, rape and other sexual crimes committed against women create special harms owing to relationships between genders in contexts where the value of women is primarily defined in terms such as "married" or "marriageable," "virgin" or "defiled." The findings of the ICTY and ICTR refer to concepts associated with this perception of women, such as embodying the pride of their respective communities, and their rapes shaming their communities.

By doing so, they may have contributed to a better understanding of how gender identities are shaped and in the process may have served to alleviate the sufferings of the victims and the shame they may feel in their communities.

[79] *Prosecutor v. Bernard Ntuyahaga*, Case No. ICTR-98–40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, March 18, 1999. The intention of the prosecutor was to withdraw this indictment and release Ntuyahaga, with a view to enabling the Belgian authorities to prosecute and try him. Ultimately, the indictment was withdrawn and Ntuyahaga released, but not directly transferred to Belgium, leading to a legal battle between Belgium and Rwanda over which country should have precedent in trying the case.

[80] See in particular Weitsman, "The Politics of Identity and Sexual Violence," 561–78. See also Rhonda Copelon, "Gendered War Crimes: Reconceptualizing Rape in Time of War," in Julie Peters and Andrea Wolper, eds., *Women's Rights, Human Rights* (New York: Routledge, 1995), 197–214; and Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: The Ballentine Publishing Group, 1975), 58, 81.

Going beyond gender identities, Patricia A. Weitsman argues that the policies of sexual violence in wartime contain fundamental information regarding how ethnic identity are constructed and manipulated:

> When identity is paternally given, and women are represented as passive bystanders in imparting identity, policies of forced impregnation and maternity may result during wartime.... The cases of Bosnia and Rwanda offer similarities and differences in the way in which identity politics played out. The differences emanated from the motivations of the governments. For the Serbian militias, the desire to degrade, humiliate, and impregnate Bosnian Muslim women with "little Chetniks" was paramount. In Rwanda, the Hutus sought to degrade, humiliate, torture, and destroy the Tutsi women. Different constructs of identity culminated in different policy intentions.[81]

These identity paradigms have been deconstructed by the case law of the international tribunals, notably through the recognition by the ICTR that rape is constitutive of genocide and that many rapes committed in Rwanda were carried out with a genocidal intent, namely, to destroy not only the individual victims, but also their ethnic group as a whole.

Both in Bosnia-Herzegovina and in Rwanda, children born of rape are often deemed "children of hate." Both Bosnia-Herzegovina and Rwanda are patriarchal societies, where ethnic identity is determined by paternal lineage. On this basis, the identity of these children is constructed by reference to their rapist fathers, even if the exact paternal identity remains unknown – as if the identity of their mothers did not matter or even exist. As Weitsman notes, "The maternal contribution to identity must be completely assumed away for an ethnic group to embark on a policy of forced impregnation or forced maternity in order to promote 'genocide' or 'ethnic cleansing.' Otherwise, the rape campaign would be viewed as propagating more of the enemy."

Also, even today, despite the fact that these children are ultimately often brought up by their mothers, in their families and communities, the ethnic identity of the father and the shameful circumstances of the conception is often all that ultimately matters. This sends a clear message about how identity is ultimately constructed among the communities of the perpetrators of the crimes and the communities of the victims. These assumptions underpinning the policy of forced impregnation in Bosnia-Herzegovina and the killing of fetuses in Rwanda rely on a biological conception of identity that is reproduced exclusively through the fathers. Such assumptions have, to an extent, been brought to the fore by the findings of the ICTY and ICTR.

[81] Weitsman, "The Politics of Identity and Sexual Violence," 577–8.

Prosecutorial Strategies in Context

This overview of the international prosecution policies shows both the many difficulties that exist in seeking to define categories of perpetrators and of victims, as well as the impact that the perceptions of group victimhood can have in divided societies.

With many important cases to be completed, and several high-ranking accused still at large, it is too early to assess whether the prosecution strategies of international and hybrid tribunals have effected social changes. Both courts have been impeded in implementing their prosecution strategies by circumstances beyond their control, notably the lack of resources and their limited lifespan. A major obstacle to the realization of their strategy has been the incapacity to timely arrest all those indicted, including those considered to bear very grave responsibility in the crimes, and to try them simultaneously.

It can be noted that the respective practices of the ICTY and of the ICTR have differed tremendously. The ICTR has gone to one extreme with its prosecution policy concentrating on the crimes committed by Hutus against Tutsis. At the other end, the ICTY strategy has consisted more in attempting to balance the number of accused tried from each "group." Between these two extremes, it seems, unfortunately, that the tribunals have not succeeded in minimizing perceptions of unfairness based on the identities of those who are prosecuted, and those who are considered as victims.

CONCLUSIONS

Ultimately, have international or hybrid jurisdictions contributed to lessening the identity divide that contributed to the commission of the crimes that they are mandated to try? Do they help contest the myths and political strategies that led to the exploitation of divisive identity categories?

Answering these questions on the basis of the experience of the three jurisdictions assessed here is difficult: some of their most significant work is currently taking place, so it is too early to take adequate stock of their impact on identity and reconciliation issues, which certainly have to be assessed over the medium to long term. There are also serious methodological challenges in determining what effects should be ascribed to the work of criminal jurisdictions, and what may be partly or exclusively caused by other factors, including political forces at work within each country and the need to bow to external pressure, as has been important in former Yugoslav states' bids to enter the European Union.[82] Although there are theoretical debates on the relevance of criminal justice to reconciliation, it is nonetheless reasonable to assume

[82] Some scholars who have tried to measure the effects of ICTY indictments of high-ranking war criminals on the level of interethnic cooperation and conflict in Bosnia-Herzegovina have found little evidence of effects, but their research has been limited in terms of both time span and actual field study. See, for example, James Meernik, "Justice and Peace?" *Journal of Peace Research* 42, no. 3 (2005): 271–89, who primarily based his research on the Kansas Event Data System.

that criminal justice, including international and hybrid jurisdictions, can contribute to the reconciliatory process in divided societies, as long as significant portions of all communities accept the legitimacy of the accountability mechanisms.[83]

Legitimacy issues may be conditioned by the collective meaning assigned to the work of international and hybrid criminal courts. As we have seen, these jurisdictions are created in response to the commission of heinous crimes, which are, by their very nature, linked to the targeting of people on the basis of their identities. The commission of international crimes presupposes strong – if not exclusive – collective identities, at least from the points of view of the perpetrators. In these contexts, although international and hybrid prosecutions concentrate on highlighting the role of individuals and assigning individual criminal responsibility for the crimes, their prosecutions and trials may nonetheless be assigned a collective meaning, as if, beyond the individual prosecuted, it was a whole group put on trial. As such, judicial proceedings, like the crimes they try, may well reinforce, at least temporarily, the collective identity of both the perpetrators and of the victims as groups. However, international and hybrid tribunals are concerned primarily with trying individual criminals and individualizing guilt for the crimes committed, not with writing history and analyzing the divisions that led to the crimes.

Prosecutions and the Promotion of the Rule of Law

Holding high-level leaders responsible for crimes with an identity dimension may have short- and long-term moderating effects in deeply divided societies insofar as international and hybrid courts may "decapitate" political movements that rely on identity-based ideologies. International and hybrid courts are indeed powerful factors in eliminating from power certain negative political forces, as demonstrated in the case of Slobodan Milosevic. To that extent, international and hybrid courts are instruments available to the international community to intervene in situations where the gravity of identity-based crimes is such that these crimes could destabilize national and possibly regional order. This was the case in both the former Yugoslavia and Rwanda, triggering action by the UN Security Council. Thus, international justice defines a new form of international interventionism, aimed at stopping the massive and systematic commission of identity-related crimes, and sanctioning and excluding some of those responsible.

Some authors have argued that the ICTY and the ICTR have done much to marginalize those directly responsible for policies of genocide and ethnic cleansing,

[83] See, among others who dispute the relevance of criminal justice for reconciliation or social peace, Helena Cobban, "Think Again: International Courts," *Foreign Policy* (March/April 2006): 22–8. Others have strongly expressed divergent points of view, such as Juan E. Mendez, "Latin American Experiences of Accountability," in Ifi Amadiume and Abdullahi An-Na'im, eds., *The Politics of Memory: Truth, Healing and Social Justice* (New York: Zed Books, 2000), 127–41.

as well as to marginalize their sponsors or supporters who may wield power within political parties or in government. Payam Akhavan cites as evidence the way nationalist Bosnian Serb politicians distanced themselves from Momcil Krajinik (president of the Bosnian Serb Assembly during the 1992–95 war, and the Serb member of the Bosnia-Herzegovina collective presidency in 1996–98) after his arrest by the ICTY in 2000.[84] Once-powerful nationalist leaders may thus be pushed to the margins of political power through the work of international justice.

The potential for moderating effects may, however, be hard to predict or to make consistent. As already underlined, legitimacy deficits may undermine the role that international and hybrid courts can play in bridging divisions. In circumstances where strong group identity continues while the courts operate, there is a risk of a perception that, through individual trials, and especially through the trials of high-ranking leaders, it is the whole group that is "unfairly" selected, tried, and then held responsible and shamed. Some leaders tried by the ICTY, including Slobodan Milosevic and Vojislav Seselj, have attempted to instill and exploit such perceptions. Milosevic, during his initial appearance before the ICTY, questioned the very legitimacy of the ICTY, saying "I consider this Tribunal a false Tribunal and [the] indictment a false indictment. It is illegal being not appointed by the UN General Assembly."[85] In Seselj's case, his political party, the Serbian Radical Party, actually regained popularity while its leader was standing trial in The Hague. Interestingly, Milosevic had previously called Seselj as a defense witness, offering to both of them a platform to jointly expose their nationalist views. The ICTY may have thus unintentionally offered them a forum to publicize these positions and reinforce nationalist tendencies among Serbs.

In any case, the prosecution policy that international courts have followed, aimed at only those bearing the highest responsibility for the crimes, is probably insufficient in scope to affect broad social changes. Seeing lower-ranking offenders punished is also important for local communities. In a 2001 survey of witnesses for the ICTY, Eric Stover noted that people expressed a wish for more local war criminals to be arrested.[86] In a study of returning refugee flows to the ethnically cleansed communities of Srebrenica and Prijedor, Monika Nalepa has suggested that there may be a positive correlation between the return of minorities and the prosecution of lower-level perpetrators. She surmises that victims may have been less likely to return to communities where they would continue to see war criminals responsible for ethnic cleansing still entrenched in local power.[87] To this extent, the broader scope of

[84] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95, no. 1 (2001): 13–14.

[85] *Prosecutor v. Milosevic*, Case No.: IT-02–54, Transcript of Initial Appearance, 3 July 2001, at 2.

[86] Eric Stover, "Witnesses and the Promise of Justice in The Hague," in Stover and Weinstein, *My Neighbor, My Enemy*, 117.

[87] Nalepa, "Why Do They Return?" 18.

trials undertaken by hybrid courts such as the WCC may more adequately serve the needs of the victims. In any case, the impact that international or hybrid jurisdictions may have on bridging identity divides is likely to be conditioned by the extent and content of who they target for prosecutions. Their limited respective mandates and prosecutions policies, more or less restricted to those bearing the highest responsibility in the gravest crimes, may in the same proportion confine their contribution to bridging identity-based divides.

Still, concentrating on the high-ranking leaders can be salutary. International and hybrid jurisdictions positively participate in the democratization process by making leaders accountable. In so doing, they diffuse the message that leaders can be held accountable, and also that there is a right and even an obligation for people – military and civilians – to question the orders and messages they receive if the latter are illegal or unlawful. This message is clearly part of consolidating the rule of law and a democratic process. As such, the establishment of international and hybrid jurisdictions has redefined the relationship between the judicial and the political spheres, in circumstances where domestic courts may sometimes not be able to enforce accountability, especially not against the leadership, notably in cases when immunities apply, for instance concerning heads of states or of government.

Moreover, establishing international or hybrid jurisdictions, usually in a context of prevailing impunity in the countries concerned, shows the resolve of the international community to impose international norms, giving strong arguments to the domestic forces advocating for justice and the respect of human rights, and contributing to strengthening the rule of law. International and hybrid courts are more likely than domestic jurisdictions to qualify offenses as international crimes such as genocide, crimes against humanity, and war crimes, thus acknowledging the gravity of the crimes suffered.[88]

Court processes also highlight individual criminal responsibility and stress the role of individuals in fomenting and exploiting an identity discourse that helped fuel the crimes. Judicial work can deconstruct the historical and sociological constructs that led to the commission of identity-related crimes on a massive scale through means such as propaganda and manipulation. Ideally, the blame is proportionate to the level of responsibility. Criminal justice individualizes guilt: by highlighting individual criminal responsibility and stressing the role of individuals in fomenting a politicization of identities, judicial measures may contribute to a substantial revision of what the perpetrators as well as the victims consider to be the role of collective identities in the crimes. As such, the trials of top leaders can provoke a catharsis and enable the perception of collective political responsibility for crimes to be replaced by a clear identification of individual criminal responsibility.

[88] This may sometimes be linked to the controversial issues pertaining to the debate around the retroactive application of certain international legal norms.

Prosecutions as Truth Telling

In terms of the truth-telling role of international and hybrid jurisdictions, it appears important to distinguish between the process used to discover the truth and the impact or effect of the truth telling.

First, concerning the process: victims and witnesses often wish to participate in a judicial process so as to be given an opportunity to "tell the truth." For those witnesses who appeared before international and hybrid tribunals, they have often expressed a sense of release from having had an opportunity to go public about the crimes they have suffered or witnessed. A witness who testified before the ICTY in the trial of the three men she held responsible for the death of her husband and her neighbors stated, "I really wanted to go to The Hague. I wanted to see the [three defendants] and to ask them why they did it. Why did they kill all these people? Why did they destroy our village? We had such good relations. We were good neighbors. I just wanted one of them . . . to tell me why they did that."[89] Other witnesses who appeared before the ICTR even indicated that they had found the inner strength to survive from the prospect of being able to testify. Experience has shown that, eventually, the sharing of experiences and emotions may connect victims, perpetrators, and even bystanders.[90] This sharing of experience may contribute to the reconstruction of previously existing shared identities that were eroded or destroyed by subsequent identity fractures and the commission of identity-based crimes.

The selective nature of criminal prosecutions and trials, however, especially in a context where international and hybrid jurisdictions look only at those bearing the highest responsibility in the crimes and hence only to a limited set of crimes' allegations and victims, means that only a few are interviewed during investigations and even fewer are called to testify: the others are potentially left frustrated by a process excluding them.

Moreover, some of the victims and witnesses who testify may find the process too constricted because courts limit the scope of what they can say to the sole allegations raised in the indictment and to matters pertaining directly to the accused. The "court truth," to borrow an expression coined by Serbian justice activist Natasa Kandic, is therefore necessarily limited vis-à-vis the truth experienced by victims and witnesses.

The relationship between judicial work and truth is convoluted. In the civil law tradition, judicial processes are about searching for and establishing "the truth," and on this basis determining the scope of individual criminal responsibility of the accused and punishing them accordingly. This is, however, not the primary goal

[89] *ICTY at a glance*, available on the official ICTY web-site: http://www.un.org/icty/glance-e/index.htm (consulted on March 21, 2007).

[90] See, for instance, Véronique Christophe and Bernard Rimé, "Exposure to the Social Sharing of Emotion: Emotional Impact, Listener Responses and Secondary Social Sharing," *European Journal of Social Psychology* 27 (1997): 37–54.

sought in the common law tradition, which has substantially influenced international criminal law. Under common law, justice is more about a balance of probability. Opposing parties, the defense and the prosecutions, search to undermine the witnesses called by the other. Witnesses, including victims, are therefore subjected to cross-examination, and the version of the events that they relate is constantly questioned. As such, at the heart of this particular criminal system lies the idea that the statements and testimonies of witnesses, and in particular of victims, must be tested and that what they recall is but one version of the events alleged. This process may be particularly traumatic for victims and witnesses who have experienced terrible identity-based crimes and struggle to recall the events and recount them before the court and the accused, often in public and under the eyes of the various ethnic or religious communities. Being doubted and questioned in one's truth, especially in a tragically and traumatizing truth, can be overwhelming. In any case, any therapeutic effect that courtroom confrontations may have is obviously not extensive owing to the limited role that international and hybrid mechanisms play in victims' lives. Trials reveal only a partial and limited truth, related to the charges, the facts of the case, and the evidence accessible and presented. Since they can prosecute and try only a very limited number of cases, and often can reflect only a portion of the criminal responsibility of a high-ranking accused, courts cannot be relied on as the sole truth-telling mechanism.

Some have argued that comprehensive truth telling is simply not feasible in the confines of a courtroom, necessarily restrained by the limits of the judicial process.[91] This may be accurate for the broad aspect of truth telling that enables the establishment of some common narratives about past crimes, which is certainly limited in a judicial process. Judges are not historians, and the aim of justice is not to write history. What is exposed, however, even if it is limited, is revealed under procedures and evidentiary standards more stringent than any other forms of truth telling. It is thus probably given greater credibility, and especially in the medium to long term.

This point takes us to the impact or effects of the truth-telling dimension of the activities of criminal prosecutions. Through its truth-telling function, criminal accountability may prompt a measure of public realization of the crimes committed and of the processes through which identity divides were made salient and politically exploited. This process could have two effects. First, it may allow for an acknowledgment that the heroes and martyrs of one's own group, who are typically broadly understood to have fought as a matter of "self-defense," may in fact not be heroes at all, but rather criminals who committed horrific abuses. The evidence revealed during international trials may trigger profound social changes to perceptions of

[91] For a comparison between the relative advantages and inconveniences of courts and other truth-telling mechanisms, see Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies* (Philadelphia: University of Pennsylvania Press, 2007).

collective identity. This appears to have been the case, for example, when a video presented by the prosecution during the trial of Slobodan Milosevic, which showed an elite military unit called the "Scorpions" executing prisoners around Srebrenica, was broadcast in Serbia in 2005. The images presented stark evidence of coordinated, blatant crimes committed by Serb forces against Bosniaks. They shocked the public's conscience in Serbia, leading to passionate debates about Srebrenica and other massacres, about propaganda, and more generally about "facing the past."

Second, the truth telling that trials perform may help erode the social constructions of difference that made the crimes possible in the first place, and contribute to a reversal of the principles of absolute inclusion or exclusion and of monolithic identities. Obviously, this is a long-term process whose distinct aspects would be difficult to identify and disaggregate. For the moment, evidence that can be marshaled includes the changes of heart that have occurred for individuals participating in a trial. One particularly powerful example of this phenomenon is the case of Milan Babić, an associate of Milosevic who turned against him, testified at his trial, and later committed suicide. At his own trial, Babić pleaded guilty and recognized his criminal responsibility, declaring that

> I come before this Tribunal with a deep sense of shame and remorse. I have allowed myself to take part in the worst kind of persecution of people simply because they were Croats and not Serbs. Innocent people were persecuted; innocent people were evicted forcibly from their houses; and innocent people were killed. Even after I learned what had happened, I kept silent. Even worse, I continued in my office, and I became personally responsible for the inhumane treatment of innocent people. . . . I can only hope that by expressing the truth, by admitting to my guilt, and expressing the remorse can serve as an example to those who still mistakenly believe that such inhumane acts can ever be justified. Only truth can give the opportunity for the Serbian people to relieve itself of its collective burden of guilt. Only an admission of guilt on my part makes it possible for me to take responsibility for all the wrongs that I have done. I hope that the remorse that I expressed will make it easier for the others to bear their pain and suffering. I have come to understand that enmity and division can never make it easier for us to live. I have come to understand that our – the fact that we all belong to the same human race is more important than any differences, and I have come to understand that only through friendship and confidence we can live together in peace and friendship, and thus make it possible for our children to live in a better world.[92]

To capture the full potential of truth-telling effects, the work carried out by international and hybrid tribunals must be communicated effectively, notably through outreach programs. All too often, the facts that have emerged from trials at the ICTY and ICTR have been obscured either through manipulation of nationalist or

[92] Milan Babić, Sentencing hearing, 2 April 2004.

historical myths that deny the courts' legitimacy, or sometimes more simply through sheer lack of knowledge about what the tribunals have uncovered.

Prosecutions and the Politics of Identity

In the end, justice is not meant to be a means to fight nationalism, racism, or any other political ideology exploiting identity-based divisions, and it would be unreasonable to expect that judicial accountability mechanisms alone could provide all the necessary circumstances for reconciliation.

However, as noted throughout this chapter, even international or hybrid tribunals at a remove from events cannot entirely escape the politics of identity that have engulfed societies emerging from identity-based conflict. In deeply divided contexts, international prosecutors are confronted with the issue of what an adequate prosecutorial strategy is, and they face a conundrum. The issue of whether or not to "balance" the responsibility of each community – notably in terms of the number of indictments concerning each group – is a vexing one that is not easily solved and depends on a sensible determination of adequate prosecution strategies.

The work of impartial and reputable courts, and their end-result in the form of indisputable judgments, impose and assert the truth, hopefully preventing further myths and revisionism, even if that truth is not initially accepted by all. Although the reasons and nature of the intervention of the international community differ in each case, a recurring objective in establishing international or hybrid courts has been to bring a measure of impartiality or neutrality to societies that have been divided and marked by identity politics and the widespread occurrence of identity-based attacks and persecutions. Prosecutions and judicial trials may play an important role in the reconciliation of divided societies and appear often to be, at least, a sine qua non condition for reconciliation. Thus, although criminal justice cannot by itself instigate reconciliation, it provides an important basis for those ready to prompt a move away from divisive identity politics.

6

Silences, Visibility, and Agency: Ethnicity, Class, and Gender in Public Memorialization

Elizabeth Jelin

In the last decades, political conflicts and the perpetration of mass atrocities around the world have often been interpreted – mainly by the actors themselves although also by others – as cultural, ethnic, or racial conflicts. This has been the case in South Africa, Bosnia and Herzegovina, Serbia, and Rwanda. For many, the disputes are anchored in naturalized racial or cultural identities, where cultures are conceived of as essentially different and incommensurable. There is often a further assumption, namely, that *relations* between different cultures are by nature hostile and mutually destructive. In consequence, conflict is seen as inevitable whenever cultures come into contact with each other. Such essentialist conceptions lead to policies of exclusion and to violent conflicts of the "either-or" type,[1] in which there is no room for other forms of interaction, bargaining, and negotiation. Differences in ethnicity and culture are seen as the underlying condition of violent conflict (often the label "ancient hatred" is attached), and people believe that the fundamental issue over which they are fighting is the protection of their own ethnic difference, in ways that lead to "cultural fundamentalism."[2]

The perspective advanced in this chapter is a different one. Rather than starting with essential identities, I begin from the understanding that the sense of belonging to a certain collective body and the sense of identification with that community – be

* This chapter is based on research carried out by several colleagues from whom I learned a great deal: Kimberly Theidon, Ponciano del Pino, Jonathan Ritter, Olga González, María Eugenia Ulfe, Ludmila da Silva Catela, and Emmanuel Kahan. Several colleagues at the *Núcleo de Estudios de Memoria* in Buenos Aires commented on a draft version of the chapter. I also benefited from comments and suggestions offered by Paige Arthur, Carlos Iván Degregori, Kimberly Theidon, Ponciano del Pino, and Pablo de Greiff. To all of them, my gratefulness.

[1] See Albert O. Hirschman, A *Propensity to Self-Submersion* (Cambridge: Harvard University Press, 1995).

[2] See Verena Stolcke, "New Rhetorics of Exclusion in Europe," *International Social Science Journal* 51, no. 159 (March 1999): 25–35.

it ethnic, national, religious, cultural, or based on any other criterion – is the result of historical processes that unfold under specific economic, political, and social conditions. As many analysts and observers of contemporary violent conflicts have concluded, taking such a historical perspective leads to a view of cultural antagonisms as the result of histories and structures of power relations that entail conflicts about resources, and not the other way around.[3] Thus, cultural lines that divide societies are more often the *result* of conflicts, their by-products, than they are causes of conflicts, and particular ethnic identities may even emerge in the unfolding of conflict.[4]

Not all recent political conflicts and mass atrocities have been defined in cultural terms. In Chile, Argentina, Uruguay, Brazil, and Peru, ethnicity or race have not been identified as salient categories by the actors in the conflict during the 1970s and 1980s. In these and other cases, violence and conflict were interpreted in terms of ideological or political confrontations rather than as wars between essentialized identities. Nevertheless, in such politically defined conflicts, there are often strong underlying structural injustices and oppressions that can be conceived as cultural or ethnic.

This chapter illustrates some processes through which silenced or hidden ethnic, cultural, or gender dimensions come to light in the course of the unfolding of violent conflicts and in their aftermaths. Their visibility, however, seldom if ever results in demands for specific memorialization policies. At times, external actors may foster such policies of recognition of victimhood (in monuments, memorials, museums, and the like), and these initiatives may clash with the way communities deal with their recent past, since communities tend to follow their usual practices in handling conflict and pain in their struggles for improvement of their life conditions and in their search for empowerment. The way memory emerges and is expressed is highly specific, and no general pattern can be established. The significant variables at play, however, can be systematically looked at. One practical consequence of such findings is that there are no general recipes or recommendations regarding which policies of memorialization or recognition are to be fostered in any particular case.

A NOTE ON MEMORY AND MEMORIALIZATION

The concept of memory used in this chapter refers to the ways people make sense of or construct some meaning of their past, and to the ways in which they relate that

[3] Ibid. This sense of belonging or identification is what I take to be a sufficient characterization of the used and overused notion of "identity." Critical discussions of the notion of identity are found in Stuart Hall, "Who Needs 'Identity'?" in Stuart Hall, ed., *Questions of Cultural Identity* (London: SAGE Publications, 1996); and in Roger Brubaker and Frederick Cooper, "Beyond 'Identity'," *Theory and Society* 29, no. 1 (2000): 1–47.

[4] See Dan Smith, "Language and Discourse in Conflict and in Conflict Resolution," *Current Issues in Language and Society* 4, no. 3 (1997): 190–214; and Lourdes Arizpe et al., "Cultural Diversity, Conflict, and Pluralism," in *World Culture Report 2000* (Paris: UNESCO, 2000).

past to their present in the act of remembering. This perspective involves understanding memories as subjective processes anchored in experiences and in material and symbolic "markers." There is a dynamic link between individual subjectivities, societal or collective belonging, and the embodiment of the past and its meanings in a variety of cultural products, which can be conceived as *vehicles of memory* – books, museums, monuments, films, rituals of commemoration, photographs, and so on.

After periods of extended political conflict and of repression or state terrorism, there is an active political struggle about the meaning of what went on. Alternative and even rival interpretations of the recent past and its memories take the center stage in cultural and political debate. Struggles about legitimacy of voice and "truth" are involved, where the state embodies the formal legitimate authority capable of endorsing and institutionalizing mechanisms to deal with societal demands regarding the violent and dictatorial past (through commissions, trials, reparations, and the like). The struggle is therefore not one of "memory against oblivion" or silence, but rather between opposing memories, each of them with its own silences and voids.

Furthermore, memories and silences regarding the "recent" past are woven into long-term historical structures of inequalities and injustices and into ingrained cultural practices, which combine with secular processes of modernization and, more recently, with forms of globalization and international contacts. Long-term memories combine in contradictory and ambiguous ways with short-term ones, in ways which complicate the significance of identities and agency.[5]

Issues related to the place of identities in the politics of memorialization involve the need to take into consideration a paradox in social and political struggles: as a rule, marginalized or invisible social groups and categories struggle for equality and their entitlement of rights. At times, they do it by trying to erase and distance themselves from the stigmatized labels and identities they have been carrying on their shoulders. At other times, they do so by bringing to light or stressing their specificity and difference – for example, identities in ethnic, gender, or religious terms. At first sight, this emphasis of specific identities and differences seems to clash with the politics of transitional regimes, where the accent is to be placed on the reconstruction of the state as the locus of legitimate authority and on the construction of equal rights of citizens. Therefore, demands for policies of "recognition" of specific identities in memorialization processes have to be placed in the framework of struggles for equality and the respect for human rights.

Finally, the "aftermath of mass atrocity" is not a static state of affairs. Rather, it refers to process and to change. Representations of the past, the identities of the

[5] The notions of "long" and "short" memories have been proposed by Ludmila Da Silva Catela, "Poder Local y Violencia: Memorias de la Represión en el Noroeste Argentino," in Alejandro Isla, ed., *En Los Márgenes de la Ley: Inseguridad y Violencia Ne el Cono Sur* (Buenos Aires: Paidós Tramas Sociales, 2007); and Silvia Rivera Cusicanqui, *Oprimidos Pero No Vencidos: Luchas del Campesinado Aymara y Qhechwa de Bolivia, 1900–1980* (La Paz: Hisbol-Csutch, 1984).

groups involved, and memorialization policies and initiatives change over time. What is done and achieved at one time opens up a range of opportunities and closes off certain possibilities for the next stage or step. What is at stake is, ultimately, a "history of memorialization."[6]

In what follows, I present several cases chosen to illustrate the complex ways in which identity criteria (ethnicity, race, class, and gender) of broadly defined "victims" become significant in understanding memorialization processes – by their visibility, by their being silenced, by their becoming the defining feature of specific policies, and by the way in which memories and meanings of the recent past are woven into historically grounded cultural practices. Cases are selected from two countries that at first sight offer a very different picture in terms of the salience of ethnic and culturally grounded classifications, namely, Argentina and Peru.

PERU: BEYOND THE TRUTH AND RECONCILIATION COMMISSION

Peru has a long history of deep and persistent inequalities, whereby vast sectors of its population have been excluded and marginalized from modernization processes. In 1980, at the same time that a new inclusive constitution was being approved, Shining Path (*Sendero Luminoso*) – an armed guerrilla movement that called for revolutionary insurgency – began its actions in the area of Ayacucho. Although the peasants in that region were largely Andean indigenous peoples, Shining Path ideology gave no consideration to their cultural specificity or to the ways in which race and ethnicity played a role in their social and economic marginalization in Peru. Government responses to the violence were brutal, sending the army and the navy into the Peruvian highlands to repress and annihilate the armed guerrillas and whoever stood in their way. Additional violence was caused by the actions of the *rondas campesinas* – groups of armed peasants presumably organized for the "self-defense" of communities.

Andean peasants were torn apart by the conflict. At times they supported or were active members of Shining Path; under other circumstances they called for the intervention of the army. They also formed armed peasant patrols supported by the armed forces. With such a complex and protracted period of brutal violence, there is no way to draw a clear line between "victims" and "perpetrators." Instead, there is a large and moving "grey zone" of violence, with shifts among the various positions.[7]

In the 1990s, the political regime advanced the message that the human rights violations that the state committed during the conflict were the necessary price to

[6] See Elizabeth Jelin, *State Repression and the Labors of Memory* (Minneapolis: University of Minnesota Press, 2003); and Elizabeth Jelin, "La conflictiva y nunca acabada mirada sobre el pasado," in Marina Franco and Florencia Levín, eds., *Historia reciente: Prespectivas y desafíos para un campo en construcción* (Buenos Aires: Paidós, 2007).

[7] See Kimberly Theidon, *Entre prójimos: el conflicto armado interno y la política de la reconcilación en el Perú* (Lima: Instituto de Estudios Peruanos, 2004).

pay to stop the subversive violence that had infected the country during the previous decade. The majority of the population accepted this interpretation, fostering oblivion and amnesty for all the violations the state had committed. In 2000, a major corruption scandal led President Alberto Fujimori to flee the country to Japan and to resign the presidency. By then, the key demands of the population were linked to respect for the rules of representative democracy.

In that antiauthoritarian climate, societal demands linked to human rights violations led to the establishment of a Truth and Reconciliation Commission [*Comisión de la Verdad y Reconciliación*] (CVR) to investigate the political violence in the country during the twenty-year period from 1980 to 2000. Its work formally concluded in August 2003, when it presented its final report to the president and the population of the country.

The CVR report was a significant step in making visible the ethnic nature of violence in Peru. It referred to the ways in which ethnic discrimination and marginalization of Andean peasants and indigenous groups had been part of the long-term history of Peru.

> Three out of every four victims were peasants whose mother tongue was Quechua. As Peruvians know, this is a sector of the population that has been historically ignored by the State and the urban society, that part of society that enjoys the benefits of our political community. *This Commission did not find grounds to claim – as has been done – that this was an ethnic conflict. Yet it does have good reasons to assert that these two decades of death and destruction would not have been possible without the deep disdain towards the disadvantaged population of the country* displayed equally by members of the PCP-Shining Path and by State agents – the kind of disdain that is woven into each moment of everyday life of Peruvians.[8]

As is well known, the conflict did not affect the whole country equally; it was localized regionally, following paths of hierarchical orderings rooted in long-term economic, social, cultural, and linguistic patterns of domination. In Peru, racial construction is embedded in space.[9] If the *costeños* (coastal people, including natives of Lima, or *limeños*) consider the *serranos* (highland people) as inferior, the latter see the *chutos* (those who live in the higher mountains) as their own frontier.[10] Thus, if violence had been as prevalent in the rest of the country as it had been in Ayacucho, 1.2 million Peruvians would have died.[11] If the same proportion of the

[8] Comisión de la Verdad y Reconciliación, ed., *Informe Final de la Comisión de la Verdad y Reconciliación*, first ed. (Lima: Comisión de la Verdad y Reconciliación, 2003), Preface, 1–2; my emphasis. Henceforth referred to as IFCVR.

[9] I thank Ponciano del Pino for his comments about the relationship between geography and race in Peru.

[10] Maritza Paredes, "Fluid Identities: Exploring Ethnicity in Peru," *CRISE Working Paper*, no. 40 (Oxford: Centre for Research on Inequality, Human Security and Ethnicity, 2007), 13–19.

[11] CVR, *Informe Final*, General Conclusions.

general population had been killed as the proportion among the Asháninka, the count would have 2.5 million dead.

Given these spatial, historical, and cultural distinctions, for a good part of Peruvian society these two decades of violence do not fall into an interpretive void linked to trauma and the absence of frames of reference. Rather, they can be fit into "much older interpretive frameworks of a community that excludes and discriminates, especially the poor who additionally are culturally different, in this case Quechuas and Asháninkas."[12]

Responses to the CVR and the Politics of Recognition

The report raised the visibility of several issues that can be read through an identity lens. It was an attempt on the part of "the center" to discover and document the magnitude of suffering and violence that the (mostly Andean and indigenous) Peruvians have experienced. The attempt was to make visible hidden and silenced aspects of that violence – the specificity of the suffering and violence against women, against Andean peasant communities, against indigenous groups. In that sense, *the report itself is an act of memorialization*, of making visible the invisible and of bringing into the open public sphere the "underground memories" that people kept to themselves and their nearest and dearest.[13] What was the effect of the report with respect to identity-related issues? What identity markers are to be found in Peruvian society today? How are the memories of the recent political violence interpreted in the framework of long-term domination and subordination? In what ways is the national narrative found in the report understood and interpreted by people localized in specific areas, with their long-term traditions? Are there other forms of memory work in the country?

The Asháninka

The Asháninka are the largest indigenous group in Peru, living in the Amazon region. They were also the most-victimized group during the period of the violence, suffering displacement, death, captivity, and the destruction of communities. The surviving and returning people had to find ways to cope with the violence and suffering experienced. At times, they were able to find local paths to "reconciliation," rooted in their belief system and understandings of the world.[14] Yet in spite of their

[12] Carlos Iván Degregori, "Heridas abiertas, derechos esquivos: reflexiones sobre la Comisión de la Verdad y Reconcilación," in Raynald Belay et al., eds., *Memorias en conflicto: Aspectos de la violencia política contemporáneo* (Lima: IEP-IFEA-Embajada de Francia-Red para el desarrollo de las ciencias sociales, 2004), 85.

[13] See Michael Pollak, *Memoria, olvido, silencio* (La Plata: Editorial Al Margen, 2006).

[14] See Leslie Villapolo Herrero, "Senderos del desengaño: construcción de memorias, identidades colectivas y proyectos de futuro en una comunidad Asháninka," in Ponciano del Pino and Elizabeth Jelin, eds., *Luchas locales, comunidades e identidades* (Madrid and Buenos Aires: Siglo Veintiuno Editores, 2003).

victimhood, the Asháninka are not visible or active in claiming symbolic or material reparations on the national level. At the "center," what prevails is a return to the historical silence about the fate of the indigenous groups. Insofar as no "others" (NGOs and the like) took upon themselves the task of speaking in their name as victims, their suffering and victimhood have not become salient issues in anybody's political or cultural agenda.[15]

The Condition of Women

The CVR made enormous efforts to elicit testimony about violence against women, establishing a special Gender Program. The aim was to redress the idea that "women don't talk" and to record women's voices. As it was known that when they do talk women describe the suffering of their family members and the disruptions of everyday life, special strategies were designed to get women to "talk about themselves."[16] "Gender sensitivity" meant, then, a central concern for testimonies of sexual violence.[17] Nonetheless, the result was that women talked, but not necessarily about their own victimhood or sexual violence. With the qualitative evidence collected, however, the CVR was able to assert that sexual violation against women was a generalized practice during the armed conflict.

Firsthand reports of sexual violence are rare everywhere; reports usually refer to hearsay or to experiences of "other" women. Why do women provide testimony about sexual violence as witnesses rather than as victims? Beyond shame and guilt, the fact is that rape was seldom an isolated act – usually it was part of other atrocities overshadowing the reporting of rape. Also, violence against women is a feature "of life" and not only of war. Thus, the sexual violence during the armed conflict in Peru must be read in the longer historical context of beliefs about racial and gender relations. Specifically regarding rape, Theidon refers to "racing rape," that is, to the

[15] Searching for information on the Internet on the Asháninka yields information about their traditional practices and the need to preserve them (webserver.rcp.net.pe/ashaninka/), on their language (www.native-languages.org/ashaninka.htm), on development initiatives on the part of various international NGOs linked to environmentalist agendas (www.rainforestfoundationuk.org/s-Ashaninka%20Territorial%20Security%20-%20Peru), and on identity-linked projects (www.narobe.com/). Very few of these web pages make reference to the atrocities committed in the area during the years of violence. There are no proposals or initiatives dealing with memory processes registered on the Internet. In August 2008, a major political mobilization of Peruvian indigenous groups protested against a new law that would limit their authority on communal lands. The protest led to the defeat of the proposed law in congress. To what extent this mobilization may be an unforeseen consequence of the CVR report's attempt to make salient the historical oppression of indigenous groups is a question that only in-depth research could answer.

[16] See Julissa Mantilla, "Las experiencia de la Comisión de la Verdad y Reconciliación en el Perú: Logros y dificultades de un enfoque de género," in Paulina Gutiérrez, ed., *Memorias de ocupación: Violencia sexual contra mujeres detenidas durante la dictadura* (Santiago: Centro Regional de Derechos Humanos y Justicia de Género, 2005); and Narda Henríquez Ayín, *Cuestiones de género y poder en el conflicto armado en el Perú* (Lima: CONCYTEC, 2006).

[17] IFCVR, Vol. III, 89.

way soldiers used ethnic insults when raping women. Through such insults, soldiers, who were mostly *cholos*, themselves transferred that stigma to the women – insulted as *indias*.[18]

More generally, the victim-centered nature of truth commissions within the interpretive framework of "violations of human rights" pays particular attention to body integrity. This creates a tension between the first-person report of the "victim" and the more holistic gendered character of memory. Furthermore, the emphasis on passive victimhood leaves little room for narratives of an active participation of women in the defense of their communities and families, silencing other experiences that do not fit the preestablished frame:

> There is a bit of irony; commissions are charged with investigating the truth, and yet the broader truths that women narrated were too frequently reduced to the sexual harm they had experienced. . . . Commissions must move beyond their victim-driven logic to open up narrative space for women to provide testimony that is not limited to suffering and grief. Thus "gender sensitivity" would focus less on strategies designed to make women talk about "their rapes" and more on developing new ways of listening to what women say about war.[19]

Undoubtedly, the CVR report exposed the sexual violence that took place during the conflict. The disquieting aftermath is whether it reinforced gender stereotypes of women's position as victims, silencing their actual and potentially active role in societal affairs. There has not been an open societal discussion of the meaning of this issue nor a social and political response to their painful experiences. It has not led to a broadening of the concern in educational programs or in any form of reparation. Documentation of atrocities according to the categories of the report is there to be read (available on the web), and memories remain in the realm of personal experience, without producing any symbolic or material transformation in gender relations.

The Visibility of Quechua

When looking at societal initiatives regarding the memories of the recent violent past in Peru, one is struck by the presence of Quechua words: the photo exhibit that accompanied the CVR report is called *Yuyanapaq: Para recordar* ("to remember"); the abridged version of the report is called *Hatun Willakuy* ("the great story"); a publication by the Peruvian National Association of Relatives of Kidnapped, Detained, and Disappeared [*Asociación Nacional de Familiares de Secuestrados, Detenidos,*

[18] My analysis of women's voices in sexual violence during the conflict relies heavily on the work of Kimberly Theidon. See Kimberly Theidon, "Gender in Transition: Common Sense, Women and War," *Journal of Human Rights* 6, no. 4 (Oct.–Dec. 2007): 453–78.

[19] Ibid., 474.

y Desaparecidos del Perú] (ANFASEP) is called *Willachkaykim (te estoy avisando)* ("I'm warning you"); a book launched by the Pro-Human Rights Association [*Asociación Pro Derechos Humanos*] (APRODEH) in several of the sites most affected by the violence is called *Warmikuna Yuyariniku* ("we women remember"); a group of young researchers working on memory in Lima calls itself *Yuyachkanchik: Estamos Recordando* ("we are remembering").[20] The list can go on.

The use of Quechua words in titles and in cultural products in the national public sphere has not been a normal or customary practice in Peru. By exposing the demography of violence and repression, and in spite of the asymmetry and perhaps the paternalism involved,[21] the CVR seems to have produced a more widespread recognition of the ethnic composition of the country. It linked victimhood to long historical denial, emphasizing the urgency of major structural and symbolic changes. Although the structural policy recommendations of the CVR have not been implemented in full, there has been an increasing symbolic use of Quechua, as a constant reminder of the ethnic character of the victims. In fact, it could be said that the Quechua labels and titles constitute a symbolic marker of the short- and long-term oppression of Quechua speaking people in Peru.

Why the use of Quechua in such instances? Who is taking this symbolic step? Is making salient the cultural identity of the victims a tool for redressing historical inequalities? Can such a symbolic step bring about further structural changes and the empowerment of the marginalized groups? It is not the Andean people themselves who take such steps and promote the symbolic public presence of Quechua. It is mostly initiated and promoted by sympathetic Spanish speakers, be they Peruvian activists or international NGOs, who seldom understand or speak the language; neither are they part of the cultural practices of the communities involved. As a matter of fact, many if not most of the people in the rural and marginalized Andean areas conceive their language and culture as part of the generalized stigma which they carry vis-à-vis "white" and "mestizo" Peru.

In sum, those who make use of Quechua symbolic markers as an act of recognition and remembrance do so with a kind of "never again" message: an intention of preventing further violence toward subordinate populations and of promoting the rights of the ethnic "minority" in citizenship terms. In this action, the "ethnic other" is made visible, mainly as a victim. To call attention to this victimhood, the specificity

[20] The cultural theater group *Yuyachkani. Estamos recordando, estamos pensando* ("we are thinking; we are remembering") is a significant antecedent of this practice. The group initiated its activities in 1971. See www.yuyachkani.org.

[21] According to the one of the CVR commissioners, "The asymmetry was heightened by the actual composition of the CVR, reflecting the same fault lines that contribute to explain the political violence in the country. For instance, ten of the members were men and only two were women, all of them urban middle class. Only one member was fluent and another one could understand some Quechua, the language of 75 percent of the victims." Degregori, "Heridas abiertas, derechos esquivos," in Raynard Belay et al., eds., *Memorias en conflicto*, 82.

(in this case, in terms of language and customs) of the "ethnic other" is highlighted and taken up symbolically. Neither is "the other" incorporated on equal terms in the nation, nor are there systematic efforts made to learn about, or participate in, the history and culture of the "other." The "other" remains an outsider.

Short- and Long-Term Community Memories and Silences

Beyond the presence of the CVR and the links to the state, communities in the Andes and in the Amazon have to cope with their past and present; they have to continue living and working. The ways in which they incorporate the violent past in their everyday lives are quite diverse, combining traditional and habitual ways of handling conflict with "new" mechanisms, often brought in by outsiders – be they the human rights community of activists, the state or the church, international cooperation, or other NGOs and societal actors.

The new or recent forms of violence and suffering are remembered within the frameworks offered by their long-term memories and ways of life.[22] What is significant in such cases is the fact that the "recent" is grounded in and framed by the longer-term cultural practices. They are integrated in a historical flow that at times includes the political and institutional aspects – those that mark the political system in the "center" and define political regimes – yet these are not the central feature defining societal processes of memorialization. Local societal processes follow their own path, whereas national political and institutional dimensions and decisions lie in the background and not in the center of the memory processes.

There are numerous examples of the incorporation of memories of recent historical violence at the community level, in music and in traditional paintings, in local institutions, and in practices. A good case for illustrating such processes is the shifts in the lyrics of *Pumpin* music, analyzed by ethnomusicologist Jonathan Ritter.[23] In 1976, a song and dance contest dedicated to *Pumpin* (a type of local carnival music) in the province of Fajardo was established. This was the time when Shining Path was beginning to organize in the province. From the very beginning, songs linked to political mobilization were performed in the contest (in addition to others, including love songs), reflecting to a certain extent the early penetration of Shining Path in the region – as well as the revolutionary group's acceptance of the festival in spite of its rejection of village customs.[24]

[22] In-depth studies of ways of coping in local settings of Peru are to be found in Ponciano del Pino, "Uchuraccay: Memoria y Represión de la Violencia Política en los Andes," in del Pino and Jelin, eds., *Luchas Locales, Comunidades e Identidades*; and Theidon, "Entre Prójimos."

[23] This case draws on Jonathan Ritter, "Siren Songs: Ritual and Revolution in the Peruvian Andes," *British Journal of Ethnomusicology* 11, no. 1 (2002): 9–42; and Jonathan Ritter, "Of Music, Truth, and Memory: Carnival in Rural Ayacucho before and after the Truth Commission" (paper presented at the LASA conference, Montreal, September 5–8, 2007). The latter paper includes the lyrics of the song *Fosas clandestinas*, in Quechua and in English translation.

[24] See Ritter, "Siren Songs."

The revolutionary lyrics of the initial period cannot be interpreted in a direct and easy way. In the late seventies, for instance, songs included *José Carlos*, referring to José Carlos Mariátegui, the founder of the Peruvian Communist Party. In 1981, one song declared a *Situación revolucionaria* ("revolutionary situation"). Undoubtedly, Shining Path had a major influence in the radicalization of the lyrics. Yet there were many reasons at the time to perform radical songs: according to Ritter, "Fear, obligation, personal ties, competitive drive and social motivations were all compelling reasons for performing revolutionary songs and joining militant *conjuntos*. None of these motivations, however, implied actual active support for the guerrillas."[25] The radicalization of songs did not necessarily involve radicalization of political practice, feelings, and beliefs.

The festival was interrupted in 1983, owing to the level of violence in the region. Displaced Fajardinos held festivals in Lima, and in the 1990s the contests were reestablished in the region. At that point, Ritter notes, "Testimonial songs protesting the brutality of the army replaced calls for revolution, and *the concursos became the principal site of commemoration and social memory*."[26] They became a "site of memory" of violence and suffering for the area residents. In fact, the reestablishment of the festival and the testimonial songs made cultural sense for the population, "tying long standing traditions (carnival song and festivity) with . . . a current need for re-establishing a sense of identity, however fragile, in the chaos of the violence and its aftermath."[27] It is no surprise then that in the 2002 *concurso*, the opening song was *Fosas clandestinas* ("clandestine graves"). Although this was the time when the CVR was beginning its work in the region, the writing and performance of such testimonial songs are not to be seen as new phenomena prompted by the opening of the space for remembrance linked to the work of the CVR. As Ritter states, they represent a strong continuity with cultural events of the previous decades.

In contrast to these culturally embedded and embodied expressions, there are other memorialization processes in which these embedded expressions of the recent past are recast in "new" or "imported" forms, usually brought in by well-meaning and friendly outsiders or mediators. This is the case of the *Museo de la Memoria*, established by ANFASEP in the city of Ayacucho in 2005. ANFASEP was created in 1983 by a group of women. Their aim was to search for information about the fate of their disappeared relatives. Working in secrecy and fear at the beginning, this group maintained its activities across more than two decades. The women had limited economic, social, and cultural resources to deal with the powerful – they were Quechua-speaking women, with little if any formal education, without the material resources to travel to Lima to present their claims, with little experience in handling authoritarian and racist state bureaucrats. They were able to exert some

[25] Ibid., 36.
[26] Ibid., 39, my emphasis.
[27] Ritter, "Of Music, Truth, and Memory," 5.

pressure and affect some policies only on the basis of the help and the mediating role of "outsiders" who could act on their behalf: international and national human rights organizations, some progressive lawyers, and political activists.[28] Very often, however, they were left on their own, which meant harassment, mistreatment, and relegation to public silence.

During the long cycle of violence, they kept their (often hidden and silenced) pace and action. When times changed and the political climate started to open up, their voices could be heard more widely, and they became somewhat more visible in the public space.[29] In 2005, the ANFASEP building – which had been used as headquarters and as a soup kitchen for children who had lost their parents in the conflict – was turned into a *Museo de la Memoria*. German resources and know-how intervened in the idea and the building of the museum. For the opening, they organized an international seminar to promote dialogue about "successful experiences of building a culture of peace coming out of the memory of countries affected by political violence."[30]

Undoubtedly, these forms of expression were "imported" into the life of these Quechua-speaking women, used to express their demands through vigils, rallies, and sit-ins in public spaces. Over the years, in contact with other organizations of relatives of victims of political violence in Latin America, they did come to incorporate broader interpretations of their grievances, sharing experiences with other groups in other countries.[31] The idea of a museum was new to them, and it turned into a point of contact between ANFASEP and the outside world (in this case, German cooperation). Local ANFASEP people, especially their youth group, act as visitors' guides. Yet the museum attendance is mostly from out of town. *Ayacuchanos* do not visit, being indifferent or even against the whole initiative.[32] Therefore, the question remains: what is the meaning of the museum for the expression of "local" memories, in a city that does not list a single museum among its institutions? Is this type of Western European notion, suggested by or promoted in interaction with outsiders, the road for recognition of rights?

[28] See Ana María Tamayo, "ANFASEP y la lucha por la memoria de sus desaparecidos," in Carlos Iván Degregori, ed., *Jamás tan cerca arremetió lo lejos: Memorias y Violencia Política en el Perú* (Lima: IEP-SSRC, 2003).

[29] Ibid. Also Asociación Nacional de Familiares de Secuestrados, Detenidos y Desaparecidos del Perú – ANFASEP, "*¿Hasta cuándo tu dolor? Testimonios de dolor y de coraje*" (2007); available at www.qillqakuna.iespana.es/ANFASEP,%20madres.htm.

[30] See *Memoria histórica y cultura de paz: Experiencias de América Latina* (Lima: Went, DED, MIMDES, 2006). A description of the museum that situates the initiative as part of the recommendations of the CVR is found in Emilio Laynes Luján, "Implementación del museo de la memoria de ANFASEP – 'Para que no se repita,'" Autor@s vari@s, *Memoria histórica y cultura de paz. Experiencias de América Latina* (Lima: InWent, DED, MIMDES, 2006).

[31] FEDEFAM, "Proyecto Desaparecidos"; available at www.desaparecidos.org/fedefam.

[32] María Eugenia Ulfe, "Los lugares de memoria en Ayacucho y el turismo" (paper presented at the LASA conference, Montreal, September 5–8, 2007).

ARGENTINA: BETWEEN TRUTH, REMEMBRANCE, AND NUNCA MÁS

The 1970s were times of deep political conflict and widespread political violence in Argentina. In March 1976, a military coup took place and the government, defining itself as leading a "Process of National Reorganization," implemented a systematic policy of clandestine repression, including massive "disappearances" as the basic method of repressing political dissent and wiping out existing revolutionary armed political groups. Estimates of disappearances vary, with figures of up to 30,000 people. The military dictatorship lasted from March 1976 until December 1983, and repression was harshest during the initial years of the regime.

Consistent with the Cold War frame, the military defined the conflict as one in which Argentina was being attacked by foreign forces ("international communism") that wanted to subvert its "true essence." The crusade to save the nation was ideological, couched in nationalistic terms. The conflict was also defined in political terms by the various groups on the left: a struggle that opposed the dominant classes (the "oligarchy") and "the people." On neither side were there explicit references to ethnic, racial, or religious features of the conflict.

The response to the military regime developed in the form of a local human rights movement, which supported victims and their relatives, spread information to break the imposed silence about the scope of the violations, launched open protests, and organized international solidarity. The most urgent and immediate task was to stop kidnappings, torture, and disappearances, and to free those who had been detained. The interpretive framework was the discourse of human rights and the denunciation of state repression and violations, based on international standards about universal rights that were being developed at the time.[33]

Activists involved in the human rights movement included relatives of victims, defined as "directly affected"; there were also progressive intellectuals and political leaders, and progressive clergymen of diverse creeds: Protestants, Jews, and Catholics. These religious leaders were active not as "representatives" of their parishioners but in humanistic and universalistic understandings of suffering and of the defense of human rights.

One of the key issues of the transition to the constitutional government in 1983 was to find ways of "settling accounts with the past." The institutional policies included, first, an independent commission of "notables," the National Commission of the Disappeared [*Comisión Nacional sobre la desaparición de personas*] (CONADEP). The "notables" included a rabbi (Marshall Meyer), a Catholic bishop (Jaime de Nevares), and a Methodist bishop (Carlos Gattinoni). The aim of the commission was to gather detailed information about the fate of the disappeared and the methodology of state repression. Its findings were presented to the president, and its report

[33] See Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca: Cornell University Press, 1998).

in book form, *Nunca más* ("Never again"), was first published in November 1984. The book soon became a best seller and is still being reprinted and distributed. It included a section on "Anti-Semitism," thus officially recognizing the public denunciations made of differential treatment of Jewish victims.[34] That section of the report deals with the presence of Nazi symbols in detention camps and with the fact that many perpetrators identified with Nazis. It also includes some testimonies of the heightened harshness of torture and demeaning treatment that Jews received in clandestine detention camps.[35]

After the report, the nine junta members who ruled Argentina from 1976 to 1982 were brought to trial in the Federal Court of Appeals of Buenos Aires in 1985 (five of them were convicted). The trial showed the systematic nature of repression and involved the collection of a body of information that would become evidence in new indictments. As before (and after), the dominant interpretive framework was that of systematic human rights violations, made in universal and not in particularistic identity terms. With mounting pressure from the military, the executive tried to prevent further indictments through the Full Stop Law and the Due Obedience Law, in mid-1987. A few years later, in 1989 and 1990, President Carlos Menem used his presidential prerogative to pardon the members of the military juntas in jail, as well as other military members and some civilians prosecuted for their participation in armed guerrillas.

The story did not stop there, however. Throughout the nineties, the human rights movement continued to denounce the dictatorship and demand justice. Initiatives regarding policies of memory and reparations were launched, and international courts began to deal with violations of human rights in Argentina. Cultural initiatives regarding the violent past and the struggles toward the recognition of human rights spread, including testimonies and books, movies and exhibits, oral history archives, and academic research.

Throughout this period, conflicts and struggles about memory were couched primarily in political terms. Issues related to specific ethnic identities were mostly absent, with the partial exception of anti-Semitism. In rallies and institutional markers of remembrance, there are instances of special attention given to specific categories: memorials to disappeared lawyers or journalists, emblems of repression of workers, plaques inaugurated in schools and universities for students, some banners

[34] Other specific identifications mentioned in the *Nunca más* report refer to occupational, professional, and institutional categories of disappeared persons (lawyers, trade unionists, journalists, priests), and some references to age and gender (mentioning the existence of pregnant women, children, the elderly). Part of the information is organized geographically by province or by clandestine detention center. For a full analysis of the working of the commission and the history of the reception and changing meanings of the book, see Emilio Crenzel, *La historia política del* NUNCA MÁS. *La memoria de las desapariciones en la Argentina* (Buenos Aires: Siglo Veintiuno Editores, 2008).

[35] Testimony includes a description of the way a perpetrator forced a Jewish detainee to act like a dog, moving his tail, barking, and licking his boots. He then forced the same person to act like a cat. There are no photographs of such scenes, as was the case for Abu Ghraib.

in remembrance of disappeared of specific nationalities (Chileans, Uruguayans, Bolivians, Paraguayans, and the like). Among women, some small groups who spent their detention time together organized meetings and shared their experiences. Yet on the public scene, these were very limited and not very visible or salient.

Does this mean that ethnic, religious, or cultural identities did not matter in Argentina? Is the country so homogeneous that there is no room for specific identity-based demands and memory narratives? Under what conditions is silence prevalent? When can specific voices express themselves and be heard? I will take up two contrasting cases to analyze specific memory processes.

Multiple Marginalities: Ethnicity, Class, and Region in Jujuy[36]

Since 1983, the last week in July has been a time for people to travel to the northwestern province of Jujuy to participate in the commemorations remembering the *Apagón de Ledesma* (the Ledesma blackout). "Ledesma" is the brand name of the large sugar mill that has been the dominant economic activity in the area since the beginning of the twentieth century.[37] The sugar mill is located in the outskirts of Libertador General San Martín (a city of 44,000 people), yet the company extends well beyond. The neighboring town of Calilegua (around 4,000 inhabitants) was built by the company for its workers, and one important company estate, with a residence for the owner-family, is located there.

The northern province of Jujuy, bordering on Bolivia, has traditionally been a marginal area of Argentina – a country where population, power, and wealth are highly concentrated in the metropolitan area of Buenos Aires. In this province, the large sugar estates and the sugar mills have long been areas of exploitation of local workers. Over the years there have been several unionization attempts, yet the power of the enterprise and its deeply rooted links to provincial authorities and security forces ensured that no significant workers' organizations could emerge.

What was the *Apagón de Ledesma?* According to the official CONADEP report,

> The disappeared were kidnapped in their homes on July 27, 1976, and almost all of them were workers of the Ledesma enterprise. In the midst of the general blackout, uniformed forces broke into their houses, detaining more than 200 persons. All of them were taken to the clandestine detention center of Guerrero, where they suffered the brutal tortures.... Of the total numbers of detained persons, more than 70 remain disappeared.[38]

[36] This section is based on the research carried out by Ludmila da Silva Catela and on the notes of a field visit accompanying da Silva Catela in July 2006. Personal conversations about this issue with her greatly helped in the preparation of this section.

[37] The company web page (www.ledesma.com.ar) traces the introduction of sugar cane production in the valley to the end of the seventeenth century.

[38] CONADEP, *Nunca más* (Buenos Aires: EUDEBA, 1985), 218–19.

Over the years, the march commemorating these events has taken on the significance of a national emblem of the repression suffered by workers, becoming also the symbol of the connivance between the armed forces and big business. In fact, the longer history of Jujuy (and other areas of the country) is full of instances showing that the local repressive state forces have always been dependent and subordinated to the interests of local economic and political elites, generating a "perverse symbiosis between political power and private instances of economic elites."[39] Thus, linking repression to the interests of the local elites is part of the long-term framework needed to understand the political dynamics in the region.

In accordance with the limited information conveyed by *Nunca más*, a master narrative of the Ledesma case developed in the national human rights community. It is to be found in numerous web pages, in publications, in documentary films, and in court presentations.[40] It is taken up by institutions and by national leaders of the human rights community. This master narrative had a significant local referent, who became the local "memory entrepreneur" actively organizing and leading the major commemorations. Olga Arédez, a dentist by profession, was the wife of a physician who the company hired in the late 1950s. He left the enterprise and then became a local leader – as the union physician and as mayor of the town. He was kidnapped the day of the military coup, then freed and recaptured in 1977. Since then, he has remained disappeared. Since the transition, each Thursday afternoon, Olga would walk in circles by herself in the center of the square of Libertador General San Martín, with a white scarf on her head.

Although not a Madre Mother de Plaza de Maya, Olga did wear the white scarf that identifies the Mothers – perhaps the only non-Mother to do so. It is notable that she did this alone and not as part of a group. Da Silva Catela states that although "[the loneliness] looks like a minor detail, it reveals the range of tensions generated around those who, as 'memory' entrepreneurs,' build their positions to speak in the name of all. In this case, loneliness turns into a sacrificial positive value."[41] For more than twenty years, she was the principal local organizer and speaker in commemorations. She was the link with the national human rights organizations. She *was* the rally.[42] With her education, with her power and social position, and with her solitude as a powerful tool to raise national solidarity, she was able to place the *Apagón* in the national human rights agenda.

Is this narrative the "truth"? How do the local people, including the relatives of the disappeared, tell the story? Why, after all, was Olga alone when there were several

39 Da Silva Catela, "Poder local y violencia," 212.

40 For instance, in the presentation of the *Central de Trabajadores Argentinos* to the Spanish Judge Baltazar Garzón, cited in *Puentes*, no. 4 (La Plata: Comisión Provincial de la Memoria, 2001): 45–7.

41 Da Silva Catela, "Apagón en el Ingenio," in del Pino and Jelin, eds., *Luchas Locales, Comunidades e Identidades*, 87.

42 Arédez is well known in human rights circles. A documentary film about her, *Sol de Noche*, was produced in 2002.

people who disappeared in Libertador and in Calilegua, people whose "mothers" were around, also wearing their white scarves? What do others say? Some tell their stories of kidnapping, seclusion, torture, and finally release. Others tell the story of the abduction of their children or husbands. These stories do not necessarily coincide with the "master narrative": differences may be in detail, but it is details and nuances that make for the texture and meaning of conflicting memories.

Let us take up the date. People in the area know that the *Apagón* did not take place on July 27. Rather, within a thick narrative full of detail and mood ("the TV was on, with a 'Boca' football match," "we were celebrating the week of *San Lorenzo* and we were meeting at the parish house"), local people remember that the lights went off on July 20, and that their houses were raided that night. The story is that of a calm, peaceful community, living its everyday life, disrupted by violence coming from security forces and the enterprise. Why commemorate on July 27, then? Clearly, because it is in the book: "All of us who were there know that it was July 20. I told that to Olga, but she says 'but in the book it says differently.' In the book OK, they can put today, yesterday or tomorrow; you can go and change dates, but those of us who lived through it know. It was July 20, July 20, 1976."[43]

Who was kidnapped during that event and on other dates? At the national level, the story of Ledesma is about the repression of workers, linked to a single plant and union activity in it. Yet most of the disappeared were not workers at the Ledesma sugar mill.[44] Several of the Calilegua disappeared were young university students in Tucumán; some were actually kidnapped in the city of Tucumán, days or weeks before the blackout. Thus, rather than emphasizing the repression of workers, some of the local underground narratives talk about the disruption of their peaceful life and about the accusations of being a "subversive" town. "It was a very sad night, as if they put red ink on Calilegua, defining it as a guerrilla town," one person remembered.[45] Thus, the same violent episode is interpreted as an emblem of the memory of workers' struggles in Argentina, and as a stigma for a community that remembers how it was labeled "subversive" and "communist." "Stigmatized identities and memories, or emblematic ones, are then the currency of dispute and negotiations," Da Silva Catela notes.[46]

43 Interview quoted in da Silva Catela, "Apagón en el Ingenio," 89.

44 As a matter of fact, waves of repression and imprisonment of union leaders of the plant took place earlier, in 1974 and 1975. Right after the coup of 1976, the few workers who had union activity were fired by the Ledesma company. Thus, there was no union leadership active at the time of the kidnappings. See Ricardo Nelli, *La injustica cojuda: Testimonios de los trabajadores del azúcar del ingenio Ledesma* (Buenos Aires: Puntosur, 1988).

45 Interview quoted in da Silva Catela, "Apagón en el Ingenio," 84.

46 Ibid., 85–6. There are also discrepancies in the total number of kidnapped people, the number of disappeared people in each community, and what happened to them following their detention. In this respect, the master narrative often refers to the days or even months spent in the premises of the sugar mill; others talk about an immediate transfer to the Guerrero clandestine detention center, which is 120 kilometers away. Ibid., 101.

These underground narratives did not confront the master narrative openly. There was a regular public commemoration, legitimized by the regular presence of national leaders of the human rights movement and of national and local progressive trade union activists. Each July 27, there were people marching the six kilometers that separate Calilegua from Libertador in a rally of several thousand participants. And there were some people remaining in the margins of the rally. Although presumably the commemoration was related to the disappearance of their kin, relatives of the disappeared from Calilegua stayed in the background: mothers with their white scarves carrying the photos of the disappeared, looking on as bystanders at the organized rally. They did not participate in an event that they felt was not theirs. Yet they were not silent. If asked, they would tell their stories, without being outspoken in the public sphere. Their interpretive frame was one of everyday life and family, in the context of a long history of class domination, racial discrimination, and repressive powers of elites.

Olga died in early 2005. During the July rally that year, she was very much present, as a symbol and an emblem of struggle. Yet there were significant changes in 2006. That year, the relatives of the disappeared from Calilegua – who in terms of class and race were "the other" vis-à-vis Olga and the delegations coming from Buenos Aires – became much more visible. The speech at the start of the rally was delivered by the sister of a disappeared person from Calilegua, and a memorial was inaugurated in the town, carrying the names of the town's disappeared engraved in a plaque. For the first time, Calilegua mothers and relatives did participate in the rally.

There was also a significant shift in the meaning of the conflicting dates. July 20, the date referred to in the underground narratives but silenced in the master narrative, was introduced in the calendar of events, with a vigil in the main plaza of Libertador General San Martín. Perhaps more importantly as a symbolic marker of the subtle change in power relations, there was a move to establish a Provincial Day of Human Rights. Rather than taking the nationally legitimized date (July 27), the provincial government heard the voice of the up-to-then voiceless people and chose July 20 as the date.

What has happened? Why these minor yet locally significant changes? We are not faced with a confrontation between different interpretations of dictatorship. It is not between the defenders of the military and the victims; neither between left and right, progressives and conservatives. It is a story of center and periphery; a story of class and race. Jujuy and other outlying areas of Argentina have to struggle to gain the attention of Buenos Aires and the national center. Within the human rights community, the attention that repression in Jujuy could muster was through the construction of an emblem: the symbol of repression of workers. This was the script that gained legitimacy in the center. Olga Arédez was the mediator; she had the cultural capital, professional standing, and class belongings that allowed for smooth contact with the center. The presence of the Ledesma case in the *Nunca más* implied

the legitimized entrance of repression in Jujuy into the national master narrative as an emblem for repression of the working class.

The other stories, those told by the common people in town, could not contradict openly the master one; neither did they reproduce it without criticism. What the people did was to tell their experience privately, talking about "their" dates, reconstructing their memories as part of their everyday life. In a context of deep historical and structural inequalities, darker skins, less formal education, and lower class status mean subordination and public silence. Only when the conditions change – in this case, by the death of the local leader and the opening of some channels of communication – can these small yet locally significant changes take place.

This is a story of class, region, and race. The events referred to seem rather minor. They are not registered by the media, by public opinion, or by state agencies. Nobody talks about them. Nobody interprets the microdynamics of the case in terms of class, ethnic, or racial cleavages. That is part of the cultural silences of Argentina. Yet it is clear that in the (mostly muted) conflicts about the memories of the past, there are deeper social cleavages, which anteceded the specific events referred to. The emergence of the stories of the "others," however, may only be circumstantial, unless there are deeper changes in the structures of power, locally and nationally.

Jewish Victims and Public Memory

Argentina is a country of significant European settlement. Since the 1870s, official policies fostered European immigration, with the belief that these settlers would bring the "civilization" that could counter the "barbarism" of the original sparse population. Jewish immigration began at the end of the nineteenth century and increased considerably during the 1920s, when conditions in Eastern Europe worsened for Jews and the United States limited immigration. Thus, a significant Jewish community exists in Argentina, representing around 1 percent of the country's population.

Since very early in that history, anti-Semitism has been present in the country. Anti-Semitic activities and attacks were anchored both in right-wing nationalistic ideologies and in popular belief systems.[47] In particular, there is a long history of discrimination against Jews in the military forces (until recently, Jews could not become military officers), and anti-Semitic expressions were quite common in the armed forces (including often explicit commitments to Nazi symbols).

Within this long-term historical context, from the very beginning of repression the fate of Jews during the military dictatorship was a significant political issue,

[47] See Daniel Lvovich, *Nacionalismo y Antisemitismo en la Argentina* (Buenos Aires: Javier Vergara Editor, 2003); and Leonardo Senkman, ed., *El Antisemitismo en la Argentina* (Buenos Aires: Centro Editor de América Latina, 1989).

within the Jewish community and beyond. In fact, estimates show a heavy overrepresentation of Jews among the disappeared, comprising from 5 to 10 percent of the disappeared.[48] Although it is almost impossible to have exact figures, and there is no satisfactory sociodemographic analysis, this overrepresentation reflects the relatively high presence of people of Jewish descent among some of the target groups of military repression: urban middle class students and intellectuals, militants, and left-leaning activists. Controversies were not so much about the facts of repression; they were rather about strategies of dealing with these facts. Some were ready to denounce and demand; others – including the main Jewish community organizations – were not ready to confront the state openly.

The first public international denunciation of the "special treatment" of Jews under detention was the Timerman case. A well-known journalist and director of a daily newspaper, Jacobo Timerman was abducted from his home in April 1977. Under different forms of detention – first clandestinely "disappeared," then under detention and finally under house arrest – after two-and-a-half years he was expelled from the country and his Argentine citizenship was revoked. During his detention, there were important negotiations on the part of international Jewish organizations and the state of Israel, as well as an international media campaign, to obtain his freedom.[49]

Timerman denounced the conditions of his detention in a widely acclaimed book, *Prisoner Without a Name, Cell Without a Number* (1981, published initially in the *New Yorker* magazine). In the book, Timerman brought to world attention the Argentine military standpoint about the "world conspiracy of Zionism, Marxism, and Jewish Capitalism." He mentioned that his interrogation centered on Jewishness, based on the military conviction of the existence of a "Zionist enemy." This idea refers to a long-held belief of the Argentine nationalistic right about a Zionist conspiracy geared to taking over the region of Patagonia to create an independent Jewish state (the "Plan Andinia").[50]

During the military dictatorship, anti-Semitism was an integral part of unofficial state policy. The traditional right never saw Jews as fully belonging to the Argentine nation. Rather they were seen as "foreigners." If anti-Semitism did not become an officially recognized policy, it was because of a concern with the international image

[48] See Miguel Galante et al., "Informe sobre la situación de los detenidos-desaparecidos judíos durante el genocidio perpetrado en Argentina," *Revista Índice* 20 (2000).

[49] See Joel Barromi, "Israel frente a la dictadura militar argentina. El episodio de Córdoba y el caso Timerman," in Leonardo Senkman and Mario Sznajder, eds., *El legado del autoritarismo. Derechos Humanos y Antisemitismo en la Argentina contemporánea* (Buenos Aires: Nuevo Hacer, 1995); Graciela Mochkofsky, *Timerman: El periodista que quiso ser parte del poder 1923–1999* (Buenos Aires: Puntosur, 2004); and Victor Mirelman, "Las organizaciones internacionales judías ante la represión y el antisemitismo en Argentina," in Senkman and Sznajder, eds., *El legado del autoritarismo*.

[50] The ideological roots of these views are discussed in Miguel Alberto Galante and Adrián Jmelnitzky, "Acerca de la dimensión antisemita en el terrorismo de estado en Argentina," *CD Historia y Memoria* (La Plata: Centro de Investigaciones Socio-Históricas, 2001).

that the Argentine government wanted to preserve vis-à-vis the United States and other Western powers.[51]

By now, there is considerable evidence regarding the specific ways in which Jews were treated when abducted and detained. In testimony and in judicial processes, the evidence abounds: the CONADEP report, the trial procedures, the extradition actions initiated by the Spanish judge Baltasar Garzón, the oral history archive of Memoria Abierta,[52] and the 2007 witnesses at the Christian von Wernich trial in the city of La Plata.[53] The "special treatment" showed up in four stages of the repressive process: a) at the time of abduction or detention; b) in the specific forms of torture and humiliation during clandestine detention; c) in the use of Nazi language and symbols; d) in the "special" interrogation directed at Jewishness and Jewish community activities.[54] Yet, to explain the overrepresentation of Jews among the disappeared, it is highly plausible that there was in operation a further selection mechanism by which Jews were more likely to be "chosen" for the "death flights" and other forms of disappearance.

At the time of his denunciation, Timerman's views clashed with the apparent "normal" everyday life among the Jewish community in the country, and among the main Jewish community organizations. These organizations – the two biggest of which were the community center called the Argentine Israelite Mutual Association [*Asociación Mutual Israelita Argentina*] (AMIA) and the umbrella organization of Argentina's Jewish organizations, the Delegation of Jewish Argentine Associations, [*Delegacion de Asociaciones Israelitas Argentinas*] (DAIA) – maintained smooth relationships with the government. They never confronted or criticized its repressive activities and limited their demands to combating anti-Semitic actions and publications. Efforts to save lives and help get some people out from the country were secret and remained out of public view, and relatives of Jewish victims got very little support or help from the community organizations.

The Argentine Jewish community is politically and ideologically quite heterogeneous, as is the general population of the country. It should come as no surprise that there were different and conflicting views about the dictatorship among the Jewish population. Some prominent Jews and Jewish organizations distanced themselves from the main community organizations and became involved in the leadership of

[51] See Paúl Warzawsky, "Régimen militar, Iglesia Católica y comunidad judía en la República Argentina," in Senkman and Sznajder, eds., *El Legado del Autoritarismo*.

[52] See Alejandra Oberti and Susana Skura, "Antisemitismo en Argentina: Notas sobre la pertinencia de una colección sobre la temática en el marco del archivo de historia oral de Memoria Abierta" (paper presented at the LAJSA conference, Buenos Aires, 2007).

[53] In the trial of Christian von Wernich, a collaborator priest with clear anti-Semitic ideas convicted for his crimes in October 2007, witness after witness referred to the anti-Semitic content and the extra burden of suffering of Jewish prisoners. These testimonies had extensive coverage on TV news programs and in daily newspapers.

[54] See Galante and Jmelnitzky, "Acerca de la dimensión antisemita en el terrorismo de estado en Argentina."

the human rights movement and of the opposition to dictatorship. For instance, the Jewish publication *Nueva Presencia*, established in 1977, did report on repression and disappearances.[55] Also, as an outspoken activist in the human rights movement, Rabbi Marshall Meyer was an active member of the Permanent Assembly of Human Rights [*Asamblea Permanente de los Derechos Humanos*] (APDH) since 1977.[56]

During the last years of dictatorial rule, part of the Jewish community organized itself in the Jewish Movement for Human Rights [*Movimiento Judío por los Derechos Humanos*] (MJDH). The MJDH confronted the passive attitude of the Jewish community leadership; it denounced anti-Semitic expressions in the media; it attacked the government. The idea guiding the movement was that the defense of human rights had to be general and universal, beyond denouncing specific instances where people of Jewish descent were the victims. The MJDH participated actively in all the human rights mobilizations during the transition years, with their own banners and identifying symbols. The banner "Aparición con vida" (back to life) with the Star of David was their identification in the rallies.[57]

After the transition in 1983, this movement and Jewish relatives of disappeared persons continued their active presence in the public sphere. Debates and controversies continued for more than twenty years about several key issues: the "special treatment" of Jewish victims, the way the Jewish community leaders and organizations acted during dictatorship and afterwards, and the timid role of international Jewish organizations and the State of Israel in denouncing repression and helping victims.[58]

[55] *Nueva Presencia* and the English-language daily *Buenos Aires Herald* were the only publications that systematically denounced human rights violations.

[56] Marshall Meyer was a North American rabbi who lived in Argentina since 1959. After the inauguration of President Alfonsín, Meyer was named to be part of the CONADEP. He left the country to return to the United States in 1984, and he died in 1993. See Daniel Fainstein, "Secularización, profecía y liberación: La desprivatización de la religión en el pensamiento judío contemporáneo. Un estudio comparativo de sociología histórica e historia intelectual" (PhD diss., Universidad Nacional Autónoma de México, 2006).

[57] The role of the State of Israel regarding the situation in Argentina was quite important, significant, and controversial (Barromi, "Israel Frente a la Dictadura," in Senkman and Sznajder, eds., *El Antisemitismo en la Argentina*; and Leonardo Senkman, "Israel y el rescate de las víctimas de la represión," in Senkman and Sznajder, eds., *El legado del autoritarismo*.

[58] The main community organization, DAIA, produced a first report of its handling of dictatorship in 1984, justifying the strategy adopted. This report was strongly contested by the MJDH. Fifteen years later, when the issue of anti-Semitism during dictatorship was taken up in Spanish courts, DAIA prepared a new report much more critical of the military dictatorship. In 2004, a plaque in remembrance of the disappeared Jews was inaugurated in the reconstructed building of the main Jewish community center. The DAIA report is summarized in Galante et al., 2000. For further discussion of these issues, see Ignacio Klich, "Política comunitaria durante las Juntas Militares: la DAIA durante el Proceso de Reorganización Militar," in Senkman and Sznajder, eds., *El legado del autoritarismo*; Senkman and Sznajder, eds., *El Antisemitismo en la Argentina*; Emmanuel Kahan, "Discursos y representaciones en conflicto sobre la actuación de la comunidad judía durante la última dictadura militar: El caso de la Delegación de Asociaciones Israelitas de Argentina" (paper presented at the Jornadas de Trabajo Sobre Historia Reciente, Universidad de Nacional de Rosario, May 2008); Warzawsky, "Régimen Militar";

The controversy is actively maintained *within* the Jewish community, in spite of the changes in the central Jewish organizations' views and policies vis-à-vis the military dictatorship. Thus in 2005, DAIA selected MJDH to receive an award for its work in defending freedom during and after dictatorship, an award that was rejected with the following denunciation:

> We cannot forget that 8,350 days ago, DAIA, AMIA and OSA blamed us for fostering anti-Semitism because we held a rally . . . "against anti-Semitism." We cannot forget the Israeli ambassador who referred to us as biological Jews; we cannot forget that while each day dozens of people disappeared, among them 2,000 Jews, the Israeli government was selling arms to the military. As Renee Epelbaum, mother of three disappeared, said, 'I would not want to learn that my Jewish children were assassinated with Israeli weapons'. . . . We cannot forget. . . . It is for all these reasons that in the name of the MJDH, I cannot receive today the DAIA award.[59]

Several features of this story should be stressed. In the first place, there is a clear pattern of victimization, yet nobody claims that the conflict and repressive acts were targeted specifically at the Jewish population for the fact of being Jewish. Second, as in any social community, one cannot find a unifying ethnoreligious sense of belonging that pervades and suppresses other cleavages. On the contrary, the Jewish community was and is internally divided. It did not and could not unite under the banner of a Jewish identity. Third, its various groups are endowed with significant cultural, political, and social capital; they could therefore establish their own national and international alliances without having to rely on mediators and spokespersons. Each group, and within it different people, interprets the past in different ways.

Conflicts about memories and interpretations of the past, about the politics of memory and about the symbolic power of the victim, are part of the dynamics of memorialization. Some people set the memories of repression and suffering during the military dictatorship in the framework of longer-term memories of suffering of the Jewish people – the chain of meaning may include the Shoah, the Argentine dictatorship, and the bombs that destroyed the Israeli Embassy and the building of the Jewish community center, events that occurred in 1992 and 1994. Yet, in spite of the various organizational capacities to deal with grievances and demands, there have not been specific demands of public memorialization of Jewish victims of dictatorship.

Mirelman, "Las organizaciones internacionales judías"; Borromi, "Israel frente a la dictadura militar argentina," in Senkman and Sznajder, eds., *El legado del autoritarismo*.

59 Raul Kollman, "El Movimiento Judío por los Derechos humanos (MJDH) rechazó el premio y criticó a la DAIA," *Página 12*, Sept. 2, 2005.

SOME ANALYTICAL AND POLICY ISSUES

The cases presented allow me to raise several points linked to the social and political dynamics of memory work and to the recognition of the various actors and agents involved in transitional processes. In the presentation of the cases, special attention was placed on the agency (or lack of it) of the victimized communities and collectivities, on the way they themselves acted in the aftermath of violence, and on the presence (or absence) of claims for memory based on their shared sense of community belonging ("identity"). Attention to these matters brings up the underlying ethical question about the role of well-meaning outsiders (including, of course, the community of political actors, researchers, and practitioners of transitional justice) in transition processes. It is the actors themselves – in our cases, direct and indirect victims – who give meaning to their experiences, to their actions and that of others. Outsiders have to be cognizant and respectful of the local conditions, belief systems, needs, and desires of the actors themselves. Yet often tensions emerge between localized meanings and the universal ethics of human rights.

No Community Is Homogeneous

When dealing with historically constructed identities that express themselves through collective action, no community will be homogeneous, acting in a cohesive and unified way. There are internal differentiations and often controversies among individuals and groups, based on economic and social standing, on gender, on political ideology, on age, or on standpoints vis-à-vis their position in relation to other communities and the larger society.

Among the Argentine Jewish community, among the Northern towns of Calilegua and Libertador, the communities of Ayacucho or the Asháninkas, there is no *one* unified view about the past; there is no consensus about the way to deal with that past. Perhaps the conflicts are more open and visible in the Jewish community in Argentina. It is not, and has never been, a unified community. It encompasses people of different social classes, places of residence, historical origins, ages, and generations. There are people with different and often opposed interests. In ideological leanings and beliefs, it is as diverse as the population of the country, and there is a considerable variation in the degree of identification and commitment to the Jewish institutions and practices. Thus, it is hard to expect a shared position in political and social conflicts. Although more explicit in the presentation of the Jewish community, the lack of homogeneity and the existence of internal conflicts are also to be found in the dynamics of change in the commemorations in Calilegua or in the marginality of ANFASEP in Ayacucho.

Identities have to be conceived as historical constructs, with blurred and changing boundaries. Groups come together and define themselves as belonging to the same category or community in the process of dealing with and often confronting "others."

There is nothing in "indigenousness" or in "Jewishness" that will make for collective action; "indigenousness" will emerge (or not) as a defining trait in demands and conflicts according to specific social, economic, political, and cultural dimensions of power relations.

On the other hand, what brings together groups of people combines long-term traditions and feelings of belonging with current or short-term conjunctures. Spatial or residential patterns are highly significant here, especially outside major cities. In Calilegua or Fajardo, people see themselves as "locals" of these towns. Yet beyond this fact of sharing a space, there is internal differentiation of interests, beliefs, and practices – by class, gender, age, or religious beliefs and practices – and the heterogeneity of a group resides precisely in this differentiation.

The Role of Cultural Mediators

Very poor material resources and historically entrenched cultural domination by other groups result in a lack of autonomous capacities to act in the public sphere. In such cases, spokespersons or cultural mediators may serve to carry their interests and demands in the wider political arena. The contrast between the women of ANFASEP in Ayacucho or the Mothers in Calilegua, on the one hand, and the Jewish community in Argentina, on the other, could not be greater in this respect. In the latter case, various Jewish voices could be heard, expressing diverse and often conflicting messages, demands, and narratives. The internal diversity and the various strategies and ideologies could be expressed and heard, given the relatively good access to cultural and social resources.

Thus, the differential social and cultural capital and the degree of access to national and international resources and opportunities lead to different degrees and types of presence (or absence) of voices in the public sphere. The most disadvantaged and subordinate groups fall into silences, creating "underground" memories that seldom reach the public arena.[60] Perhaps the greatest empty political and symbolic space is that of the Asháninka in Peru.

The Importance of Context

Representations and narratives emerge in specific historical circumstances and in response to – in dialogue or confrontation with – other narratives or interpretations. In Argentina, the legitimate voice has been that of the relatives of victims,[61] whereas in Peru the dominant interpretations are not produced by the victimized groups themselves but by "sympathetic others" – be they the National Commission of

[60] See Pollak, *Memoria, olvido, silencio*.

[61] See Elizabeth Jelin, "Victims, Relatives, and Citizens in Argentina: Whose Voice Is Legitimate Enough?" in Richard A. Wilson and Richard D. Brown, eds., *Humanitarianism and Suffering: The Mobilization of Empathy* (Cambridge: Cambridge University Press, 2008).

Human Rights [*Comision Nacional de los Derechos Humanos*] (CNDH), people who worked with the CVR, or international activists in NGOs. The authority for the "correct" ways to remember is in the hands of the more powerful – as in the expectations of how women should testify about the sexual abuses or in the construction of the ANFASEP museum in Ayacucho. This involves a certain degree of "standardization" and "universal homogenization" of the definition of suffering and victimhood, one that blurs or erases the specificity of each cultural milieu. These contrast with *Pumpin* music and the like,[62] cases in which the processes of incorporating the memories of the recent past are done within their longer-term and ongoing cultural practices.

A disquieting issue in this respect is that there is no certainty that the public exposure of victimization, fostered at times by well-meaning outsiders, will have a positive effect on the road to empowerment and autonomous agency, at least in the short-term period that "transitional justice" involves. Therefore, the role of outsiders in creating discourse, practices, and interpretive frameworks has to be assessed in each case. At times, in the short run, it may entail further violations of the victims. The unsettling case in this respect is the issue of the testimony of rape among women in the CVR hearings. On the other hand, once the discourse of human rights is in place, marginalized groups of various sorts may "piggyback" and express their claims (which often precede dictatorship) in the language and discourse of human rights. In such cases, the new framework is appropriated by the communities and used as a tool for their empowerment.

Identity and the Interplay of Short and Long Memories

The way in which "short" memories fit into "long" memories of a group is a key to understanding identity dynamics. In all the cases presented, the short term is understood and placed into long historical time. The lyrics of *Pumpin* music have a history of their own, linked to longer-term processes of modernization in Peru. It is in this frame that the *Senderista* lyrics first, and the lyrics dealing with suffering and violence later, can become vehicles for memory. These are not outside imports but rather local interpretations of experiences. Similarly, the power of the sugar mill in Jujuy and its repressive role in disciplining its workers has been present for decades. This, together with the dynamics of class relations associated with skin color, led to specific silences, which could be broken when social and political conditions changed.

Likewise, anti-Semitism is not a new phenomenon in Argentina. Its extreme expression during the dictatorship came to the public view first with the international

[62] Olga González has analyzed the way painted boards (*tablas*) from the Sarhua region depict violence. Sarhua's *tablas* precede recent violence. When they are created to convey memories, they follow the pattern of silence and secrecy about conflict that existed in that community long before the period depicted in them. See Olga González, "Unveiling Secrets of War in the Peruvian Highlands" (PhD diss., Columbia University, 2006).

attention to the Timerman case; it was then multiplied by the testimonies received by the CONADEP and the witness-testimonies during the trial of the ex-commanders. Community organizations, the State of Israel, and Jewish international organizations dealt with the case within the framework of their previous work on other anti-Semitic acts. In fact, there were no specific demands of recognition of any special victimhood or of differentiated memorialization on the part of Jewish activists. Public memorialization could take place at the times and in the forms that the actors themselves and their agency determined, by their ability to make public their testimony, and by their capacity to mobilize their own cultural and political resources.

Where the Local Meets the National

Explicit policies regarding "settling accounts with the past" usually occur at the national level. Yet issues of specific identities usually manifest themselves at local and regional levels. Gaps and misunderstandings are then the rule. Memories and meaning are territorialized and localized. What the cases presented here show are the nuances in meanings and interpretations that emerge in specific local conditions. Undoubtedly, there is a need to combine national policies with local understandings. Not an easy task. Yet perhaps the main result of the exercise done analyzing the links between processes of memorialization and historical communities of belonging is that, as the Preface of the Peruvian CVR report states, the biggest challenge the nation faces, and the way to look toward the future, is to establish policies that will revert *the deep disdain toward the disadvantaged population of the country.*

PART II

Identities, Transition, and Transformation

7

Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society

Courtney Jung

The framework of transitional justice was originally devised to facilitate reconciliation in countries undergoing transitions from authoritarianism to democracy.[1] But it is used with increasing frequency to respond to certain types of human rights violations against indigenous peoples. In some cases, transitional justice measures are employed in societies not undergoing regime transition. Such measures as apologies, reparations, and truth commissions offer opportunities for reinscribing the responsibility of states toward their indigenous populations, empowering indigenous communities, responding to indigenous demands to be heard, and rewriting history. Nevertheless, treating indigenous demands for justice as a matter of "human rights" is an ethically loaded project that may reinforce liberal and neoliberal paradigms that indigenous peoples often reject. Whether transitional justice measures will serve primarily to legitimate the status quo between postcolonial states, settler societies, and aboriginal peoples, or whether they will have transformational capacity, will depend in part on the political context in which they take place. The impact of such transitional justice measures as apologies, truth commissions, and reparations will be limited, or extended, by the wider policy environment in which they occur.

This chapter outlines some of the potential complexities involved in processing indigenous demands for justice through a transitional justice framework. It identifies three broad areas in which the interests and goals of governments and indigenous peoples may clash, and where transitional justice itself may be the object of political wrangling. First, governments and indigenous peoples may differ over the scope of injustices that transitional justice measures can address. Second, governments may

* The author would like to thank Paige Arthur, Gina Cosentino, Eduardo Gonzalez, Patrick Macklem, and Joanna Rice for helpful comments and insight on this chapter. The analysis and conclusions are the sole responsibility of the author.

[1] On the intellectual history of transitional justice, see Paige Arthur, "How 'Transitions' Re-shaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (May 2009): 321–67.

try to use transitional justice to draw a line through history and legitimate present policy, whereas indigenous peoples may try to use the past to critique present policy and conditions. Third, governments may try to use transitional justice to reassert their sovereign and legal authority, whereas indigenous peoples may try to resist this strategy and even make competing claims to sovereignty and legal authority.

Recent developments in the relationship between the Canadian government and First Nations highlight the challenges and opportunities of addressing indigenous demands for justice through the lens of transitional justice. In May 2006, the government, the churches, and the Assembly of First Nations and other aboriginal organizations reached agreement on a settlement to address the legacy of the Indian Residential School system.[2] The agreement included reparations, a truth commission, and commemoration. In June 2008, Conservative Prime Minister Stephen Harper offered an official state apology to former students of Indian Residential Schools. Both the Harper government and First Nations leaders seem keen to employ transitional justice measures to deal with the legacy of the Residential School system. Nevertheless, they have different reasons for endorsing a transitional justice framework and distinct perspectives on the work and goals of the apology, the Truth and Reconciliation Commission, and compensation.

THE SCOPE OF INJUSTICE

Almost every dimension of indigenous life has been shaped, and limited, by the colonial encounter, and by a postcolonial history of dispossession, racism, exclusion, betrayal, and forced assimilation. The indigenous experience is one of loss of land and sovereignty, the loss or devaluation of language and culture, loss of access to resources, and limited access to the socioeconomic and political rights of citizenship. The scope of the wrongs that have been committed against indigenous people is extensive. As a result, indigenous demands for justice are wide ranging.

But transitional justice measures are limited. In Canada, the apology, the TRC, and compensation are designed to address only the legacy of the Residential Schools. Yet the Residential School system is a narrow slice of the outstanding issues that bedevil the relationship between aboriginals, the Canadian government, and non-aboriginal Canadians. In the last fifteen years alone there have been two major government initiatives that proposed serious and wide ranging transformation of Canada–First Nations relations – the Royal Commission on Aboriginal Peoples and the Kelowna Accord. But both floundered, and the Conservative government entered office in January 2006 with little more than a controversial proposal to

[2] The Assembly of First Nations is an organization of First Nations chiefs that acts as the national political representative of First Nations governments and their citizens in Canada. The AFN is funded by the government, and has an office in Ottawa. The National Chief is elected by the Assembly of Chiefs, and plays a prominent role in responding to and shaping government initiatives that impact aboriginal people.

"extend human rights to First Nations" in a way that threatened to undermine aboriginal collective rights. The government has attempted to use "human rights" as a strategy for limiting state obligation and as a wedge to undermine indigenous collective rights to self-determination. Although the Conservative government did not initiate the transitional justice project that is now the centerpiece of its aboriginal policy, transitional justice extends the party's human rights agenda and is offered as an alternative to constitutional transformation and social justice.

Recent Developments in Relations with First Nations

In 1991, the government of Canada established the Royal Commission on Aboriginal Peoples ("RCAP") to investigate the social, economic, and political conditions of the aboriginal peoples of Canada, as well as to develop recommendations focused on the improvement of these conditions and the overall relationship between First Nations and the Crown. The commissioners directed their consultations to one overriding, and extremely broad, question: what are the foundations of a fair and honorable relationship between the aboriginal and nonaboriginal people of Canada? The commission held 178 days of public hearings, visited 96 communities, consulted dozens of experts, commissioned scores of research studies, and reviewed numerous past inquiries and reports. Their central conclusion was that the main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong.[3]

The commission released its final report and recommendations in November 1996. The report was five volumes long, including 4,000 pages and 440 recommendations. The first volume traces the history of the relationship between aboriginals and the state, details various failed policies, including the Indian Residential Schools policy, and proposes a new path forward. Volume two lays out the laws that presently govern First Nations, including treaty rights, existing financial arrangements for aboriginal governments, land provisions, and comanagement agreements. Volume three recommends new directions in social policy in the areas of housing, education, language preservation, health, family and child welfare, arts and heritage, and museums. Volume four articulates the views of aboriginals themselves. It includes sections on the perspectives of Elders, women, youth, Métis, and urban aboriginals. Volume five is titled "Renewal: A Twenty Year Commitment." The two central planks of the commitment are redressing economic and welfare disparity, and constitutional reform.

Fourteen months later, in January 1998, the government unveiled its response to the RCAP report: "Gathering Strength – Canada's Aboriginal Action Plan." The action plan had four components: renewing the partnership, strengthening

[3] See *The Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996); hereinafter cited as *RCAP Report*.

aboriginal governance, developing a new fiscal relationship, and supporting strong communities, people, and economics. Nevertheless, in April 1999, the Human Rights Committee of the United Nations High Commissioner for Human Rights released its concluding observations on Canada's observance of UN Human Rights Covenants: "The Committee is particularly concerned that the State party (Canada) has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples." In fact, ten years later it is generally acknowledged that, although the government launched a few minor initiatives based in part on RCAP recommendations, the transformational spirit and intent of the Commission has been squandered.[4]

The next major aboriginal initiative was the Kelowna Accord. The Kelowna Accord is a series of agreements between the government of Canada, First Ministers of the Provinces, Territorial Leaders, and the leaders of five national aboriginal organizations in Canada, including the Assembly of First Nations. The agreements resulted from eighteen months of roundtable consultations culminating in a First Ministers' Meeting in Kelowna, British Columbia, in November 2005. The accord committed the government to spend five billion dollars over ten years to improve the education, employment, and living conditions of aboriginal peoples, and it was welcomed by aboriginal leaders for involving a process of cooperation and consultation. Chief Phil Fontaine, then leader of the Assembly of First Nations,[5] identified the Kelowna agreement as a "comprehensive, practical approach" to "the single most important social justice issue facing the country," and Prime Minister Paul Martin singled out the agreement as the "crowning achievement" of his term as prime minister.[6]

Nevertheless, when Martin's Liberal government fell in January 2006, the Conservative incumbents insisted that the Kelowna Accord "did not exist" because funds had not been budgeted for its implementation.[7] Under the leadership of Prime Minister Stephen Harper, the Conservative government has ignored the Kelowna Accord. In June 2006 it tabled a new budget that dedicated few new resources to First Nations. Two days later, Martin introduced a private members bill, calling on the government to follow through on the promises laid out in the Kelowna Accord. The bill passed by a vote of 176–26. Since private members bills cannot compel government to spend money, however, the Conservatives ignored the vote.[8]

[4] "Implement Kelowna Deal on Native Poverty: Fontaine," CBC News, November 21, 2006; available at www.cbc.ca/canada/story/2006/11/21/fontaine-kelowna.html.

[5] Phil Fontaine was the national chief for three terms: 1997–2000, 2003–2006, and 2006–2009. He did not stand for reelection in July 2009.

[6] Ibid.

[7] Rarihokwats, "E-Note: Kelowna Accord Goes Missing," *Gathering Place First Nations Canadian News*, June 9, 2007; available at www.gatheringplacefirstnationscanews.ca/Governance/Rarihokwats/prentice%20on%20kelowna.pdf.

[8] "Tories to Ignore Parliament's Kelowna Accord Vote," CTV News, March 22, 2007; available at www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070321/kelowna_vote_070321?s_name=&no_ads=.

Instead, the Conservative government came into office with its own aboriginal initiative, Bill C-44, an act to amend the Canadian Human Rights Act by removing the exemption (Section 67) that shields the federal government and First Nations governments "from complaints of discrimination relating to actions arising from or pursuant to the Indian Act." Although the proposal is often described as extending human rights to First Nations people living on reserves, in fact, aboriginals already enjoyed the general protection of the Canadian Human Rights Act, except in special situations where their rights and status are governed by the Indian Act. What is more, the Section 67 exemption had no effect on the equality rights guaranteed in the 1982 Canadian Charter of Rights and Freedoms.[9]

The amendment received first reading in the House of Commons in December 2006 and was referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development. That committee deliberated on the bill in sixteen meetings between March and June 2007, and it heard a number of expert witnesses who raised serious concerns about the process and substance of the legislation. In June 2007 the committee adopted an opposition motion recommending that debate on the repeal be suspended for up to ten months to allow the government to initiate a broad consultative process to include First Nations representatives. In July 2007 a majority of members were called back, by the Conservative Party, to an unusual midsummer meeting for a clause-by-clause consideration of the bill. Again, the opposition voted to suspend such consideration pending consultations, and the bill died when parliament was prorogued in September 2007. Two months later the government introduced Bill C-21, which was identical to Bill C-44. That bill was finally passed in June 2008 with five significant opposition amendments.[10]

First Nations representatives and expert nongovernmental witnesses had five major concerns regarding Bill C-44. First, they argued that a human rights bill must include a nonderogation clause to indicate that there will be no derogation or abrogation of aboriginal and treaty rights. Second, they insisted that the bill include an interpretive provision to guide the Canadian Human Rights Commission, tribunals, and courts in balancing individual human rights and the collective constitutional rights of First Nations. Third, they requested a thirty-six-month transition period to develop the critical capacity to implement CHRA provisions. Fourth, they requested funding to help First Nations governments respond to human rights complaints. Fifth, they recommended that complaints against First Nations governments be considered by independent First Nations institutions.

Specifically, although First Nations representatives insisted on their own commitment to ensuring the full range of human rights for their people, they were

[9] *Bill C-44: An Act to amend the Canadian Human Rights Act*, Canada Law and Government Division LS-546E (August 27, 2007).

[10] *Bill C-21: An Act to amend the Canadian Human Rights Act*, Canada Law and Government Division LS-577E (June 30, 2008).

concerned that an equality framework would expose First Nations governments to allegations of preferential treatment toward band members. Several expert witnesses insisted that the repeal of Section 67 "could cause the Indian Act to unravel, dispossessing hundreds of First Nation communities across Canada from their reserve lands."[11] One way it might do so is by allowing nonaboriginal people to challenge health and education benefits provided to aboriginal people alone.[12] Nonaboriginals may also have been able to challenge the special land, fishing, logging, and other rights that aboriginals have secured, in part through the Indian Act.

Under the circumstances, aboriginal representatives had reason to be wary of the Conservative government's intentions in introducing Bill C-44. Harper's closest advisor, Tom Flanagan, has written a book titled *First Nations? Second Thoughts*, in which he argues that aboriginals are immigrants who should be assimilated, and he has appeared as an expert witness against aboriginal land claims.[13] Harper's first minister of Indian Affairs was Jim Prentice, a property rights lawyer who has argued for extending property rights to reserves and is also known for his opposition to native land claims.[14] Property rights are another way of extending individual rights to band members in a way that threatens collective rights and, indigenous leaders fear, may ultimately lead to land alienation.

In the end, Bill C-21 was amended by opposition members on the committee to include some of the exemptions and caveats recommended by First Nations and expert witnesses. In particular the final bill stated that

> the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the First Nations peoples of Canada, including: 1) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; 2) any rights or freedoms that now exist by way of land claims agreements or may be so acquired; and 3) any rights or freedoms recognized under the customary laws or traditions of the First Nations peoples of Canada.

In addition,

> In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*,

[11] Rarihokwats, "Legal Experts Cite Grave Problems with Human Rights Bill C-44," *Gathering Place First Nations Canadian News*, June 9, 2007; available at www.gatheringplacefirstnationscanews.ca/Governance/Rarihokwats/prentice%20on%20kelowna.pdf.

[12] Testimony provided by William Black, professor of human rights law, faculty of law, University of British Columbia; see ibid., 2.

[13] Tom Flanagan, *First Nations? Second Thoughts* (Montreal and Kingston: McGill-Queen's University Press, 2000).

[14] "Aboriginal Agenda Conflicts with Background of Harper Advisors: Lead Advisor Tom Flanagan Has Made a Career of Opposing Land Claims," *Harper Index*, May 16, 2007; available at www.harperindex.ca/ViewArticle.cfm?Ref=0022.

> this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests.[15]

Nevertheless, conservative commentators hailed the bill as "a good first step toward solving the much bigger problem of treating Native people as though they are different from the rest of the country, clearing up any misunderstanding that some may have about Natives being a 'sovereign nation.'"[16] Notwithstanding the opposition amendments, the repeal of Section 67 of the Constitution is significant. It remains to be seen how much weight courts will assign to the nonderogation and interpretive clauses the bill includes. How much protection those amendments will actually offer to band governments has yet to be tested in court. As the bill moved into the Senate, Indian Affairs minister Chuck Strahl clarified the relationship between C-21 and the UN Declaration on the Rights of Indigenous Peoples, explaining "Our government believes that delivering real human rights to First Nations peoples, as this Bill does, is much more important and tangible than any aspirational document."[17] The Harper government has been insistent that their commitment to human rights justifies their refusal to ratify the UN Declaration.[18]

The Legacy of the Residential Schools

Against the backdrop of these other policy initiatives, successive Canadian governments have struggled to address the legacy of the Indian Residential School policy. For roughly one hundred years, between the late nineteenth and late twentieth centuries, the government of Canada collaborated with various churches to operate a residential school system that forcibly removed aboriginal children from their parents and communities and placed them in boarding schools.[19] Approximately 150,000 children were sent to residential schools. Starting from only two schools

[15] *Bill C-21: An Act to amend the Canadian Human Rights Act*.

[16] Jeff Parkinson, "Bill C-21 Helps Dispel 'Sovereign Nation' Notion," *Caledonia Wake-up Call*, June 27, 2008; available at caledoniawakeupcall.wordpress.com/2008/06/27/bill-c-21-helps-dispel-%E2%80%9Csovereign-nation%E2%80%9D-notion.

[17] "Statement By The Honourable Chuck Strahl In Relation To Bill C-21, An Act To Amend The Canadian Human Rights Act," Ministry Indian and Northern Affairs Canada Doc. 2–3044 (May 28, 2008); available at www.ainc-inac.gc.ca/ai/mr/nr/m-a2008/2–3044-eng.asp?p1=209557&p2=6139.

[18] "Canada Taking 'Bold Steps' on Aboriginal Issues, Strahl Tells UN," *CBC News*, May 1, 2008; available at www.cbc.ca/canada/story/2008/05/01/un-strahl.html.

[19] See Agnes Grant, *No End of Grief: Indian Residential Schools in Canada* (Winnipeg: Pemmican Publications, Inc., 1996), 64; *RCAP Report*, Vol. 1, 343; Indian Residential Schools Resolution, "Backgrounder: Federal Representative to Lead Discussions toward a Lasting Resolution of the Legacy of Indian Residential Schools," June 8, 2005; available at www.irsr.gc.ca/english/federal_repre.html (hereinafter cited as "IRSR Backgrounder"); Indian and Northern Affairs Canada, "Backgrounder: The Residential Schools System," last updated April 23, 2004; available at www.ainc-inac.gc.ca/gs/schl_e.html (hereinafter cited as "INAC Backgrounder").

in operation when Canada was formed in 1867,[20] a total of 130 residential schools existed over time.[21]

The explicit purpose of the residential schools was to destroy aboriginal language and culture, "to take the Indian out of the child." Students were not allowed to speak their own languages at school, and their cultures and heritages were debased. Children also suffered physical harm. Some schools had mortality rates of 35 to 60 percent, due to malnutrition, abuse, and exposure to tuberculosis, and many children were victims of physical and sexual abuse. Through the Residential School System, the government of Canada violated human rights to bodily integrity, equality, privacy, education, culture, family, and life.

Injustices associated with residential schools assumed mainstream political and legal significance in the late 1980s. Commencing in 1989–1990, prosecutions against former residential school staff began in British Columbia and the Yukon, spurring additional police investigations and, in turn, further prosecutions.[22] By 1992, most churches had apologized for their conduct but also asserted "shared responsibility" with the federal government for the consequences of the residential school system.[23] The RCAP report detailed widespread neglect, governmental underfunding, health-related problems, as well as sexual, physical, and emotional abuse endured by students over many years, and called for a public inquiry into the policy.[24]

In response to the RCAP report, Jane Stewart, then minister for Indian Affairs and Northern Development, issued a *Statement of Reconciliation* in 1998, acknowledging the federal government's role in the development and administration of the residential schools, and expressing regret to those students who experienced sexual and physical abuse.[25] The *Statement of Reconciliation* was part of a four-part strategy

[20] *RCAP Report*, 353.

[21] "INAC Backgrounder."

[22] *RCAP Report*, 378.

[23] Ibid., 379–80.

[24] Ibid., 383. According to the report, "The public inquiry's main focus should be to investigate and document the origins, purposes, and effects of residential school policies and practices as they relate to all Aboriginal peoples, with particular attention to the manner and extent of their impact on individuals and families across several generations, on communities, and on Aboriginal society as a whole. The inquiry should conduct public hearings across the country, with sufficient funding to enable those affected to testify. The inquiry should be empowered to commission research and analysis to assist in gaining an understanding of the nature and effects of residential school policies. It should be authorized to recommend whatever remedial action it believes necessary for governments and churches to ameliorate the conditions created by the residential school experience. Where appropriate, such remedies should include apologies from those responsible, compensation on a collective basis to enable Aboriginal communities to design and administer programs that assist the healing process and rebuild community life, and funding for the treatment of affected people and their families." Ibid.

[25] Indian and Northern Affairs Canada, "Statement of Reconciliation: Learning from the Past," last updated April 24, 2004; available at www.ainc-inac.gc.ca/gs/rec_e.html. See also Indian and Northern Affairs Canada, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Minister of Indian Affairs and Northern Development, 1997); available at www.ainc-inac.gc.ca/gs/chg_e.html (hereinafter cited as *Gathering Strength*).

that included a commitment of $350 million for community-based healing for those suffering the effects of physical and sexual abuse in residential schools, a revision of litigation strategy, and the implementation of alternative dispute resolution (ADR) mechanisms to avoid lengthy and expensive litigation.[26] Nevertheless, by October 2002, more than 11,000 legal cases had been filed against the federal government and the churches.[27]

In March 2004 the Assembly of First Nations issued a scathing critique of the government's ADR process, arguing that it perpetuated racial stereotypes, treated survivors unequally, measured abuse in accordance with the "standards of the day," and failed to compensate for loss of language and culture.[28] The overriding complaint was that the government's framework for resolving residential schools claims was inadequate and too slow. The government too was dissatisfied with the ADR framework, which had failed to stem the tide of lawsuits against the federal government and the churches. In May 2005, the government signed a political agreement, promising negotiations toward "a settlement package that will address a redress payment for all former students of Indian residential schools, a truth and reconciliation process, community based healing, commemoration, an appropriate ADR process that will address serious abuse, as well as legal fees."[29]

The ink was barely dry on the political agreement when, on August 5, 2005, the AFN launched a class action lawsuit against the federal government on behalf of four proposed subclasses: survivors, deceased, aboriginal, and family.[30] Chief Phil Fontaine, leader of the AFN and a residential school survivor, was named as the proposed representative of the survivor and aboriginal subclasses. In addition to various declarations, the AFN sought twelve billion dollars in general damages; twelve billion dollars in special damages for negligence and breach of fiduciary, statutory, treaty, and other common law duties; and twelve billion dollars in punitive damages.[31] The AFN further sought the establishment of a fund "whose objects are to create, support, develop, enhance and expand programs designed to mitigate the

[26] *Gathering Strength*. See also Indian and Northern Affairs Canada and First Nations and Inuit Health Branch, "The Path to Healing," October 2007; available at http://www.hc-sc.gc.ca/fniah-spnia/services/indiresident/healing-guerison-eng.php.

[27] See Kaufman, Thomas, and Associates, *Review of Indian Residential Schools Dispute Resolution Projects*, Final Report (Ottawa: Indian and Northern Affairs, Canada, 2002), ii; available at http://www.ainc-inac.gc.ca/ai/rqpi/info/nwz/pdf/20081027_fres_eng.pdf; and Pamela O'Connor, "Squaring the Circle: How Canada Is Dealing with the Legacy of its Indian Residential Schools Experiment," *International Journal of Legal Information* 28 (2000): 251.

[28] Assembly of First Nations, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (Ottawa: Assembly of First Nations, 2004); available at www.afn.ca/cmslib/general/Indian-Residential-Schools-Report.pdf.

[29] Government of Canada and Assembly of First Nations, *Political Agreement* (Ottawa, Ontario, May 30, 2005); available at www.iacobucci.gc.ca/doc-eng.asp?action=20050530pa.

[30] *Larry Philip Fontaine et al. v. The Attorney General of Canada*, Ontario Court File No. 05-CV-294716 CP (issued August 5, 2005).

[31] Statement of Claim, para. 2 (j)-(l).

Cultural, Linguistic and Social Damage caused by the Crown's Residential Schools Policy."[32]

According to Chief Fontaine,

> Our action is not an attempt to impede the process, but rather a means to ensure that we are able to fully participate in the process, more effectively settle this to the benefit of all residential schools survivors and all First Nations citizens affected by the residential schools, and to ensure that all options remain open for them. The [Political Agreement] has provided a political vehicle to move forward, but a legal vehicle is required to finalize the process with the AFN in a central and representative role, which this action now provides.[33]

On May 10, 2006, the government announced the approval by all parties of the Indian Residential Schools Settlement Agreement (IRSSA), an out-of-court settlement that represents the consensus reached in the discussions between the government of Canada, legal counsel for former students, the churches, the Assembly of First Nations, and other aboriginal organizations. It is the largest, most complex class action settlement in Canadian history. The IRSSA was approved by the courts and came into effect on September 19, 2007. The settlement agreement includes five important components of transitional justice: a "common experience" payment; an independent assessment process; a truth and reconciliation commission (TRC); commemoration; and healing.[34]

The Scope of Transitional Justice

Parachuted onto this adversarial terrain, the scope of transitional justice has nevertheless been hotly contested. When governments and indigenous groups agree to employ a transitional justice framework to address a discrete segment of the historical injustices that have structured relations between them, they are likely to try to use that framework for different purposes. The government may try to use such measures as apologies and reparations to shut down other indigenous demands, offering transitional justice in exchange for quiescence on other issues. In particular, a transitional justice framework may channel indigenous politics into a human rights framework as a way to undermine indigenous demands for collective rights, on the one hand, and social and economic rights, on the other hand.[35]

[32] Statement of Claim, para. 2(i).

[33] Assembly of First Nations, "AFN National Chief Files Class Action Claim Against the Government of Canada for Residential Schools Policy," press release, August 3, 2005; available at www.afn.ca/article.asp?id=1632. Although Fontaine claimed he had few substantive reservations about the Political Agreement, he launched the class action suit in order to reshape the process. He wanted the final settlement to be negotiated among equals (parties to a legal case), and he wanted it to be legally binding so that the government could not renege on an agreement.

[34] See Appendix I for a fuller description of the settlement agreement.

[35] In the South African context, Mahmood Mamdani has argued eloquently that the legacy of colonialism concerned social suffering, not primarily individual human rights violations. Transitional justice, he

In addition to Bill C-21, the apology and the TRC have emerged as the most visible elements of the Harper government's First Nations policy, whereas it has noticeably ignored two particularly salient indigenous demands – to revive Kelowna and to sign on to the UN Declaration on the Rights of Indigenous Peoples. In fact, the government has taken a predictably neoliberal approach to economic development on reserves, focusing on resource exploitation and small business development rather than the priorities identified by First Nations themselves and laid out in the Kelowna Accord: education, housing, social welfare, and health.[36] Current Indian Affairs minister Chuck Strahl has repeatedly rejected demands to endorse the declaration. Fontaine has speculated that the government's rush to approve the human rights bill was a tactic to deflect criticism away from its decision to reject "indigenous rights."[37] At a reception after the apology, Beverley Jacobs, head of the Native Women's Association of Canada, proposed that the apology would be more credible if the government approved the declaration. Strahl responded by repeating the government's position that it prefers to work on practical matters at home rather than sign on to "flowery words" of a declaration of principles.[38]

In such an adversarial political environment, aboriginal leaders may try to use transitional justice to open up political space and to press further demands. The success of transitional justice in addressing indigenous demands for justice may depend therefore on its capacity to animate politics, and political accountability, beyond its limited mandate. There are three ways it might accomplish this aim. First, transitional justice measures may extend their definitions of injustice to include not only individual harms suffered by former students themselves, but also collective and cultural harms suffered by aboriginal communities, languages, and cultures. While acknowledging the harms done to individuals, they may place significant weight on collective and intergenerational harms, and try to change dominant conceptions of who suffered the injustice (whole populations, not individual students) and what counts as an injustice (loss of culture and language, not only physical or sexual abuse).

argues, should be about the provision of social and economic rights, not truth and reconciliation. Mahmood Mamdani, "Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism," *Comparative Studies in Society and History* 43, no. 4 (2001): 651–64. It is relevant to bring his analysis into the context of transitional justice for aboriginal peoples because the perception of a trade-off, and of a bifurcation of political claims and strategies, bedevils indigenous politics in many parts of the world, including Canada. The background to the Canadian apology and TRC show how governments may try to present human rights as an alternative, rather than a complement, to social and economic rights.

[36] "Government of Canada and Aboriginal Advisory Board Working to Improve Economic Development," Ministry Indian and Northern Affairs Canada Doc.2–3126 (February 17, 2009); available at www.ainc-inac.gc.ca/ai/mr/nr/j-a2009/nr000000189-eng.asp.

[37] "AFN Chief Expresses Concern about Government Efforts to Rush Human Rights Legislation Without Proper Consultation," AFN press release, July 24, 2007; available at www.afn.ca/article.asp?id=3712.

[38] "Leaders Hope Apology Will Curb Prejudice; Truth and Reconciliation; 'Real and Lasting Forgiveness Must Be Earned,'" *The Gazette*, Montreal, June 14, 2008, A14.

Because the primary aim of the residential schools was to extinguish aboriginal language and culture, with explicit and intended intergenerational effects, such harms are clearly identifiable as a major and lasting component of the legacy of the residential school system.

Survivors and aboriginal leaders have insisted that the residential school system caused harm to communities as a whole. When the children were taken away, it affected parents, aunts, uncles, and grandparents, and not only the children themselves. Many customs and traditions could not be practiced without the children, and the loss of the children undermined family and communal life. The residential schools policy was explicitly intended to destroy Indian language and intergenerational cultural transmission, and to a great extent it succeeded. Loss of language and culture, described explicitly as communal rather than individual losses, were repeatedly entered as evidence in the residential schools cases.

Aboriginal survivors have also tried to resist the logic of "individualizing" the harm of residential schools by insisting on the forward-acting effects of the schools on subsequent generations. Research has shown that residential school survivors often suffer from drug and alcohol addictions, depression, higher rates of suicide, and poor relationship and parenting skills. Many are not only victims but also perpetrators of sexual and physical abuse. The children and other family members of residential school survivors suffer the continuing effects of their parents' experience in the schools. They also suffer because parents have been unable to transmit their own language, culture, and moral framework to their children. It is to some extent the children of residential school survivors who have inherited the real long-term impact of the schools – the loss of culture and language, substance abuse, and family violence.[39]

In response to this intergenerational conception of harm, the settlement agreement allocates $125 million for "community healing." This money has been allocated to the Aboriginal Healing Foundation, which is supposed to use it to fund "eligible projects" that

> address healing needs of Aboriginal People affected by the Legacy of Indian Residential Schools, which could include the intergenerational impacts. Under the terms of the Settlement Agreement, eligible projects (a) focus on prevention and early detection of the effects of the Legacy of Indian Residential Schools, including the intergenerational impacts on all generations; (b) include elements of research and of capacity building for communities, including Communities of Interest, to

[39] The intergenerational effects of trauma have been well-documented, in particular in studies of children of Holocaust survivors. Marinus H. Van Ijzendoorn, "Are Children of Holocaust Survivors Less Well-Adapted? A Meta-Analytic Investigation of Secondary Traumatization," *Journal of Traumatic Stress* 16, no. 5 (2003): 459–69; George Halasz, "Children of Child Survivors of the Holocaust: Can Trauma Be Transmitted across the Generations?" *Pro Memoria* 21 (2004): 45–9; Danny Brom, "A Controlled Double-Blind Study on Children of Holocaust Survivors," *Israel Journal of Psychiatry* 38, no. 1 (2001): 47–57.

address their long-term healing needs; (c) include, where and when possible, and depending on local needs and circumstances, a holistic approach including medial and traditional methodologies; (d) address special needs of segments of the population, including those of the elderly, youth and women; and (e) be based on a community healing approach designed to address needs of individuals, families and communities, which may include Communities of Interest.[40]

A second way to extend the scope of transitional justice beyond individual survivors alone is through attention to the potential danger of generating divisions between survivors and aboriginals who were not sent to residential schools. This risk is generated by the fact that compensation is awarded to individuals (and not communities) and by a truth commission that focuses on the experience of survivors. Roughly 10 percent of the aboriginal population of Canada has received compensation for their residential school experience, which means that roughly 90 percent are left out of the transitional justice framework, have received no apology, and are unlikely to participate in the main events of the TRC.[41] Part of the legacy of the residential schools is fractured communities. Transitional justice must be careful not to reproduce that outcome.

The TRC should therefore take seriously the claim that harms were done to families and communities as a whole, not only to individual survivors. Commissioners may choose to translate their mandate broadly, to reach out to aboriginals who are not school survivors, and to support the "community healing" dimension of the settlement agreement with outreach programs intended to draw whole communities, and not only survivors, into a common dialogue.

One way to do so may be through reconciliation – a concept that is underspecified in the context of the Canadian TRC.[42] The Truth and Reconciliation Commission is clearly tasked with providing a forum for survivor testimony and for documenting and archiving such testimony. Along with an independent research component, this dimension of the TRC has been identified as fulfilling the mandate for uncovering the truth of the residential schools policy and experience.

How the TRC will achieve the complementary task of reconciliation is left unclear in the TRC mandate, but it is worth considering seriously as "reconciliation" could

[40] Indian Residential Schools Settlement Agreement, Schedule M, Funding Agreement between the Aboriginal Healing Foundation and Canada, May 8, 2006; available at www.residentialschoolsettlement.ca/Schedule_M.pdf. Hereinafter cited as "IRS Agreement."

[41] Ninety-four thousand people applied for the common experience payments, and 1.3 million people reported at least some aboriginal ancestry in the 2001 census. See 2001 Census, "Aboriginal Peoples of Canada," Statistics Canada, 2001; available at www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm.

[42] When Justice Harry LaForme resigned as TRC Comissioner in September 2008, he cited differences between himself and the other commissioners over whether the TRC should focus on truth, as they proposed, or on reconciliation, as he insisted. The substance of this difference has never been fleshed out, and it remains very unclear what LaForme meant by reconciliation, and how his vision differed substantively from that of his colleagues. Nevertheless, his claim and resignation have put the issue of reconciliation on the table in potentially fruitful ways.

provide a bridge between "survivors" and "nonsurvivors," and not only between aboriginals and nonaboriginals. One way to do both would be to try to use the TRC to organize and mobilize aboriginal political participation, taking advantage of the fact that the truth commission will hold hearings and commemorations in hundreds of small communities across Canada. This government-funded odyssey presents opportunities for information dissemination, political education, organization, registration, and mobilization among a population that is normally fractured, uninformed or misinformed, and politically apathetic.

The concept of reconciliation could be mobilized to rebuild capacity and institutions for political participation at three distinct levels of engagement: self-government, aboriginal political leadership, and Canadian politics. One way to reach beyond survivors alone is to invest in local capacity building to strengthen indigenous self-government. Such a project might be conceived as a springboard for mobilizing an aboriginal political voice and reinvesting First Nations in Canadian political life, building trust in the democratic process and democratic institutions. If the commission can reach beyond survivors to promote local capacity building, and to invest aboriginal peoples in Canadian politics, it may be able to activate multiple tendrils of reconciliation.

Third, indigenous leaders could try to extend the concept of transitional justice beyond the residential schools policy alone to open up a debate on historic injustice more broadly. To some extent, the IRSSA has already accomplished one such move by negotiating a "common experience payment" for all residential school survivors. Previous frameworks for addressing government responsibility for the residential school system allocated compensation only to those former students who suffered sexual or serious physical abuse at the schools. Jane Stewart's 1998 Statement of Reconciliation expressed regret not for the residential school system as a whole, but specifically to those students who had suffered physical or sexual abuse in the schools. Such a paradigm sustains the myth that the system itself was faultless by acknowledging only harms perpetrated by particular individuals (a few bad apples) within the system. A common experience payment that offers compensation to anyone who went through the residential school system, regardless of their experience within the system, sustains a more far-reaching critique of the system as a whole.

Aboriginal leaders may be able to push a transitional justice framework even further to demonstrate that the residential school system was itself part of a larger web of racist and oppressive government policies that have structured and limited indigenous life and life chances. The residential school system was not an aberration in Canadian government policy toward First Nations. The system was of a piece with other racist and discriminatory practices that have structured aboriginal life and life chances for the past three hundred years, mostly under the sheltering umbrella of the Indian Act. The government's acknowledgment of the injustice and cruelty of the residential school system offers an opening that aboriginals could use to highlight the injustices of other government policies, and the almost ludicrous

effrontery of offering an apology for the residential school system alone in the light of the apocalyptic damage and harm the colonial and Canadian governments have perpetrated against aboriginal peoples. To the extent that a transitional justice paradigm supposes the existence of historic injustice, and implies that states have an obligation to redress such injustice, it may open space for a much broader conceptualization of the actual injustices postcolonial governments may be held responsible for.

THE TEMPORAL IMPLICATIONS OF "TRANSITIONAL" JUSTICE

The first sentence of the "Mandate for the Truth and Reconciliation Commission" states, "There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future."

The scope of transitional justice is not only limited spatially, to a particular segment or type of injustice, but also has the potential to be contested temporally. For the government, one goal of transitional justice is to draw a line through history, emphasizing that it takes responsibility for government abuses that are nevertheless firmly in the past. It thereby underlines the difference between the past and the present, and the distinction between present and past policy. It hopes also to bring an end to recriminations that keep it morally on the defensive. Such government initiatives as apologies, truth commissions, and reparations are designed in part to allow the government and the dominant (settler) society to say finally to aboriginal peoples "OK, now we're even." The "transition" is to an even playing field in which the government can no longer be held accountable for past wrongs.

For indigenous leaders, transitional justice is not a wall but a bridge. Aboriginal peoples will have an interest in using apologies, compensation, and truth commissions to draw history into the present and to draw connections between past policy, present policy, and present injustices. Indigenous peoples may wish to extend new conceptions of historical wrongs to demonstrate that certain present policies reinscribe historical injustices and relations of oppression. It has taken many years for nonaboriginal Canadians to recognize and acknowledge that the residential school system was racist, abusive, and fundamentally wrong, not only in its practice but in its intent. Indigenous leaders may hope to use the moment of transitional justice to push this cognitive transformation to question the legitimacy of present policies and to draw conceptual links between present and past policies. Whereas the government may try to use transitional justice to signal a break with the past, indigenous activists may try to use the past as a way to critique the present. For them, transitional justice is effective to the extent it links the past with the present. The "transition" is to a relationship in which connections between past and present are firmly acknowledged, and in which the past guides present conceptions of obligation.

The tension between government and indigenous conceptions of how transitional justice affects the relationship between past and present is evident in reparations,

the TRC, and the apology. The IRSSA provides "at least $1.9 billion" for "common experience" payments to former students who lived at one of the residential schools. Each student is entitled to $10,000 for the first year, or part of a year, that s/he spent at school, and $3,000 for each additional year. Common experience payments are not taxable. Family members of students are not eligible for compensation. Students who suffered sexual or serious physical abuse may additionally go through an "independent assessment process" to determine the extent of their abuse and, therefore, the extent of their compensation. As the public notice explaining the residential school settlement states, "Awards are based on a point system for different abuses and resulting harms. The more points the greater the payment."[43] The "independent assessment process" replaces the alternative dispute resolution process previously in place. By July 2008, the government had received 94,085 applications for the Common Experience Payment and issued payments to 66,232 survivors. Payments have been somewhat lower than anticipated, primarily because of problems with documenting attendance, and a significant number of cases are being contested.[44]

Once the settlement agreement was reached, former students of residential schools faced a stark choice. By filling out a claim form and accepting compensation, former students gave up the right to go through the courts in the future. The public notice of the settlement states, "Former students – and family members – who stay in the settlement will never again be able to sue the Government of Canada, the Churches who joined in the settlement, or any other defendant in the class actions, over residential schools."[45] Former students who wished to retain the right to sue had to submit a form to "opt out" of the class action by August 20, 2007. The government included a clause in the agreement that stipulated that if 5,000 people opted out of the common experience payment, the government could back out of the agreement altogether.

From the perspective of the government, the clear intent of the settlement agreement was to shut down the wave of litigation that propelled the issue of residential schools onto the political stage and kept the Canadian government on the defensive for more than fifteen years. If the settlement agreement did not accomplish that goal, the government explicitly, and legally, secured the right to back out of the agreement. Nevertheless, the agreement did accomplish that goal. "With only 340 people opting out by the 2007 deadline, the Settlement Agreement has effectively corralled residential schools claims into a standardized compensation process."[46] In 2006,

[43] "IRS Agreement."

[44] International Center for Transitional Justice, "Where We Work: Canada"; available at www.ictj.org/en/where/region2/513.html.

[45] Indian Residential Schools Settlement, "Official Court Notice," 2007; available at www.residentialschoolsettlement.ca/summary_notice.pdf.

[46] Linda Popic, "Compensating Canada's Stolen Generations," *Indigenous Law Bulletin* 7, no. 2 (December/January 2008): 15.

there were roughly 12,000 claims lodged against the churches and the government; these were largely resolved by the settlement agreement.[47]

In a context of transitional justice, there are benefits to such a move. A compensation package limits the amount of compensation an individual can receive but offers reparation more broadly to all those affected. From the perspective of compensation alone, a widely disbursed "common experience payment," supplemented by additional payments for abuse, can be seen as fulfilling a commitment to justice. Pablo de Greiff makes the case that a disparity in the amount of an award does not necessarily produce an injustice to the extent that reparations programs obviate other costs associated with litigation: long delays, high costs, cross-examination, gathering evidence, and the possibility of an adverse decision.[48] AFN and other residential school survivor groups have pointed explicitly to these costs when they endorse the compensation package included in the settlement agreement.

Transitional justice nevertheless normally conceives such initiatives as criminal prosecutions, truth commissions, reparations, and memorialization as complementary. "To be effective transitional justice should include several measures that complement one another. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as 'blood money' – an attempt to buy the silence or acquiescence of victims."[49] The settlement agreement has the potential to be perceived in this way precisely because it offered compensation only in exchange for an end to court battles.

Indeed, if reparations and truth commissions are offered as an alternative to law, they may even be the source of renewed grievance.[50] To the extent that transitional justice is perceived as a way of closing off legal avenues of redress, and of insulating the government (and churches) from the law, some of its reconciliatory potential may be squandered. The mandate of the TRC reinforces this trade-off between law and transitional justice, making clear that the truth commission is not empowered to "hold formal hearings, act as a public inquiry, or conduct a formal legal process." The truth commission does not possess subpoena powers, and the commission

[47] Ibid.

[48] Pablo de Greiff, "Justice and Reparations," in Pablo de Greiff, ed., *The Handbook of Reparations* (New York: Oxford University Press, 2006), 459.

[49] International Center for Transitional Justice, "What Is Transitional Justice?"; available at http://www.ictj.org/en/tj/. Some survivors do in fact appear to view compensation through this lens, suggesting that the offer of money further compromised their integrity. The fact that so few survivors opted out of the compensation package should not be taken as evidence that most people are satisfied with it, or that compensation has put an end to grievance.

[50] A "lump sum" payment can also be challenging for receiving communities, creating divisions among beneficiaries and nonbeneficiaries, including within families and extended families. In Canada, the lump sum payments have already been linked to suicides, a rise in substance abuse, and predatory marketing practices. See Jack Branswell and Ken Meaney, "Aboriginal Settlements Bring Woes of Their Own: Abuse Payments Trigger Trauma, Linked to Deaths," *Ottawa Citizen*, Janurary 26, 2009; available at www.ottawacitizen.com/Aboriginal+settlements+bring+woes+their/1217628/story.html.

cannot make any findings or express any conclusion or recommendation regarding the misconduct of any person. Nor shall the commission "name names in their events, activities, public statements, report, or recommendations, or make use of personal information or statements made which identify a person"; neither will it "record the names of persons so identified" when they are named in testimony. These limitations make the Canadian TRC significantly weaker than many other truth commissions, for example in South Africa. The TRC is tasked with eliciting and documenting survivors' accounts of their Residential School experience, which may inscribe a "survivor narrative" into Canadian history and act as a bridge to the present. Nevertheless, the TRC is also part of the process of putting an end to the government's legal liability.

The apology has also been used to draw a line through history. On June 11, 2008, Canadian Prime Minister Stephen Harper stood in the House of Commons and issued a statement of apology to victims of the Residential School system (see Appendix II). Against the backdrop of other Conservative government policies toward First Nations, the Harper apology is somewhat anomalous. The Conservative government firmly resisted demands for an apology until at least August 2007. In March 2007, then minister of Indian Affairs Jim Prentice insisted that an apology would not accompany the TRC and the victims' reparations package ordered by the court in the Indian Residential Schools Settlement Agreement because it was not required by the agreement. He also suggested that no apology was necessary, since "fundamentally, the underlying objective had been to try and provide an education to aboriginal children" – a benign motive, in his mind, that differentiated this case from that of Maher Arar's torture in Syria and the head tax paid by Chinese immigrants in the first half of the twentieth century – two other policies for which Harper had apologized in his first two years in office.[51] Prentice and Harper reportedly believed that, if there was to be an apology, it should come after the TRC issued its final report – after the evidence was in, in other words.[52]

Nevertheless, in April 2007, Liberal MP Gary Merasty set forth a motion in the House of Commons calling on MPs to apologize, and the Tories voted in favor. On May 1, 2007, the House of Commons issued an apology, but the executive remained recalcitrant. Other MPs and the Indian Affairs minister evidently weighed in with Harper and convinced him of two things. First, that an apology would help build trust and secure support for the First Nations initiatives the Conservatives hoped to advance. Bill C-44 was in front of the Aboriginal and Northern Affairs Committee from March through June of that year, and opposition committee members reported that they were under "considerable pressure" to pass the bill.[53] Second, residential

[51] "Why to Apologize for the Residential Schools," *The Globe and Mail*, March 28, 2007, A22; Bill Curry and Brian Laghi, "Mounting Sense of Urgency Was Apology's Catalyst," *The Globe and Mail*, June 13, 2008, A4.

[52] "Aboriginal Agenda Conflicts with Background of Harper Advisors," Harper Index.

[53] Rarihokwats, "Legal Experts Cite Grave Problems with Human Rights Bill C-44."

school students were dying at the rate of four per day, which would mean that many would not live to hear an apology at the end of the TRC mandate in five years.

In his speech from the throne, given at the opening session of parliament in October 2007, Harper promised an apology.[54] According to Indian Affairs minister Chuck Strahl, the wording of the apology was shaped in part by "ongoing consultations" between Strahl, the prime minister, and residential school survivors. Nevertheless, Harper faced criticism that indigenous leaders had not been sufficiently involved in drafting the apology. For example, the government refused to circulate a draft of the apology, despite requests from the Assembly of First Nations and the National Residential Schools Survivors Society. NDP leader Jack Layton warned that the Conservative government "run[s] the risk of that kind of paternalistic attitude of 'we know best and First Nations will just have to accept what we dish out.'"[55]

In fact, in the weeks leading up to the apology, the AFN ran itself ragged trying to ensure that Harper would deliver an appropriate apology in the appropriate way. On one level, AFN leaders were probably concerned that the apology could be offered in such a way that it failed to satisfy the needs of survivors to hear the government accept responsibility and express regret, and yet satisfied the government's obligation to issue an apology. Even if the apology was a poor one, it would probably be the last one residential school survivors would get. The AFN hoped to make sure the moment was not squandered.[56]

Several aboriginal groups also complained that the government had not funded travel for school survivors who wished to witness the apology in person. As Strahl told reporters, "We're not going to pay for thousands of students to fly to Ottawa." Roughly 100 aboriginals, mainly board members of school survivor groups, were flown to Ottawa at government expense.[57]

A few hours before the apology, Conservative MP Pierre Poilievre said on an Ottawa radio show, "Now, along with this apology comes another $4 billion in compensation for those who partook in the residential schools over those years. My view is that we need to engender the values of hard work and independence and self-reliance." His outburst generated a torrent of e-mail responses, much of it accusing him of undermining the apology. Although Poilievre issued his own apology in

[54] Curry and Laghi, "Mounting Sense of Urgency Was Apology's Catalyst."

[55] "Plan for Residential-School Apology Criticized," *The Globe and Mail*, June 6, 2008, A4; "Native Groups Shut Out of Residential Schools Apology," *The Canadian Press*, June 6, 2008, A5.

[56] Brett Throop, "AFN Chief Visits Trent," *Arthur Student & Community Newspaper*, November 24, 2008; available at www.trentarthur.ca/index.php?option=com_content&task=view&id=1025&Itemid=33. The AFN's concern over the wording, timing, and delivery of the apology can also be attributed to an interest in using the apology to create a legacy for Fontaine. As the elected leader of the Assembly of First Nations, Fontaine is able to take credit for government initiatives that take place while he is in office. When such initiatives fail, as they did for example in the case of the Kelowna Accord, his legacy suffers a setback. In particular because of his role in negotiating the settlement agreement, Fontaine's reputation is tied to the success of the apology, compensation, and the TRC.

[57] "Plan for Residential-School Apology Criticized," *The Globe and Mail*, June 6, 2008, A4.

the House of Commons the next day, fully retracting his remarks, his comments, for many, revealed the cynicism of the Harper apology against the backdrop of the Conservative government's otherwise regressive policies toward First Nations.[58]

Most residential school survivors and First Nations leaders nevertheless endorsed the apology and approved of its wording. Many were pleased that Harper had used the term "survivor" to refer to former students, because Ottawa has long resisted the terminology employed by most groups of former residential school students. Harper also acknowledged the damage that schools had caused to indigenous communities and cultures, and not only to individual students, and to the capacity of First Nations to reproduce and pass down their languages and traditions. Harper said explicitly "We are sorry," and he was clear about what the government was sorry for. He also, at least metaphorically, transferred responsibility for the residential schools experience from indigenous communities to the government. Specifically, Harper said, "The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a government, and as a country." He concluded by endorsing the Truth and Reconciliation Commission and expressed hope in its ability to "educate all Canadians" about the residential school system and to forge a new relationship between aboriginal and other Canadians. Most indigenous commentators agreed that the text and tone of the apology was sincere.

The apology included both of the dimensions that de Greiff has identified as important components of reconciliation: the acceptance of responsibility and the expression of regret. De Greiff argues that apologies act most importantly to affirm common norms and values. The apology acknowledged that a norm was violated, and the acknowledgment reestablished a common moral ground. In this case, Harper acknowledged that indigenous judgments about the wrongness of residential schools were right after all, and the judgment of the government, and of the churches, and of the dominant society, was wrong. Many residential school survivors focused on this dimension of the apology. They insisted that the prime minister had to go beyond saying "We are sorry" and admit that they were *wrong*.[59] In his speech, Harper said three times that the government's residential school policy was wrong, and many indigenous people claimed to draw strength from that admission. AFN leader Phil Fontaine explained, for example, "For first nations, it will restore our dignity because it will say we were unjustly wronged as a people over generations simply because of who we were," he said. "The apology will affirm that we are as good as anyone."[60]

In his response to the prime minister's apology, read, after protracted negotiations, from the floor of the House of Commons, Fontaine said,

[58] "MP Retracts Radio Remarks," *The Globe and Mail*, June 13, 2008, A4, see also the "reader's comments" accompanying article online; and "Next Step: More Accountable and Transparent Native Governments," *The Globe and Mail*, July 28, 2008, A13.

[59] Elise Stolte, "PM's Apology Must Go beyond Sorry, Aboriginals Say; Healing for Community Rests on Ottawa Taking Responsibility for Its Past," *Edmonton Journal*, June 9, 2008, A1.

[60] *Anne McIlroy* and *Bill Curry*, "97 Years Later, Apology at Last," *The Globe and Mail*, June 9, 2008, A1.

> Never again will this House consider us the Indian problem just for being who we are. We heard the Government of Canada take full responsibility for this dreadful chapter in our shared history. We heard the prime minister declare that this will never happen again. Finally, we heard Canada say it is sorry. Brave survivors, through the telling of their painful stories, have stripped white supremacy of its authority and legitimacy. The irresistibility of speaking truth to power is real. Today is not the result of a political game. Instead, it is something that shows the righteousness and importance of our struggle.[61]

A surprising number of nonindigenous Canadians were also aware of, and supported, the apology. In a survey conducted between June 11 and 13, 2008, 83 percent of respondents were aware of the apology to residential school students. Among those who were aware, 71 percent agreed or agreed strongly that the government should apologize, and only 18 percent disagreed or strongly disagreed. Political affiliation nevertheless distinguished respondents, with only 66 percent of Conservatives expressing support for the (Conservative government's) apology, compared with 75 percent of Liberal voters and 82 percent of NDP voters. One third of respondents said they were left with a more favorable view of government, and the apology had the greatest positive impact among young people.[62]

Expectations about what will come of the apology nevertheless diverge significantly. For many nonindigenous Canadians, the apology was meant to close a chapter of Canadian history. By accepting guilt, many expect to be able to move on, to draw a line that separates the present from a shameful and unfortunate past. The point of an apology, many believe, is to put the past behind us. In our personal lives we often use apologies to shut down recrimination and take back some of the moral ground we have lost by our actions. Many people expect an official state apology to do the same. As one columnist wrote, "It is much to be hoped that native Canadians accept the apology in the spirit in which it was offered and now move on, lest a grievance culture becomes so deep-rooted that they are unable to transcend it and self-identify with victim status forevermore."[63]

Former Conservative party campaign manager Tom Flanagan expressed a similar sentiment when he noted, with indignation, that indigenous leaders expected the apology to lead to something more. "The Conservative government," he said, "is now being reminded of the truism that one thing leads to another. The aboriginal industry sees the government's re-apology for Indian residential schools as a sign of weakness, leading to a wave of demands to resuscitate the Kelowna Accord." Instead,

[61] "Canada Apologizes," *Globe and Mail*, June 11, 2008, A1. Harper initially refused to allow a response from the floor, and he invoked parliamentary rules to prevent it. But AFN staffers were able to identify a set of procedural rules that allowed a response under such circumstances, and the leaders of the opposition parties also favored responses.

[62] "School-Abuse Apology Widely Backed," *The Globe and Mail*, June 14, 2008, A4.

[63] John Ivison, "A Good Day for Canada, and for Stephen Harper," *Victoria Times Colonist*, June 12, 2008, A14.

he insists, the apology should have no effect on the government's First Nations policy. "At this juncture, it is critical for the government not to get knocked off its own agenda." Indeed, what Flanagan proposes as a next step is that First Nations reform their own governments to demonstrate more transparency and accountability. Apparently, the government's apology should lead to a quid pro quo – some kind of acknowledgment that First Nations have been complicit in their own misfortune, and also bear responsibility.[64]

For most indigenous leaders and residential school survivors, however, this is not the obvious next step, although the presumption that the apology implies further action is practically universal. As Grand Chief Edward John wrote on the eve of the apology, "An apology alone is not reconciliation. An apology cannot undo history."[65] Mary Simon, president of the Inuit Tapiriit Kanatami, has reiterated that sentiment, insisting "that real and lasting forgiveness must be earned. It will be forthcoming only when it becomes clear that the government is willing to act."[66] AFN leader Phil Fontaine consistently invokes the apology as a source of legitimacy and momentum, implying not only that something must follow from the apology but that something must follow quickly. When Justice Harry LaForme resigned as chair of the TRC commission in October 2008, Fontaine issued a statement that said, among other things, "We are prepared to act quickly with due regard to Survivors, but we must not lose the momentum that was created by the Apology of June 11th. We cannot afford to be distracted from the purpose and intent of the TRC and its work that is vital to the future First Nations-Canadian relations in this country."[67]

In the months since the apology, Fontaine and others have pointed repeatedly to the large gap between the rhetoric and intent of the apology and the TRC and the Conservative government's continued recalcitrance on social welfare policies toward First Nations. At a July 2008 meeting of premiers, Fontaine said the apology and the work of the commission were very important for the survivors and for the country. He added, however, that concrete actions were needed to back the rhetoric. In his statement, he pointedly recalled that the Conservatives had scuttled the Kelowna Accord, adding that "First Nations want more funding for education, training, and skills development for native children. What we want to see from the Council of the Federation is continuous support to fill the gap of quality of life between Canadians and us."

64 "Next Step: More Accountable and Transparent Native Governments," *The Globe and Mail*, July 28, 2008, A13.

65 "Break from the Past; What's Expected from the Residential Schools Apology," *Vancouver Sun*, June 11, 2008, A15.

66 "Leaders Hope Apology Will Curb Prejudice; Truth and Reconciliation. 'Real and Lasting Forgiveness Must Be Earned,'" *The Gazette*, Montreal, June 14, 2008, A14.

67 Assembly of First Nations, "National Chief Issues Statement on Resignation of Justice Harry LaForme as the Chair of the Truth and Reconciliation Commission," October 21, 2008; available at www.afn.ca/article.asp?id=4254.

The sincerity of apologies cannot be judged by tone alone and will inevitably be seen in the context of "what comes next." Although indigenous reactions to the apology were very positive in the immediate aftermath, the sense of vindication, and of the beginning of a new era, dissipated within months as indigenous people began to note that the apology was not followed by any tangible commitment. For many, a commitment to reconciliation signals a commitment to more concerted efforts, and greater funding, for indigenous initiatives. Reconciliation, many aboriginal leaders believe, should be signaled by government responsiveness to aboriginal needs and demands. But there is no evidence of a "new dawn" in the relationship between indigenous and nonindigenous Canadians, and the more the evidence is missing, the more isolated and irrelevant the apology appears. One way to interpret the disappointment that has followed so quickly on the heels of the apology is that First Nations saw it as a beginning, whereas the government may have seen it as an end.

One of the most conspicuous connections between the residential school system and present government policy toward First Nations is child welfare. By some estimates, the Canadian Child Welfare system is currently responsible for roughly 27,000 aboriginal children who have been removed from their homes into protective custody. According to a report issued by the AFN, there are currently more than three times as many aboriginal children in the care of child welfare agencies as there were in residential schools at the height of the system. Whereas one out of every two hundred children in the general population is placed in the care of child welfare, one out of every ten aboriginal children have been removed from their homes by child welfare agencies.[68] Most children are removed from their families because they suffer from "neglect" associated with substance abuse. Many of those substance-abusing parents are residential school survivors.

Once removed, the relationship between parents and children is remanded to the courts. With inadequate understanding of the legal system, inadequate legal counsel, and limited or no translation services, court proceedings often terminate parental rights. Responsibility and accountability rest with the mandated child welfare and legal systems and away from First Nations families and communities.

Aboriginal peoples often draw connections between the residential school system and present child welfare policies that remove aboriginal children from their homes and communities. In November 2008, sixty First Nations residents of Regina protested outside a court hearing in which grandparents were attempting to regain custody of a five-year-old girl who had been removed from her home by child welfare services. The protestors compared this custody battle to the battle First Nations people faced in the past with the residential school system. As the organizer explained, "It's been done in history ... where they took the kids out of the home and put them in the school," she said. "That caused a lot of problems with addictions and

[68] Assembly of First Nations, *Leadership Action Plan on First Nations Child Welfare*, Health and Social Secretariat, 2006; available at www.afn.ca/misc/afn-child.pdf.

all the social ills because they couldn't take care of their families. The government apologized for that. They said they were sorry and they compensated, and now it's starting over again, but this time . . . in a courtroom."[69]

First Nations seek jurisdiction over aboriginal child welfare. Child welfare theorists have identified a set of best practices for aboriginal children, including community-based intervention that empowers the community – family, friends, and neighbors – to be involved in decisions about the well-being of children in their community. In Northern Manitoba, one First Nations Child and Family Service Agency has implemented a family welfare program that operates outside of the regular child welfare and court systems, using traditional peacemaking methods and family mediation. The program brings together family, extended family, community members, Elders, social workers, and community service providers in the resolution of child protection concerns through the use of properly trained *Okweskimowewak* (family mediators).[70] The program explicitly operates outside of the provincial legal system and attempts to resolve child welfare issues using Cree norms and laws.

By linking the past with the present, a transitional justice framework may be used to illuminate the subtle, and not so subtle, racism and cultural bias that continues to taint the relationship between the Canadian government and aboriginal families. To the extent child welfare policy can be linked to the residential school system, even conceptually, if not institutionally, it may fall under the mandate of transitional justice. Through the child welfare system, the past is visited on the present. Could the TRC, which has a significant research component, include research on First Nations child welfare policy? The transitional justice framework may be used to push the government to implement the best practices that have already been identified, including community-based intervention using aboriginal laws, and mediation as an alternative to the courts. Child welfare may be one specific area in which transitional justice can be deployed to shine critical light on the present through the lens of the past.

SOVEREIGNTY AND LEGAL PLURALISM

The issue of sovereignty may importantly distinguish attempts to use transitional justice measures in postauthoritarian and postconflict societies from the use of transitional justice to address historic injustices against indigenous peoples in societies that are not undergoing transition. States use transitional justice measures to make amends for human rights violations that they commit against their own

[69] Derek Putz, "Case a Flashback to Residential School System: Protestor," *Leader Post*, November 20, 2008, 1.

[70] Joe Pintarics and Karen Sveinunggaard, "Meenoostahtan Menisiwin: First Nations Family Justice, Pathways to Peace," *The First Peoples Family and Child Review* 2, no. 1 (2005): 67.

citizens. The transitional justice framework is distinct from a human rights framework to the extent it balances demands for criminal prosecutions against a perceived need to sustain democratic institutions in a transitional setting where such institutions may be fragile.[71] Against this conceptual backdrop, it should be clear that using transitional justice measures in the absence of transition or regime change is of more than semantic concern. Transitional justice measures are designed in large part to reinscribe a common national identity, legitimate the government, and to reestablish the moral authority of state sovereignty – all of this, without any transition.

Even governments that have not undergone transition may be able to employ the conceptual architecture of transitional justice to reinforce the sovereign authority of the state over its indigenous population. Apologies highlight the ways in which the state failed a segment of *its own* population by failing to treat its citizens equally. Truth commissions aim in part to rewrite the history of a nation and to weave the indigenous historical experience into a new common national narrative. Truth commissions also aim to achieve reconciliation, to restore trust in government, and to include indigenous people in the creation of collective memory and history. Transitional justice measures aim to "promot[e] confidence in the political arrangements, [and] restor[e] to citizens full membership in society."[72] They are about integration and the assertion of a common national identity.

Yet one of the historic injustices that lies at the heart of indigenous identity is loss of sovereignty.[73] Indigenous peoples are defined in part by the fact that their sovereignty was not recognized by colonial powers that appropriated territory and sovereignty under the doctrine of *terra nullius*. Indigenous identity is premised on a common experience of dispossession, and indigenous politics draws its own legitimacy from the illegality of that usurpation of sovereignty. The demand for territorial self-government, which challenges the sovereign authority of the state, has emerged as the central defining claim of the international indigenous rights movement.[74]

The use of a transitional justice framework could undercut the conceptual and legal connection the indigenous rights movement has drawn between the historical

[71] Arthur, "How 'Transitions' Re-shaped Human Rights."

[72] Jaime Malamud-Goti, "Trying Violators of Human Rights: The Dilemma of Transitional Democratic Goverments," in *State Crimes: Punishment or Pardon*, papers and report of the conference, November 4–6, 1988, Wye Center, Maryland (Aspen Institute, 1989), 81–2; cited in Arthur, "How 'Transitions' Reshaped Human Rights," 355.

[73] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

[74] Although it is true that not all indigenous peoples demand self-government, the demand is nevertheless the distinguishing feature and binding thread of the international indigenous rights movement. As an organizing principle of indigenous politics, it is an important condition of the political voice of the movement.

loss of sovereignty and the contemporary political presence of aboriginal peoples. It could, as a result, practically limit their capacity to make some of the claims – to self-government and territorial autonomy – that define the indigenous rights movement. Indigenous leaders have sought to resist the legitimating function that transitional justice performs on behalf of the state.

But they do so in a careful balancing act. Indigenous peoples also make other demands, demands that do rely on a presumption of state sovereignty, and that rest on the fact that aboriginal populations have been excluded from many of the social, economic, and political benefits of citizenship. Indigenous political claims derive not only from a history of forced inclusion, which has engendered demands for self-government, but also from exclusion, which has led to demands for full – social, economic, and political – rights in citizenship. To the extent they hope that transitional justice measures and rhetoric can animate these other claims, indigenous leaders may welcome government willingness to acknowledge a historical debt that also implies present obligations.

Indigenous demands for such transitional justice measures as apologies and truth commissions highlight the emotional and psychological complexities of the history and relationship between indigenous peoples, nonindigenous citizens of the same state, and the government. Indigenous demands for recognition and acknowledgment are tempered by simultaneous claims to sovereignty. Indigenous demands for truth telling stem in part from a desire to inscribe their own historical experience in the history of the nation, while nevertheless maintaining a separate identity. For indigenous peoples, one aim of truth telling, apologies, and reparations is to strengthen communities and self-governing capacities that were undermined by residential schools and other racist government practices.

The potential contradictions generated by addressing indigenous claims for justice through a transitional justice framework, and by the concept of reconciliation that sits at the heart of that framework, might be addressed by importing into transitional justice the conception of "reconciliation" already implicit in Canadian law. This concept of reconciliation is premised on recognition that First Nations were sovereign at all relevant moments in the formation of the Canadian state. Reconciliation entails balancing aboriginal sovereignty with the sovereignty of Canada. More specifically, the Supreme Court has interpreted reconciliation as an obligation to reconcile Canadian and aboriginal legal systems.[75] Since 1977 and the entrenchment of Section 35 in the Constitution, Canadian jurisprudence has "moved away from governance under the Indian Act towards the general principle of reconciliation which the Supreme Court of Canada has said is at the heart of aboriginal–Crown relations . . . what is being reconciled is the pre-existence of aboriginal

[75] Supreme Court of Canada, *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (Can); *R v Van der Peet* [1996] 2 SCR.

societies, including their legal systems and their laws, with the assertion of Crown sovereignty."[76]

The Canadian constitutional conception of reconciliation appears to be a valuable resource for transitional justice in these settings – toward indigenous peoples, in the absence of regime transition. Transitional justice measures in Canada should take this concept of reconciliation into account, extending the institutional and rhetorical spaces where indigenous law may be applied and acknowledged. Truth and reconciliation commissions in particular might be sites in which indigenous conceptions of truth and reconciliation, along with indigenous structures and procedures for achieving truth and reconciliation, could be employed. Such a precedent could have legal – juridical and jurisdictional – implications that extend beyond the moment of transitional justice. The legal principle of reconciliation might be used to mitigate some of the ways that transitional justice could threaten aboriginal claims to autonomy in four ways.

First, one implication of reconciliation is negotiation among equals, which has been interpreted as a duty to consult that imposes on the Canadian government an obligation of good faith. In the context of transitional justice, such a duty could be held to mean that every aspect of transitional justice (the text and timing of the apology, the amount and extent of compensation, the mandate and staffing of a truth commission) should be negotiated between the government and aboriginal representatives. In Canada, this model was approximated when AFN leader Fontaine short-circuited the political agreement offered by the government by bringing a class action suit against the churches and the Canadian government. The Indian Residential Schools Settlement Agreement was the result of negotiations among the three parties, leading to an out-of-court settlement that was approved, and is enforceable, by the court. Once the opt-out option was closed, the Canadian government was legally bound to the agreement; even if there is a change of administration, it will be held to its commitment.

Second, transitional justice may be especially well-equipped to deal with demands for legal pluralism. Truth commissions are already set up, in part, to do some of the work that court cases would do, most importantly to provide testimony, without some of the more onerous and adversarial characteristics of Western court proceedings such as rules of evidence, burden of proof, cross-examination, and expensive legal counsel. Truth and reconciliation commissions, in short, have already recognized the ways in which Western courts and legal norms are inadequate to the tasks of truth telling and reconciliation.

[76] Louise Mandell, in oral testimony in front of the Standing House Committee on Aboriginal Affairs, June 5, 2007, see Rarihokwats, "Legal Experts Cite Grave Problems with Bill." See also Jeremie Gilbert, "Historical Indigenous Peoples Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title," *International and Comparative Law Quarterly* 56 (July 2007): 583–612, esp. 591–2.

Nevertheless, such commissions also leave open the question of what norms and procedures are appropriate to truth telling and reconciliation, creating an institutional opening where indigenous law could step in. Public hearings can be conducted in a variety of different ways, and one possibility would be to conduct such hearings in accordance with the norms and procedures of indigenous laws. The mandate of the TRC empowers the commission to recognize "the significance of Aboriginal oral and legal traditions in its activities" in the exercise of its duties.[77]

Beyond offering visibility and status to indigenous legal systems, such practice could strengthen indigenous law itself. The TRC could engage tribal Elders and others familiar with indigenous law, and install their knowledge and frameworks at the center of the process. Incorporating indigenous law into truth and reconciliation processes will require funding for training in indigenous law. To the extent some aspects of indigenous law require community participation and consensus, it can enlarge the truth commission beyond residential school survivors to include whole communities. As a result, it may also expose indigenous peoples to legal systems that have grown unfamiliar through disuse and through interruptions in cultural transmission generated by the residential school system itself.

Indigenous laws may also advance substantively different conceptions of the harms that were generated, and the laws that were violated, by the residential school system. As a result, incorporating indigenous law into truth telling might lead to substantively different constructions of truth, constructions that may be more true to indigenous conceptions of justice and injustice.

Indigenous law should also be consulted with regard to reparations and compensation. Current practices of compensation in transitional justice rely on common law damage principles that use actuarial standards derived from insurance compensation for assigning a monetary figure to particular harms. Indigenous law should be consulted in deciding whether victims should receive different amounts of compensation depending on the actual harms they suffered, and in deciding who actually counts as a victim. Compensation that targets individual residential school survivors, and produces a hierarchy of victimhood by assigning points and monetary value to different types and degrees of violation, may violate indigenous norms and laws regarding restitution. Transitional justice measures will fail in their transformative goals if they fail to include indigenous legal conceptions of violations, victims, and justice in decisions regarding the scope and structure of apologies, reparations, and truth commissions.[78]

[77] Mandate for the Truth and Reconciliation Commission, Schedule N, 5.

[78] Some scholarly work has been done on indigenous ideas of justice, most of it focusing on indigenous beliefs in restorative, as opposed to retributive justice. Indigenous justice is often aimed at healing, and restoring the relationship between victim and perpetrator. This conception of justice is clearly compatible with many of the goals and principles emphasized in transitional justice. Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (New York: Penguin Books, 2006); and Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Oxford: Butterworth Heinemann, 1992).

Third, a transitional justice framework may open space for aboriginals to draw on international laws, conventions, and declarations that specifically address the rights of indigenous peoples, including ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples.[79] Even though Canada voted against the declaration, the document was passed by the UN General Assembly, which means it has as much force in Canada as it does anywhere. Because it is not a treaty or a convention, it is not binding on any state, but as a declaration it is a statement of principles that could be drawn down into Canadian jurisprudence. How judges would respond is an open question, which remains to be tested.[80] Transitional justice actors, including for instance TRC commissioners, could be proactive in clarifying the status of the declaration in Canada and in creating opportunities to use and develop the principles of the declaration in the work of the commission.

Finally, the Truth and Reconciliation Commission offers a significant opportunity to develop and extend the concept of reconciliation beyond the law, into the domains of history, politics, human capacity building, and cultural revaluation. Meaningful reconciliation will have to go beyond law alone. Reconciliation should involve rewriting Canadian history to include aboriginal narratives, not only about the residential school system but about the history of the nation more generally. Reconciliation will involve opening space and forging mechanisms that will promote aboriginal political voice and leverage. Reconciliation requires investing in aboriginal well-being and capacity building. Reconciliation will entail revaluing indigenous languages and cultures, lost and degraded in part through the residential school system.

CONCLUSION

Context matters. Whether transitional justice measures will serve primarily to legitimate the status quo between postcolonial states, settler societies, and aboriginal peoples, or whether they will have transformational capacity, will depend in part on the political context in which they take place. In Canada, the apology and the settlement agreement have been used in part to limit aboriginal demands for social justice and constitutional transformation, and to reinforce the individual rights framework of the Conservative Party's aboriginal policy. Aboriginal activists have tried instead to leverage the moral obligation implied by the apology and the settlement agreement to extend the scope of state responsibility. Specifically, for instance, they hoped the apology would lead to the revival of the Kelowna Accord.

One implication is that when transitional justice measures are used 1) toward indigenous peoples or 2) in cases where there has been no regime transition, their

[79] See Chris Chapman's "Transitional Justice and the Rights of Minorities and Indigenous Peoples," Chapter 8 of this volume.

[80] I am grateful to Patrick Macklem for clarifying the status of the declaration in Canada.

success must be measured by their capacity to transform the playing field. It is not enough for them to perform the standard functions of legitimation and national conciliation that they have been designed for in postauthoritarian and postconflict situations. The apology and the settlement agreement must be made relevant beyond the issue of residential schools, and beyond the circle of residential school survivors. Specifically, for example, the TRC may put the AFN in a better position to challenge Canadian government policies with regard to child welfare. More generally, the transitional justice framework should be deployed to highlight the degree to which the residential school system was merely one prong of a much more widespread and comprehensive policy of aboriginal dispossession, exclusion, and forced assimilation, with continuing impact on aboriginal well-being, culture, physical and psychological health, wealth, and citizenship rights. The scope of Canadian government obligation toward its indigenous population extends far beyond the legacy of the residential school system.

APPENDIX I

The Indian Residential Schools Settlement Agreement

On May 10, 2006, the government announced the approval by all parties of the IRSSA. The government's representative, the Honorable Frank Iacobucci, concluded the IRSSA with legal representatives of former students of Indian Residential Schools, legal representatives of the churches involved in running those schools, the Assembly of First Nations, and other aboriginal organizations.

The IRSSA was approved by the courts and came into effect on September 19, 2007. The IRSSA includes the following individual and collective measures to address the legacy of the Indian Residential School system:

Common experience payment

Upon application, a Common Experience Payment will be paid to every eligible former student who resided at a recognized Indian Residential School living on May 30, 2005, the day the negotiations were initiated.

The IRSSA stipulates that $1.9 billion be set aside for the direct benefit of former Indian Residential School students. Subject to verification, each eligible former student who applies would receive $10,000 for the first school year or portion thereof and $3,000 for each subsequent year.

Truth and reconciliation

A Truth and Reconciliation Commission will be established with a budget of $60 million over five years. It will be mandated to promote public education and awareness about the Indian Residential School system and its legacy, as well as provide

former students, their families, and communities an opportunity to share their Indian Residential School experiences in a safe and culturally appropriate environment.

The Truth and Reconciliation Commission will undertake a series of national and community events and will establish a research center for ongoing access to the records collected throughout the work of the commission.

Independent assessment process

The Independent Assessment Process (IAP) is the process to assist former students settle their claims for abuse they suffered at Indian Residential Schools.

The IAP compensates former students for sexual abuse, serious physical abuse, and certain other wrongful acts which caused serious psychological consequences for the individual. This compensation is available in addition to the Common Experience Payment.

Commemoration

The IRSSA provides $20 million in funding to commemorate the legacy of Indian Residential Schools. Commemoration is about honoring, educating, remembering, memorializing, and paying tribute to former students of Indian Residential Schools, their families, and the larger aboriginal community. It also acknowledges their experiences and the broad, systemic impacts of the Indian Residential Schools system.

The government will provide funding to facilitate regional and national commemoration initiatives that address the residential school experience and provide the opportunity to share the initiative with family and community.

Healing

The IRSSA provides for an additional endowment of $125 million to the Aboriginal Healing Foundation, to continue to support healing programs and initiatives for a further five years following the implementation date.

The church entities involved in the administration of Indian Residential Schools will contribute up to a total of $100 million in cash and services toward healing initiatives.

APPENDIX II

The Apology

On June 11, 2008, Canadian Prime Minister Stephen Harper issued the following statement of apology to former students of Indian residential schools.

> Mr. Speaker, I stand before you today to offer an apology to former students of Indian residential schools. The treatment of children in Indian residential schools is a sad chapter in our history.

In the 1870's, the federal government, partly in order to meet its obligation to educate aboriginal children, began to play a role in the development and administration of these schools.

Two primary objectives of the residential schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture.

These objectives were based on the assumption aboriginal cultures and spiritual beliefs were inferior and unequal.

Indeed, some sought, as it was infamously said, "to kill the Indian in the child."

Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

Most schools were operated as "joint ventures" with Anglican, Catholic, Presbyterian or United churches.

The government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities.

Many were inadequately fed, clothed and housed.

All were deprived of the care and nurturing of their parents, grandparents and communities.

First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools.

Tragically, some of these children died while attending residential schools and others never returned home.

The government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.

While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.

The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today. It has taken extraordinary courage for the thousands of survivors that have come forward to speak publicly about the abuse they suffered.

It is a testament to their resilience as individuals and to the strength of their cultures.

Regrettably, many former students are not with us today and died never having received a full apology from the government of Canada.

The government recognizes that the absence of an apology has been an impediment to healing and reconciliation.

Therefore, on behalf of the government of Canada and all Canadians, I stand before you, in this chamber so central to our life as a country, to apologize to aboriginal peoples for Canada's role in the Indian residential schools system.

To the approximately 80,000 living former students, and all family members and communities, the government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this.

We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this.

We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this.

We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you.

Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

The burden of this experience has been on your shoulders for far too long.

The burden is properly ours as a government, and as a country.

There is no place in Canada for the attitudes that inspired the Indian residential schools system to ever again prevail.

You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey.

The government of Canada sincerely apologizes and asks the forgiveness of the aboriginal peoples of this country for failing them so profoundly.

We are sorry.

In moving towards healing, reconciliation and resolution of the sad legacy of Indian residential schools, implementation of the Indian Residential Schools Settlement agreement began on September 19, 2007.

Years of work by survivors, communities, and aboriginal organizations culminated in an agreement that gives us a new beginning and an opportunity to move forward together in partnership.

A cornerstone of the settlement agreement is the Indian Residential Schools Truth and Reconciliation Commission.

This commission presents a unique opportunity to educate all Canadians on the Indian residential schools system.

It will be a positive step in forging a new relationship between aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.[81]

[81] http://www.cbc.ca/canada/story/2008/06/11/pm-statement.html.

8

Transitional Justice and the Rights of Minorities and Indigenous Peoples

Chris Chapman

A significant proportion of the situations in which transitional justice claims have been made have affected minorities and/or indigenous peoples, including Guatemala, Peru, Iraq, Bosnia and Herzegovina, Rwanda, and the Sudan. These claims have covered massive and systematic violations such as population displacement, rape, cultural assimilation, and genocide. It is of interest to explore how the rights of minorities and indigenous peoples (MIPs) may be – and in some cases have been – articulated to strengthen such claims for transitional justice, and to produce outcomes in transitional justice processes that contribute to more effective and sustainable justice and reconciliation. Furthermore, the MIP rights framework may further a subsidiary objective of transitional justice – the quest for a more just and inclusive society, in which the chance of a repetition of past abuses becomes more remote.

THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES

Minority rights protections were developed to respond to situations involving religious minorities in the Ottoman Empire and tensions between countries containing minorities and neighboring countries to which those minorities bore ethnic affiliation ("kin-states"), particularly during the interwar period. In 1948, the United Nations approved the Convention on the Prevention and Punishment of the Crime of Genocide, which defines genocide as a number of acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." In the same year, the Universal Declaration of Human Rights provided that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as *race, colour,* sex, *language, religion,* political or other opinion, national or social origin, property, birth or other status" (emphasis added). The extent of obligations to eliminate discrimination were extended with the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination, or Race

Convention. The following year, the International Covenant on Civil and Political Rights (ICCPR) advanced international minority rights protections for the first time beyond the minimum requirements of the prohibition of genocide and discrimination; Article 27 mandates that minorities shall not be prevented from enjoying their culture, practicing their religion, or using their language.

In the 1990s, there was a period of rapid expansion of minority rights, partly a response to the break-up of the Soviet Union and Yugoslavia, feeding fears of endless secession demands and resulting minority conflicts on the fringes of Europe. These rights were designed to respond to the grievances voiced by minorities in the post-Soviet and -Yugoslav states and others around the world, thus reassuring them that their rights would be recognized and – it was hoped – heading off secession demands. They were contained in texts such as the Copenhagen Document of the Organisation for Security and Cooperation in Europe (OSCE),[1] the United Nations Minorities Declaration,[2] and the Council of Europe's Framework Convention.[3] It is possible to present what is now a relatively comprehensive set of rights in the following framework of four pillars:[4]

1. **The right to exist**: like everyone, minorities benefit from the right to life. However, states are also obliged to protect the existence of minority communities as a whole, which means the prohibition of genocide and assimilation – which would lead to the disappearance of a minority as a community with its own identity – and population displacement resulting in the expulsion of communities from the country. It also means that the state must provide security to minority communities, to ensure they are not targeted by other actors, such as militias.
2. **The right to nondiscrimination**: protecting minorities from direct or indirect discrimination on the basis of ethnic, religious, linguistic, or cultural identity. States must refrain from direct discrimination – for example, by focusing increased state funding on areas inhabited by the majority ethnic group, or denying jobs in the civil service to members of minorities – but they must also take steps to eradicate indirect discrimination by private actors – such as establishments that deny entry to members of minorities. The UN Race Convention states that temporary "special measures" will often be needed to help individuals overcome discrimination (Article 2.2). This is what is commonly called affirmative action.

[1] Conference on Security and Cooperation in Europe, *Document of the 1990 Copenhagen Meeting of the Conference on Security and Cooperation in Europe*; available at www.osce.org/documents/odihr/1990/06/13992_en.pdf. The CSCE was the predecessor of the OSCE.

[2] UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (A/RES/47/135), December 18, 1992.

[3] Council of Europe, *Framework Convention for the Protection of National Minorities* (1.II.1995).

[4] Chris Chapman, *Why a Minority Rights Approach to Conflict? The Case of Southern Sudan* (London: Minority Rights Group, 2008), 4–5. The author is indebted to Corinne Lennox for proposing the four pillars framework.

3. **The right to protection of identity**: preserving the freedom of minorities to practice their culture, religion, and language in the public and private spheres, and taking measures to enable minorities to develop these aspects of their identity. This can involve teaching minority languages in schools and using minority languages as the vehicle of instruction for general subjects; providing funding for minorities to run cultural associations and media services; and incorporating teaching about minorities in history curricula.
4. **The right to participation in public affairs**: ensuring that minorities can participate in decision-making processes that affect them at the local and national level, particularly as regards how their communities are governed. They must also be able to form their own associations freely and maintain links with other members of their community, including across state borders.

Indigenous standards are codified in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[5] and Convention No. 169 of the International Labour Organization (ILO).[6] They emphasize collective as well as individual dimensions of these rights. In addition to the provisions of minority rights, indigenous rights include extensive protections of land rights, including collective title. Critically, as far as transitional justice is concerned, UNDRIP requires "just, fair and equitable compensation" for lands that have been occupied or taken from them without their consent. UNDRIP also provides for the right to self-determination; for many indigenous activists, self-determination may include the right to form their own states, whereas the position of a number of governments is that it covers only the right to determine how their communities are run while respecting state sovereignty.

ARTICULATING MINORITY RIGHTS AS PART OF THE TRANSITIONAL JUSTICE PROCESS

So what do MIP rights bring to transitional justice processes? When prosecuting crimes of genocide, forced displacement, and sexual violence targeted at ethnic groups, the judgments of the International Criminal Tribunals for Rwanda and the former Yugoslavia draw mainly on international humanitarian law standards such as the 1948 Genocide Convention and the Hague and Geneva conventions. Very little mention is made of minority rights. Therefore it is of interest to explore whether new developments in MIP rights standards, some of which came into force after the events dealt with by the two tribunals, can bring something new to these processes. So many of the situations that transitional justice has been called on to address involve wholesale attacks on minority communities, not just through physical attacks but also by seizure of land and property, economic marginalization,

[5] UN General Assembly, *Declaration on the Rights of Indigenous Peoples* (A/61/295), October 2, 2007.

[6] International Labour Organization, *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989.

prohibition of community organization, the dismantling of political structures, and forms of assimilation by stealth. MIP rights standards were, in part, designed to provide comprehensive protection against these kinds of abuses. Indeed, there is an expanding body of jurisprudence covering minority rights issues such as the right to protection of traditional ways of livelihood, the right to form minority associations, and access to citizenship, using a wide range of standards including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and other regional standards. Non–legally binding declarations also carry political weight and can be used to shore up legal arguments.[7] To date, however, these have largely not been applied in international criminal prosecution efforts.

Reparations: A Clear Practical Link between MIP Rights and Transitional Justice

Where minority rights arguments have been used with more frequency in transitional justice situations is with regard to reparation claims and to demands for legal, political, and social reforms to ensure that massive and systematic abuses do not reoccur. In the case of the *Plan de Sánchez Massacre v. Guatemala*, the Inter-American Court of Human Rights heard that 268 people, mostly of the indigenous Maya-Achí community, were murdered by members of the Guatemalan army and civilian collaborators, at the height of the state's counterinsurgency campaign in 1982.[8] Among the testimonies presented, the court heard that "they separated the girls who were 15 to 20 years old from this group, and took them to Guillerma Grave Manuel's house; they raped them; they broke their arms and legs, and then they killed them. Subsequently, they killed those in the larger group and then set fire to the house. The children were smashed against the floor, and then thrown into the flames together with their parents."[9] The army ordered the bodies to be buried by members of paramilitary patrols within two hours of the massacre, forbidding relatives to bury their loved ones in accordance with Mayan sacred rites and in sacred ground. As a result of the massacre, the community was unable to continue practicing its traditions and rites: "The older people who were responsible for officiating the Mayan ceremonies died in the massacre and the traditions died with them, because the young people did not have anyone to teach them. Moreover, the military agents and the patrols monitored every meeting, so that they were afraid to hold their religious ceremonies."[10]

[7] For links to a selection of cases, see "Minority Rights Jurisprudence," *Minority Rights Group International*; available at www.minorityrights.org/1258/minority-rights-jurisprudence/minority-rights-jurisprudence.html.

[8] Inter-American Court of Human Rights, *Plan de Sánchez Massacre v. Guatemala*, judgment of April 29, 2004, Series C No. 105.

[9] Statement of Eulalio Grave Ramírez, victim, in *Plan de Sánchez Massacre v. Guatemala*, 10.

[10] Ibid., 11.

As part of the context of the massacre, the court heard that indigenous Guatemalans found it difficult to gain access to justice at the national level owing to systematic racism, geographical isolation, and lack of mastery of Spanish, the language of court proceedings. The court also took into account testimony presented to the Guatemalan Commission for Historical Clarification (CEH), to the effect that there had been "cases of dispossession of land and property by members of the Army, military agents and members of patrols, and even false reports of [the indigenous people] being guerrillas, filed so that the accusers could appropriate their land."[11]

In addition to a total compensation of 6.34 million dollars to 317 victims and survivors, the court ordered symbolic measures and affirmative action programs aimed at promoting reconciliation, providing reparation, and reversing the situation of impunity, cultural assimilation, and economic marginalization suffered by the survivors of the massacre. These included a public ceremony in Plan de Sánchez in which high-ranking officials of the government would recognize responsibility for the events, the publication and dissemination of the judgment in Spanish and Maya-Achí, the study and dissemination of the Maya-Achí culture in the affected communities, and the supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary, and comprehensive schooling in (the affected) communities. On July 18, 2005, the public ceremony took place; Vice-President Eduardo Stein delivered an apology on behalf of the state. In early 2006, the first payments were made to victims;[12] however, the other elements of the judgment remain outstanding. Thus, the fact that the Inter-American Convention, which forms the basis of the court's judgments, does not specifically mention minorities or indigenous peoples, did not prevent the court from ordering reparation measures to address the social and cultural dimensions of violations of Mayans' rights in Guatemala.

At the national level, measures to implement indigenous rights were strongly articulated in the peace accords, the recommendations of the CEH, and the civil-society-led Recovery of Historical Memory Project (REMHI). These included recognizing Guatemala as a multiethnic nation, ensuring access to sacred sites for Mayan descendants, consultation with indigenous people concerning laws that would affect them, state recognition of indigenous languages, and regularization of indigenous communities' land rights.[13] These measures were aimed at a fundamental reshaping

[11] Commission for Historical Clarification, *Guatemala, memoria del silencio*, Vol. 3 (Guatemala: UNOPS, 1999), 192, paras. 2904 and 2905; cited in *Plan de Sánchez Massacre v. Guatemala*, 71.

[12] "Stein: a sangre y a fuego," *BBC news*, July 19, 2005; available at news.bbc.co.uk/hi/spanish/latin_america/newsid_4695000/4695357.stm; and Mica Rosenberg, "Guatemala massacre survivors paid after 24 years," *Reuters*, February 9, 2006; available at www.nisgua.org/themes_campaigns/impunity/precedent_cases/sanchez/Guatemala%20massacre%20survivors%20paid%20after%2024%20years.pdf.

[13] Kay Warren, "Voting against Indigenous Rights in Guatemala: Lessons from the 1999 Referendum," in Kay Warren and Jean Jackson, eds., *Indigenous Movements, Self-Representation, and the State in Latin America* (Austin: University of Texas Press, 2002), 165.

of society in order to eliminate the factors of systematic, institutionalized racism that had made these abuses possible. Similarly, in Colombia, the 1991 Constitution, which followed a peace process between the state and the M-19 guerrilla movement, included explicit recognition of the multiethnic nature of the country, protections of indigenous rights, recognition of indigenous jurisdictions, local autonomy, and the creation of a special electoral district to guarantee indigenous seats in both houses of parliament.[14]

Unfortunately, there is often a gulf between legal provisions and the reality on the ground – including efforts to implement transitional justice measures such as reparations and harmonize them with the larger goals articulated through MIP rights provisions, which may themselves be considered a form of repair. In Guatemala, progress on addressing deep inequalities between indigenous peoples and Ladinos (Spanish speakers of mixed European and indigenous descent) with regard to access to land has been virtually nonexistent. In 2006, the United Nations Committee on the Elimination of Racial Discrimination noted with regard to Guatemala that it was

> highly concerned at indigenous peoples' lack of access to land, the lack of respect shown for their traditional lands, such as community forests, and the problems in relation to the restitution of lands to indigenous peoples displaced as a result of armed conflict or economic development plans.... The Committee notes with concern that mining licenses have been granted by the Ministry of Energy and Mines to concession enterprises and regrets that indigenous peoples were not consulted or informed that the permission to exploit the subsoil of their territory had been awarded to such enterprises.[15]

Measures to amend the constitution to recognize indigenous languages and the country's multiethnic nature were voted down in a referendum in 1999.

The link between minority rights and reparations is also apparent in countries such as the United States, Canada, Australia, and New Zealand, although the events under consideration occurred decades or even centuries ago. In these countries, indigenous peoples and Afro-descendants suffered gross and systematic abuses – slavery, cultural assimilation, expropriation of lands, and genocide. The passing of time since the events in question has complicated transitional justice processes; present-day governments sometimes resist demands to apologize for acts carried out by their predecessors, and finding the necessary documentary evidence (for example, land title or even just proof of occupation) is problematic. Nevertheless, a number of developments shed light on the application of minority and indigenous rights in these situations. In Australia, two groundbreaking cases, *Mabo* and *Wik*, established precedents for the return of land to Aborigines. *Eddie Mabo and Others vs. the State*

[14] Colombian Constitution of 1991, Arts 7, 171, 176, 246, 286–87, 329–30.

[15] UN Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention* (CERD/C/GTM/CO/11), May 15, 2006.

of Queensland, which dealt with a land claim by Torres Strait Islanders, rejected for the first time the concept of *terra nullius* – the idea that when European settlers arrived in Australia, the land was, from a legal perspective, empty – and recognized the principle of legal ownership based on customary usage by Aborigines (albeit only in the case of lands currently under leasehold).[16] In *Wik Peoples vs. Queensland*, the Australian High Court ruled that native title (collective rights of Aborigines to use lands traditionally occupied but not owned by them) may coexist alongside commercial farming leases.[17]

Barkan argues that these cases were aided by developments in international human rights law that had discredited the *terra nullius* concept as simply racist. But there was fierce opposition to the argument that land stolen from its rightful owners centuries ago must now be given back. As powerful economic interests complained of the threat to mining leases, the government used shock tactics, responding to Wik by claiming that 79 percent of Australia was up for grabs. In 1996 it reformed the Native Title Act to limit indigenous peoples' claims, particularly with regard to negotiations over mining contracts, and the precedence of exclusive commercial leaseholds.[18]

In the United States, particularly after World War II, Native American movements increasingly used the language of indigenous rights, including self-determination, to lobby for land restitution, access to sacred sites, and return of cultural artifacts and ancestors' remains, and at the same time such language was increasingly recognized by legislators and courts.[19] Native Americans were making the argument that they had an intimate, spiritual connection to the lost land, and that they could not practice their religious customs anywhere else – effectively arguing that they would not be able to exercise their right to promote their identity and practice their religion without land restitution. This was a powerful moral argument that led to legislation such as the American Indian Religious Freedom Act, enshrining MIP rights such as the right to practice religion ("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites"[20]) and the right to participate in decisions affecting the community ("Any exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian

[16] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: W. W. Norton, 2000), 238.

[17] "The Wik Decision," *The Law Handbook*; available at http://www.lawhandbook.org.au/handbook/ch01s01s03.php#Ch86Se55190.

[18] Ibid.; and Barkan, *Guilt of Nations*, 238–41.

[19] Barkan, *Guilt of Nations*, 178.

[20] *American Indian Religious Freedom Act of 1978*, Public Law 95–341, 42 U.S.C. 1996, Protection and preservation of traditional religions of Native Americans.

tribe which owns or has jurisdiction over such lands"[21]). In terms of political and economic power, Native Americans were clearly at a disadvantage in relation to the state; couching their claims in the language of MIP rights enabled them to make a tactical choice to use moral arguments, where they were on stronger ground.

A Significant Role for MIP Civil Society Organizations in Transitional Justice

It is difficult to compare transitional justice processes in Guatemala and the United States owing to the great differences in development and the strength of rule of law. However, both cases suggest that the existence of a powerful, legitimate civil society movement at the domestic level – one that represents indigenous peoples and is able to articulate a rights-based agenda – is helpful in effectively promoting MIP rights in transitional justice processes. According to Lucke, writing two years before the signing of the Accord for Firm and Lasting Peace in Guatemala, "The indigenous population is increasingly conscious of its identity, and indigenous organizations have experienced growth with ethnicity playing an important role in their political organization and demands for rights."[22]

Indeed, MIPs' civil society organizations may play a significant role in ensuring the success of transitional justice measures. A counterexample here is constructive. When a constitutional reform package, including measures to guarantee indigenous peoples' rights, was submitted to a referendum in 1999 under the terms of the 1996 peace accords, it was narrowly voted down. The outcome was attributed to a number of reasons, including poor voter turn-out (18.5 percent), the complexity of the referendum (covering fifty modifications to the Constitution), and the difficulty for indigenous people living in remote communities with poor roads to get to polling booths (available only in provincial capitals – the irony is that the legacy of marginalization of indigenous communities contributed to their effective exclusion from voting on measures that would help address that same situation).[23] However, a further reason appears to have been that the "yes" campaign failed to link up effectively with indigenous civil society and convince local activists that the referendum promoted their interests; one activist asked, "If I vote for this referendum, am I voting for the guerrillas or for the military?"[24] The use of mainly written campaign materials also limited potential to connect with the indigenous communities of the highlands, for whom radio and television, preferably in indigenous languages, would

[21] *Archaeological Resources Protection Act of* 1979, Public Law 9 6–95, 16 U.S.C. 470Aa-mm, Section 4 (g)(2).

[22] Karin Lucke, "Building a Sustainable Peace in Guatemala," in Marc Howard Ross and Jay Rothman, eds., *Theory and Practice in Ethnic Conflict Management: Theorizing Success and Failure* (Basingstoke: Macmillan, 1999), 203.

[23] Pico J. Hernández, "Why Was the Referendum Defeated?" *Revista Envío* 216 (July 1999); available at www.envio.org.ni/articulo/2256.

[24] Warren, "Voting against Indigenous Rights in Guatemala," 171.

have been a more effective vehicle.[25] This example is highly relevant to transitional justice efforts around the world, as it speaks directly to their legitimacy and potential to contribute to positive social changes for MIPs.

Strengthening Transitional Justice through MIP Rights

An issue of transitional justice, in relation to which MIP rights have a very clear added value, is that of certain forms of forced cultural assimilation. In Canada, between the 1890s and 1973, over 150,000 indigenous children were forcibly taken away from their parents and housed in residential schools.[26] Children in these schools were subjected to violence, sexual abuse, and appalling health conditions, including intentional exposure to tuberculosis, resulting in death. The schools aimed to "force aboriginal children to learn English, and adopt Christianity and Canadian customs as part of a government policy called 'aggressive assimilation.'"[27] In June 2008 the prime minister made a formal apology on behalf of the government to victims of the system and their families,[28] a Truth and Reconciliation Commission was set up, and a reparations fund was agreed, which will pay out a lump sum to all survivors of Can$10,000 and Can$3,000 per year for every year attended (a separate, individual process allows for higher payments for specific abuses suffered).

MIP standards, if applied to such cases, would capture the crucial element of a violation of the duty to protect indigenous peoples' identity; indeed, the Assembly of First Nations, in its 2005 Class Action Claim against the government, claimed that the schools caused "irreparable harm and damage" to First Nations' "culture, language, way of life, family, community and social structures."[29] MIP standards would also strengthen moves to reclaim land from which communities have been forcibly displaced by war, state repression, or economic development – an issue that transitional-justice processes often struggle to grapple with. Depending on the circumstances, arguments could stress the threat to identity if communities lose the link to land that forms part of that identity, possibly leading to the complete disappearance of a community with its own identity if its members are dispersed to refugee camps, resettlement in other countries, or urban slums. To cite just one example, the Sabian Mandaeans, a religious minority from Iraq numbering only about 60,000, fears for the future of its culture as more and more of its members flee sectarian persecution to Syria, Jordan, Sweden, Australia, the United States,

[25] Hernández, "Why Was the Referendum Defeated?"

[26] Assembly of First Nations, "Residential Schools: A Chronology"; available at www.afn.ca/article.asp?id=2586.

[27] "PM Cites 'Sad Chapter' in Apology for Residential Schools," *CBC News*, June 11, 2008; available at www.cbc.ca/canada/story/2008/06/11/aboriginal-apology.html.

[28] Indian and Northern Affairs Canada, "Statement of Apology"; available at www.ainc-inac.gc.ca/rqpi/apo/index-eng.asp.

[29] Assembly of First Nations, "AFN National Chief Files Class Action Claim against the Government of Canada for Residential Schools Policy," August 3, 2005; available at www.afn.ca/article.asp?id=1632.

and other countries; only an estimated 10–25 percent of the original population are thought to remain. Living in often unsustainably small diaspora communities, Sabian Mandaeans struggle to have access to priests to help them maintain their rituals, and young people increasingly marry out of the religion.[30]

A second way that MIP rights arguments might have added value is in challenging specific measures taken by governments as part of transitional justice processes, which violate the individual's right to determine her or his own identity freely – including to "opt out" of an ascribed identity. Several related examples may highlight the salience to transitional justice. In Northern Ireland, employers are required to identify, catalogue, and report the religious affiliation (Catholic or Protestant) of all of their staff for the purposes of equal-opportunity monitoring. This is done on a nonconsensual basis; where it cannot be determined via a direct question to the employee, it can be inferred from information available such as the school attended.[31] In Rwanda, the government has taken the approach of attempting to eliminate the markers that formed the basis of the 1994 genocide by forbidding self-identification as Hutu, Tutsi, or Twa. Although the aim may be understandable, this clumsy attempt at social engineering is in fact more likely to exacerbate tensions, as Rwandans are aware of each other's ascribed identities and can observe inequalities in access to resources and power but do not have the right to talk about it.[32]

RESISTANCE TO CLAIMS FOR RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES

After ethnic conflicts, hatreds and suspicion between groups can be very strong. The state itself has not had enough time to establish its legitimacy in a new political environment, and is often afraid of challenges; this fear breeds aggressiveness and knee-jerk reactions to demands from MIPs. The results of the referendum in Guatemala showed that all except one of the departments that voted in favor of the package of social reforms (including indigenous rights) were departments with a majority indigenous population (in fact the referendum also showed that all the departments most affected by the war voted yes). The "no" campaign played on the fears of the majority community, claiming that the reforms would divide Guatemalans, give constitutional privileges to Mayan communities that others would not have, and violate the principle of equality of all Guatemalans.[33] The truth was quite the opposite;

[30] Chris Chapman and Preti Taneja, *Uncertain Refuge, Dangerous Return: Iraq's Uprooted Minorities* (London: Minority Rights Group International, 2009).

[31] Christopher McCrudden, "Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner for National Minorities," in John Morison, Kieran McEvoy, and Gordon Anthony, eds., *Judges, Transition and Human Rights Cultures* (Oxford: Oxford University Press, 2007).

[32] Minority Rights Group International, submission to the United Nations Human Rights Committee (Country Report Task Force consideration of the state report of Rwanda, 94th Session, October 13–31, 2008).

[33] Hernández, "Why Was the Referendum Defeated?"

taking the example of official languages, the reforms proposed recognizing twenty-four indigenous languages in the constitution, in addition to Spanish. This contrasts with the existing constitutional provision, which states that Spanish is the official language of the state, and then goes on to proclaim – in a somewhat condescending formulation – that "vernacular languages" form a part of the country's cultural patrimony.[34] This shows that, far from enshrining privileges for certain groups, MIP rights are about the special measures that sometimes have to be taken to ensure that minorities and indigenous peoples are able to enjoy the same rights as majorities.

Transitions are, by definition, about making significant changes to the way the state is run and how it defines itself. MIP rights claims in this context may cause some fear among majorities who are used to a unitary state, which is defined in terms of the dominant ethnic group. When challenging such myths of nationhood, majority communities will need to be reassured that their rights will continue to be recognized and that their identity will not be lost, assimilated by another community, or swallowed up in a "melting pot" of cultures. In Guatemala, one of the "yes" campaign activists admitted that the campaign failed to address Ladinos' fears of Mayan cultural dominance.[35] This fear is particularly salient in Guatemala, where Mayans contest official census figures and claim – with some credibility – that they are a numerical majority.[36] In Spain, in the aftermath of the Franco dictatorship, an attempt was made to address this fear by recognizing all regions as specific cultural/national autonomies, even though autonomy claims were put forward in only a small number of cases, such as the Basque Country and Catalonia.[37] A related question is whether MIP rights claims contribute to or obstruct reconciliation – another key transitional justice objective. In Australia there was considerable debate about reconciliation in relation to the *Mabo* land rights case. According to Barkan,

> For some, the potential political results of the *Mabo* decision included the possibility of a constitutional reform, governmental changes to accelerate resolution of land rights, certain enhanced forms of self-government at the Torres Strait, and the initiation of new land claims. For others, the case merely intensified racial tension, much of which revolved around fears and demagoguery about the economic consequences of the decision.... The rhetoric of the opposition to the *Mabo* decision was often old-fashioned racism, a backlash amid new opportunities.[38]

Mabo and other developments in aboriginal claims may have paved the way for the entry of the populist, antimulticulturalism and anti-immigration Pauline Hanson to the forefront of Australian politics in the late 1990s. The fact that Australia's recent elections have shown strong swings between the two extremes on issues of aboriginal

[34] Guatemalan Constitution, amended by legislative act no. 18–93, November 17, 1993.

[35] Roddy Brett and Antonio Delgado, *The Role of Constitution-building Processes in Democratization: Case Study Guatemala* (Stockholm: International Institute for Democracy and Electoral Assistance, 2005), 36.

[36] Ibid., 35.

[37] The author thanks Eduardo González of ICTJ for this point.

[38] Barkan, *Guilt of Nations*, 244–5.

rights and immigration indicates that this debate has not yet played itself out fully; Barkan nevertheless draws a positive conclusion about attitudes to multiculturalism: "Australia has changed irreversibly over the last generation."[39]

COLLECTIVE AND INDIVIDUAL RIGHTS

An important issue in minority rights is the degree to which customs and practices of minority communities are protected by minority rights, and the case of South Africa illustrates the way in which differing views on the need to eradicate the abuses of apartheid informed this issue, particularly with regard to the customary laws of Africans and the Muslim minority. Understandably, in the light of the systematic abuses and denigration of their cultures that Africans and other non-whites had suffered under apartheid, there was a push to recognize customary law in both the 1993 and 1996 constitutions. Muslims in particular were very keen to gain recognition of sharia, having endured the imposition of Christian values in legal matters under apartheid. Such customary laws, however, often favored men, particularly with regard to personal law, governing issues such as marriage, divorce, and inheritance. For this reason the African National Congress (ANC) was determined to ensure that these laws would be subjected to the nondiscrimination provisions of the Bill of Rights. Its strong stance on this issue was motivated by the "wish to be able to get to the roots of the legacy of apartheid's pervasive discrimination policies."[40] As might be expected, this tension was not entirely resolved; for example, the compromise struck in the Recognition of Customary Marriages Act is that it recognizes polygamous marriages, while "holding onto the equality principle within the marital relationship";[41] given that polygamy does not usually allow a woman to take several husbands, this would appear to be a circle that cannot be squared.

The approach of the ANC was in fact in line with MIP standards; the UN Minorities Declaration states that "states shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, *except where specific practices are in violation of national law and contrary to international standards*" (my emphasis).[42]

There is clearly an interesting dynamic in societies emerging from violent identity-based conflicts, involving a tension between claims for collective rights and the rights of individuals. This dynamic is informed by relationships of power; elites within MIP communities, driven by an understandable fear of a return to the previous situation

39 Ibid., 235.

40 Kristin Henrard, "Power Sharing and Rights Protection and Management of Ethnic Conflict: The Case of Post-Apartheid South Africa," in Sid Noel, ed., *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (Montreal: McGill-Queen's Press, 2005), 155.

41 Ibid.

42 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4.2.

of economic and political oppression and assimilation, may emphasize the need for guarantees of collective rights; these may range from consociational power-sharing agreements that set in stone the political representation of MIP representatives in the government and legislature, to guarantees of customary laws. These guarantees may not equally benefit all members of MIP communities; power-sharing agreements, ideally, provide a channel to enable minority concerns to be channeled up from the community level to government, but they may also provide a platform for elites, appointed through processes of doubtful transparency, to consolidate their own power. Customary laws may set in stone hierarchies within the community, that benefit those same elites and favor men over women in matters of personal law. Arrangements, including transitional justice measures, may privilege some minority communities at the expense of others, particularly in the case of power sharing; Bosnia and Herzegovina, with its exclusion of all ethnic groups apart from Bosnians, Serbs, and Croats from political office, is an extreme example.

The South Africa case shows how this push to recognize collective group rights may be counterbalanced by guarantees of individual human rights, and indeed the correct application of an MIP rights approach requires this. A number of elements of MIP rights emphasize individual rights, such as the right of members of minorities to identify as a member of the group or to "opt out," antidiscrimination protections that forbid discrimination by any actor including members of one's own community, and the requirement that a community's cultural practices must not violate individual human rights. These protections are essential to ensure that the rights of individual members of minority communities are not violated in the name of measures to promote the interests of the broader community, or indeed that transitional justice measures promote one minority community's interests over those of another.

APPLYING MIP RIGHTS PRINCIPLES TO PROCESSES OF TRANSITIONAL JUSTICE

When ethnic groups have suffered massive and systematic abuses, respecting MIP rights *within* the transitional justice process is an important symbolic gesture, demonstrating that a clean break has been made with the past and encouraging all communities to have faith in the process. The fact that members of marginalized communities see for the first time that a state body is inviting them to participate, taking steps to accommodate their cultural specificities such as language and listening to their testimony, can be a powerful force for the reestablishment of bonds of trust between the state and its citizens.

A Flexible Framework

A key value of MIP rights lies in the flexibility of the framework. It can be argued that, in postconflict scenarios, everything has to be negotiated, from issues of justice and compensation for abuses, to changes in political and economic structures. Even

in the case of crimes against humanity and other nonderogable human rights norms often at stake in transitional justice situations, which should broker no negotiation, the requirement for justice confronts accused elites who have no desire to go to prison and who have the power to refuse to cooperate. MIP rights lay down a set of principles that, like any human rights norm, must be respected, but the means of implementing them vary from case to case. In the case of the right to participate in decisions affecting the minority, for example, implementation may mean reserved seats for minorities in parliament, an advisory committee to be consulted by the government, or devolution of powers to an autonomous region; the solution will depend on local circumstances and political realities. This flexibility is almost certainly underexploited; in Guatemala, citizens were simply asked to vote yes or no on a complex package of reforms involving major changes to the constitution; it was easy for elites wishing to protect narrow interests to exploit widespread confusion about the meaning of these reforms and fear of change. What was needed was a national debate about the meaning of citizenship in Guatemala and the options for making citizenship and rights a reality for the population in all its diversity.

A number of examples show that people in situations of transition have taken advantage of this highly privileged moment in which there is suddenly enormous potential for change and innovation in the political system, particularly with regard to the need to give a voice to diverse sectors of the population. After thirty years of civil war in Sudan, a peace arrangement allowed for power and resource sharing between the North and South and a federal structure. In addition, in the South, the government of South Sudan gave the go-ahead to a system of councils of chiefs and, progressively, each of the ten federal states in the ethnically diverse South is moving to set up a council. In these, each tribe or ethnic group has one representative. Effectively civil society initiatives at present have no executive or legislative power but rather serve to give advice to the state government on issues affecting the ethnic groups and as a forum for resolving conflicts between them. In Iraq, the Nineveh Plains region in the North is home to a number of minorities, who are interpreting a constitutional provision that grants minorities "administrative rights" to push for a degree of local government for the region. And in Nepal, where a new constitution is being drafted, in the aftermath of a conflict in which a Maoist insurgency overthrew the monarchy, there is widespread agreement that federalism is the road to go down. But this is a country with a highly complex demography, featuring fifty-four indigenous communities of varying sizes, the politically active and numerous Madhesi, and the Dalits, victims of an imposed identity under the highly discriminatory caste system, who are not concentrated in any region but are spread across the country. In terms of providing a political voice and guaranteeing rights, federalism will impact on these communities in different ways. A lively debate is therefore raging in political fora and the media about the shape federalism should take, throwing up a number of as yet unresolved questions: should state boundaries be determined along ethnic or geographical lines? What can be done about smaller

groups who will be minorities within the new federal regions? What about the Dalits who, as a dispersed group, are not convinced of the benefits federalism will offer them?

Within transitional justice efforts, there is a need to be mindful of these broader debates. It is almost certainly no coincidence that each of these countries previously operated a highly centralized political structure; such systems increase the likelihood of conflict by denying a voice to the political and ethnic peripheries. The current debates on new forms of governance in these countries show that people are grasping the opportunity to radically question the way their countries are run and develop creative proposals that bring previously excluded communities into the political arena. However, the reverse side of the coin in such situations of turmoil is that certain political or ethnic groups – thanks to greater firepower, wealth, or simply being in the right place at the right time – may be able to seize a disproportionate share of power. MIP rights do not provide a guarantee against this but at least give excluded communities one more tool to leverage greater rights protections and a voice in the political process. Countries emerging from political transitions are keen to establish their legitimacy internationally, and in this respect MIP rights are an important benchmark, as shown by the European Union's inclusion of minority rights as one of the so-called Copenhagen criteria that aspiring new members have to meet.

The situation is very different in established democracies where the transition perspective is a longer one, such as Australia and Canada. Here there are not the same opportunities for radically rethinking political structures; however, a stronger tradition of rule of law and greater civil society space can provide a more favorable environment for articulating MIP rights.

Participation in Transitional Justice Processes

MIP rights can contribute to transitional justice not only in terms of the outcome, but also the process. Minorities must be able to participate in decision-making processes on issues of direct concern to them. Transitional justice mechanisms in the aftermath of identity-based conflicts clearly fit into this category; therefore, to ensure that this participation is facilitated in the case of a truth commission, there will need to be outreach to MIP communities, which may be operationalized by setting up offices in areas where they live and providing the means to translate interviews and testimony into MIP languages. Outputs of transitional justice processes should also be translated into these languages, and provision should be made to make outputs available in an oral format for communities that favor oral transmission of information (this was a recommendation of the Guatemalan CEH).

Again in Guatemala, a country that has played a pioneering role in demonstrating how MIP rights can be part of the process and content of transitional justice initiatives, the Recovery of the Historical Memory Project recommended that "since

many families have been unable even to bury their dead or observe their cultural or religious rites, the authorities have the obligation to facilitate public ceremonies, exhumations, funerals, and burials, in accordance with meaningful religious and cultural traditions."[43] Some steps have already been taken to fulfill this recommendation as part of the ongoing remedies and reparations process.

A further issue is to consider who represents minority communities. Minorities, like any community, are not homogeneous, and ideally a variety of figures representing different sectors, such as gender and age groups, will be represented, and these may provide a wider variation of perspectives on issues such as customary law. Expressions of diversity of opinion within these communities are not only acceptable, they are a sign of healthy internal democracy, as within any community. However, it can be a challenge to establish an enabling environment that gives a voice to people who might be marginalized within their own communities. The Peruvian Truth and Reconciliation Commission discovered that some indigenous communities had silenced women's stories in order to privilege a local official version of the war and keep inconvenient facts out of the public eye, for example about the community's allegiances during the war.[44]

It is therefore important for governments to avoid demands that MIPs form a united front in presenting transitional justice claims. They should seek innovative methods of accommodating the diversity of positions, for example, by organizing a fluid, decentralized process allowing for consultations at the community level, with input from the broadest possible range of society actors. A model for this approach could be the two-year consultation process that brought an end to the war between the Sandinistas and the indigenous peoples of the Atlantic coast of Nicaragua in the late 1980s. As part of this process, "Hundreds of civil society activists on the Atlantic Coast were trained to carry out door-to-door consultations as part of a major social mobilization involving workshops, community assemblies, workplace meetings and broad participatory meetings with churches and other social organizations."[45] The MIP rights framework supports this approach, through the combination of the right of MIPs to participate in decisions affecting them, coupled with the prohibition of discrimination against individuals, and it is important that such principles are enshrined in laws that establish transitional justice processes.

The issue of representation also plays out in inequalities between minority communities. The ability to present and lobby for transitional justice claims will be affected by power relationships resulting from peace negotiations that bring conflicts

[43] Recovery of the Historical Memory Project, *Guatemala: Never Again!*, trans. Gretta Tovar Siebentritt (Marynoll, NY: Orbis Books, 1999), 317.

[44] Kimberley Theidon, *Entre prójimos: el conflicto armado interno y la política de la reconciliación en el Perú* (Lima: Instituto de Estudios Peruanos, 2004). The author thanks Eduardo González for this point.

[45] Sandra Brunnegger, *From Conflict to Autonomy in Nicaragua: Lessons Learnt* (London: Minority Rights Group International, 2007), 4.

to an end, and most often, the actors who sit around the table in these fora represent communities that have political or military power. These communities may have suffered massive and systematic abuses under the previous regime – as for example in the case of the Shi'a and Kurds in Iraq. In the negotiations over a new constitution for Iraq, the political parties representing these groups formed a coalition of convenience and largely sidelined Sunni parties, who in any case were divided over the question of whether to boycott or participate in the process. The Shi'a and Kurds were, understandably, keen to come up with a constitution that would mark a decisive break with the authoritarianism and abuses against political opponents and minorities that characterized the previous regime, and the result was a highly decentralized state with a very weak center. With regard to the issue of security, which is the overriding concern for all communities at present, this system gives communities with sufficient numbers to control their own region the means to control security forces. In certain cases, militias have been created to fill a security vacuum. Essentially, the result is federalism "at the point of a gun," as Kymlicka describes it.[46] This has meant that the smaller minority – Christians, Shabak, Yezidis, Sabian-Mandaeans, Bahá'í, Roma, and Turkomans, among others – who do not have the numbers to have a significant say in any region, do not have the means to protect themselves, nor the means to organize private militias, and violent attacks on these communities are causing a massive exodus from Iraq.

Under the current circumstances, it seems highly unlikely that these smaller minorities will be able to mount serious transitional justice claims in Iraq, despite having suffered massive human rights violations; decisions regarding which cases are prosecuted reflect the power wielded by the larger communities (for example, the two prosecutions brought against Ali Hasan al-Majid, also known as "Chemical Ali," have been for abuses committed against the Kurds and Shi'a), and in any case the efforts of the smaller communities are currently focused on immediate survival.

This again highlights the importance of being aware that not all claims put forward by ethnic or religious groups in transitional justice scenarios will be in accordance with minority rights. The claims of the Shi'a and Kurds were understandable from a historical perspective but were not necessarily the way to provide the best outcome for all communities. The South African experience shows that a strong Bill of Rights at the center of the state helps keep in check the often centrifugal forces at play in a transitional society, as well as promote justice and enjoyment of rights for all communities, no matter their size, and, crucially, all individuals belonging to those communities. Participation of all communities in peace negotiations and transitional justice processes may increase the likelihood of achieving strong rights protections that will protect the interests of smaller communities. This is in line with the right of MIPs to participate in decisions that affect them.

[46] Will Kymlicka, Chapter 10 in this volume.

This process should promote reflection on past crimes but will also need to emphasize what is needed for the construction of a shared future, particularly in terms of justice for systematic abuses, and reconciliation. The participation of a range of identities in such processes can in itself help build trust and understanding between communities through the experience of listening to and learning from the accounts of the realities that people from different communities have lived through. Such participation can also aid the process of working together toward the goal of forging an inclusive model of governance.

Principles of Non-Discrimination and Protection of Identity

Also in terms of process, MIP rights require that cultural practices of MIPs be respected and promoted; when applying this principle to transitional justice processes, a case can be made for the use of traditional mechanisms used by MIP communities to promote reconciliation and justice, where they exist. In Southern Sudan, the Wunlit peace conference of 1999 was a significant watershed in promoting peace and reconciliation between the Dinka and Nuer communities. Factions of the Nuer had allied with the Khartoum government in the 1990s to fight against the Dinka-dominated Sudan People's Liberation Army. Atrocities were committed by both sides, notably a series of attacks on civilian populations by Nuer leader Kerubino Kuanyin Bol, which triggered a famine that resulted in 50,000 deaths. The conference brought together traditional elements used by both communities, including truth telling, ritual, compensation, and the invocation of God to bear witness to the reconciliation.[47]

Traditional methods were also incorporated into the formal transitional justice framework in East Timor, with the aim of reintegrating perpetrators of crimes (which did not reach the level of crimes against humanity) into the community;[48] and in Uganda, there are calls for *mato oput*, the traditional conflict-resolution system of the Acholi people of Northern Uganda, to be used to deal with the crimes of the Joseph Kony's Lord's Resistance Army. The advantage of these mechanisms is that in most cases they place an emphasis on maintaining relationships and rehabilitating those found guilty into the community. Although decisions may be taken to privilege reconciliation and community cohesion over retribution, it should not be forgotten that such compromises are common in transitional justice processes. The fact that these mechanisms are seen to comply with the community's own values, in particular principles of justice and community ties, improves the chances of the outcomes being accepted by both offenders and victims.

[47] Mark Bradbury et al., "Local Peace Processes in Sudan: A Baseline Study" (Nairobi: Rift Valley Institute, 2006), 31.

[48] Patrick Burgess, "A New Approach to Restorative Justice – East Timor's Community Reconciliation Process," in Naomi Roht Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-first Century: Beyond Truth versus Justice* (New York: Cambridge, 2006).

CONCLUSION

Transitional justice is a key element in the transformation of societal conflicts, whether they be civil wars, genocides, or powerful movements of contestation against authoritarian governments – through peaceful or violent means. The suggestion that has been explored here is that minority and indigenous peoples' rights, which were originally developed with the aim of preventing and managing ethnic and religious tensions, have a contribution to make to effective transitional justice processes.[49] The standards and mechanisms developed in the 1990s and earlier to codify these rights resulted from extensive negotiations between states and therefore have an international legitimacy. By focusing on promoting and protecting the rights of vulnerable communities, they strengthen the moral and legal arguments in favor of measures to provide justice to these communities and rectify patterns of economic, political, and social exclusion that are so often the cause of the abuses they have suffered.

Clearly, there may be a tension between these two aims of MIP rights – that of promoting trust and understanding between communities, and that of strengthening the claims of the marginalized. This tension will be most evident if, among members of majority communities that have historically benefited from an exclusive and monocultural conception of the state, there is a strong perception that the transition will threaten their economic and social well-being. This factor surely played a role in the rejection of the referendum on indigenous peoples' rights in Guatemala and in the reaction to the *Mabo* decision in Australia. Indeed, it may be advisable to undertake a process of examination of historical events leading to transitional justice claims, to further understanding of why such claims are being made, before setting about promoting dialogue between communities. It can sometimes be counterproductive – in spite of the immediate and obvious need – to launch into either a negotiation-type process or a referendum, because these efforts can appear threatening and serve to awaken communities' existential fears. Work to enhance public awareness of the rationale and history behind the claims being made may lay the ground for a less confrontational atmosphere.

The reforms at stake in the Guatemalan referendum went to the heart of how the state and citizenship are defined, and how the state gives form to that citizenship when it is as diverse as it is in Guatemala, by proposing solutions to concrete issues such as language policy and political participation. Up until that point, the state, if only implicitly, had defined itself in terms of the Spanish-speaking Ladino elite; the CEH showed that genocidal massacres of Mayans were possible not only because of the economic and political exclusion of Mayans, but also because of how they were imagined by elites as having no rights. As one of the witnesses to the REMHI

[49] Chris Baldwin, Chris Chapman, and Zoe Gray, *Minority Rights: The Key to Conflict Prevention* (London: Minority Rights Group, 2007), 4.

project stated, "This situation should never happen again. I think perhaps based on development, on education for us, for all Guatemalan citizens. But they should really respect our rights as indigenous people; because I am indigenous, and I have my rights, and I have a voice to speak with."[50]

However, although it was right to involve indigenous peoples in developing the reforms necessary to give form to these rights, it was also necessary to involve the population as a whole in the process; this would have provided an opportunity for a process of social learning about the causes of the civil war, the social, economic, and political exclusion of entire sectors of society, the structural violence that this engenders, and the reforms necessary to ensure that this structural violence does not descend once again into civil war.

Given the potential for tension between the two aims of building trust among groups and strengthening the claims of the marginalized, transitional efforts – including transitional justice – should offer opportunities for an open-ended discussion of issues such as the status of indigenous languages, collective land ownership, affirmative action in the economic domain, and appropriate models of political participation for all sectors of society. Rather than proposing set formulas, the process may spur messy, unsatisfactory compromises. The process itself, however, would signal the start of a long-term reflection on addressing the injustices of the past and forging new models of citizenship and inclusion for the future.

[50] Testimony to the Recovery of the Historical Memory Project, Guatemala (Case 2176, Aldea Salquil, Nebaj, Quiché, 1980); cited in REMHI, *Guatemala: Never Again!*, 88.

9

"Fear of the Future, Lived through the Past": Pursuing Transitional Justice in the Wake of Ethnic Conflict

Paige Arthur

After the genocide in 1994, the new Rwandan government decided to abolish ethnicity. Arguing that "Hutu" and "Tutsi" identities were pernicious artifacts of Belgian colonial rule that Rwandans would be better off forgetting, the government took steps to create an ethnicity-free public space. Establishing a "unity and reconciliation" campaign, it banned references to ethnic identifications in official discourse, closely regulated speech in the media, and instituted awareness-raising campaigns among the general population.[1]

Can identities simply be abolished? Of course not. Why go to all the trouble, then? Political leaders may, not unreasonably, attempt to forge a new national identity to take the place of previous, divisive ones. Alternatively, they may wish to stress individuality over collective identities in an effort to promote the view that identities should be a matter of personal choice – not external imposition. These strategies may carry particular weight in countries like Rwanda and South Africa, where identity categories were constitutive elements of methods of repression and violence, and where communities must find a way to live together once that repression and violence has ended.

Either way, however, attempting to abolish the "old" identities may simply turn out to be a way of confirming their continuing importance.

THE SALIENCE OF ETHNIC IDENTITIES FOR TRANSITIONAL JUSTICE

Surprisingly little attention has been paid to understanding the ways in which ethnic identities might matter for transitional justice – even when the justice in question is

* I thank three anonymous reviewers from Cambridge University Press for comments that significantly improved this chapter.

[1] International Crisis Group, *Rwanda at the End of the Transition: A Necessary Political Liberalisation*, Africa Report no. 53 (2002); available online at http://www.crisisgroup.org/home/index.cfm?l=1&id=1555.

a response to clear-cut cases of identity-based violations, as took place in Rwanda and the former Yugoslavia. I have argued elsewhere that transitional justice is animated by two different sorts of beliefs.[2] On the one hand, transitional justice efforts aim to provide a measure of recognition to victims of human rights violations, thus relying on beliefs that are "normative ideas that specify criteria for distinguishing right from wrong and just from unjust," following Judith Goldstein and Robert Keohane. On the other hand, they also try to facilitate a transition to a more just society, thus relying on instrumental/causal beliefs, or "beliefs about cause-effect relationships which derive authority from the shared consensus of recognized elites, whether they be village elders or scientists at elite institutions."[3] In this chapter, I am concerned with the latter of these two beliefs – the instrumental relationship between transitional justice and its outcomes.

In this chapter, however, I shift the instrumental focus of transitional justice toward the aim of ameliorating ethnic conflict. The case of the former Yugoslavia helps illustrate the challenges I try to address: an international court was set up to bring some measure of justice in the face of horrific human rights abuse, but it served in many ways to sharpen boundaries among ethnic groups, over the short term, at least. In a general sense, the chapter thus tries to make a contribution to understanding the relationship between transitional justice and peacebuilding. It could be argued that, especially over the long term, creating a more just society will in fact ameliorate ethnic conflict, in the same vein that many peacebuilders argue that justice is an integral part of sustainable peace.[4] My focus in narrower: I am interested primarily in thinking through the ways in which transitional justice measures might make some direct contribution to lessening ethnic conflict, especially in the near term.

Specifically, I argue that transitional justice measures would be more effective in ameliorating ethnic conflict if they were explicitly designed to take into account a more sophisticated analysis of the political and conflict context in which they operate. There are three strong reasons for this. First, the political context often sets difficult terms for the operation of transitional justice measures that may affect their potential for addressing past abuses. Where the political context involves the continued participation of racist or xenophobic leaders and parties, for example, or it maintains political arrangements such as ethnic categorization and cronyism, a politics of resentment among groups may take root, potentially undermining the

[2] Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 321–67.

[3] Judith Goldstein and Robert O. Keohane, "Ideas and Foreign Policy: An Analytical Framework," in Judith Goldstein and Robert O. Keohane, eds., *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, NY: Cornell University Press, 1993), 9, 10.

[4] See, e.g., John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, DC: United States Institute of Peace Press, 1998).

reconciliatory effects of transitional justice measures. Second, transitional justice measures should be designed to work with – not against – political reforms that themselves are an effort to rectify past exclusions and injustice. They should also be prepared to shape those reforms where appropriate, particularly in terms of truth commissions' recommendations and the structure of security sector reforms. Third, transitional justice measures should contemplate making use of local resources that embrace specific cultural and religious traditions. In particular, where religion and other strong cultural traditions are at the core of political grievances, allowing for local adaptation and innovation should be a primary concern.

Understanding that context entails an awareness of the distinctive nature of ethnic identities and their role in conflict. Ethnic identities are different from other social identities because they are constructed around ideas of descent, as well as social and biological reproduction. They are, as James D. Fearon and David D. Laitin point out, "composed of cultural attributes, such as religion, language, customs, and shared historical myths."[5] As a result, in many contexts, these identities simply cannot be chosen and unchosen by individuals. This makes them different from political identities, which typically are elective. Ethnoreligious identities raise issues of cultural or biological reproduction across generations – which is something that groups often try hard to protect. Thus, control over education of the young, a piece of territory linked to the group, and cultural practices and patrimony may acquire deeper salience where these identities are at stake. Thus, the fact that transitional justice measures have dealt with violations where people were systematically persecuted on the basis of their political identity, as was the case in Argentina, does not necessarily provide much guidance for how to act in the wake of ethnic conflict.

There is abundant evidence that the dynamics of ethnic conflicts differ from those of other conflicts, as do the means of managing or resolving them. Thus, one of the crucial challenges of any transitional situation will go unmet if ethnic conflict is reduced to mere political violence. Political claims that take ethnic identities as their basis tend to focus on a few key issues, for example:

- cultural, religious, and linguistic freedom, a source of political claims among groups in the Philippines, Nigeria, Iraq, and Spain;
- a rectification of historical injustice at the level of the community, a source of claims in South Africa, Bulgaria, Rwanda, Burundi, and Guatemala;
- in the place of ethnic discrimination, a fair arrangement of economic institutions and a fair distribution of public goods and private wealth, a source of claims in Fiji and Nigeria;
- a rectification of land expropriation, which often took place over decades or centuries, a source of claims in Guatemala and South Africa;

[5] James D. Fearon and David D. Laitin, "Review: Social Construction of Ethnic Identity," *International Organization* 54, no. 4 (Autumn 2000): 848.

- a recognition of a group's legal personality, a claim often made by indigenous groups;
- and equal opportunity within and access to state and civil society institutions, a general source of claims where parallel institutions are not demanded.

The core of the problem is that in many societies, terms such as "free," "rectification," "fair," and "equal" may be interpreted very differently by members of different ethnic groups. As many researchers have noted, one of the main difficulties of resolving ethnic conflicts is the fact that arriving at a common framework of understanding of both the root causes of the conflict and the justice of those causes is challenging if not impossible. All parties to a conflict will likely feel their cause to be justified, whether by past communal victimization, the threat of future communal victimization, or the invocation of a unique communal mission. Under these conditions, mistrust and resentment will be rife.

Following on my argument that transitional justice measures would be more effective in ameliorating ethnic conflict if they were based on thorough conflict analysis, this chapter aims to develop an analytical framework for making transitional justice efforts more sensitive to factors in ethnic conflict. I argue that considering the salience of ethnic identities forces us to think also about risk factors during transitions that have, as yet, been underplayed by transitional justice practitioners. By this I mean the fact that political openings are often moments – as in Rwanda and South Africa – in which identities are particularly susceptible to reshaping. This may partly be because the state itself is changing, and it may deliberately try to reshape identity categories and engineer new relations among communities. But it may also be because such openings offer opportunities for new kinds of identifications from the ground up: especially political ones, as new actors have a chance to emerge. To the degree that new political identities may map onto exclusivist ones, often organized around ethnicity or religion, there may be a recipe for identity-based extremism, as was the case in the former Yugoslavia. Transitional justice probably cannot do much to ameliorate that process, if it happens, but it should at least do its best not to contribute to it.

To sort through the issues, I will first survey key themes in leading theories on ethnic conflict, drawn from political science, conflict resolution studies, economics, and sociology. I take this approach on the belief that there is no overarching, monocausal theory that can account for all ethnic conflicts. Each conflict is different, and what the literature offers us is not a universally applicable rule, but rather a standard set of features. That is, in any given context, some factors will be more salient than others. Second, I will think through the potential ways that transitional justice measures, taken individually, may be understood to address each of these conflict factors. Finally, I will propose a framework for analysis and a set of guiding questions to act as a framework for ensuring transitional justice initiatives are sensitive to ethnic conflict and can promote the amelioration of its most harmful factors.

THEORIES OF ETHNIC CONFLICT

Ethnicity is not, by itself, a cause of conflict. Indeed, ethnic peace is the norm.[6] As political scientists David A. Lake and Donald Rothchild point out, most ethnic groups live in peace and pursue grievances through established political channels. "But when ethnicity is linked with acute social uncertainty, a history of conflict and, indeed, fear of what the future might bring," they argue, "it emerges as one of the major fault lines along which societies fracture." Indeed, ethnic conflict is caused by "fear of the future, lived through the past," as University of Belgrade professor Vesna Pesic puts it.[7]

In the Balkans, Iraq, Burundi, Guatemala, Nepal, and elsewhere, transitional justice has been or is in the process of being undertaken in contexts where identity-based divisions have either been an explicit basis for violence or a root cause of it. Collective identities may thus play varying roles in the violence, and it is important to recognize that not all conflicts with an identity dimension should be categorized as "identity based." In Peru, for example, the conflict between the state and the Shining Path certainly had an identity dimension, in the sense that centuries of structural exclusion helped create the conditions in which the majority of victims of the violence were of indigenous origin, as the report of the Peruvian Truth and Reconciliation Commission noted.[8] By contrast, the targeting of individuals based on their perceived membership in an ethnoreligious group was a key element of the conflict in the former Yugoslavia. Here, the designation of "ethnic conflict" seems more apt. Of course, even in cases of conflicts with a clear identity dimension, as in the former Yugoslavia, there are likely to be many contributing factors. The key here is not to reduce conflicts to struggles among static, homogenous collectivities, but rather to highlight whatever may be distinctive about the roles that collective identities play in them.

In the following discussion, I will identify some of the key themes cutting across social scientific research on ethnic conflict. I have taken this approach – rather than summarizing, argument by argument, the voluminous literature on the sources of ethnic conflict – in order to highlight issues where there is some degree of consensus, even across disciplinary and methodological lines.[9] Here, I take it as my task to

[6] See James Fearon and David Laitin, "Explaining Interethnic Cooperation," *American Political Science Review* 90, no. 4 (1996): 715–35.

[7] David A. Lake and Donald Rothchild, "Spreading Fear: The Genesis of Transnational Ethnic Conflict," in David A. Lake and Donald Rothchild, eds., *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation* (Princeton, NJ: Princeton University Press, 1998), 7; Lake and Rothchild quote Pesic on the same page.

[8] Peruvian Comisión de la Verdad y Reconciliación, *Informe Finale de la Comisión de la Verdad y Reconciliación* (2003).

[9] Ramsbotham, Woodhouse, and Miall note that the research on ethnic conflict in the international relations field and in the conflict resolution field evolved largely in parallel throughout the 1990s. There was little cross-citing, and yet many of the same problems were identified and strategies proposed.

elucidate some of the key problems that transitional justice measures are likely to confront. I hope, in this approach, to be able to sidestep some of the important but divisive research debates, such as whether a rational choice or a social-psychological approach yields better explanations for ethnic conflict.

Fear and Anxiety

As the Lake and Rothchild quote from the previous section indicates, uncertainty and fear for the future may strongly shape people's expectations and behavior. Although perspectives vary on how exactly fear, anxiety, and a sense of threat either cause or factor into ethnic conflict, they are nonetheless widely understood to play an important role. The role of fear can be separated into two different components: the object of the fear and the processes by which fear leads to violence.

As far as what is actually feared, research highlights a number of issues. First, there are fears for the physical security of a group. Particularly in cases where the state is fragile or has collapsed, and people can thus no longer expect the basic protections typically afforded by a state, they may seek to align themselves with members of their own group in order to make their own provisions for security – a phenomenon that will be obvious to observers of events in Iraq, the Democratic Republic of the Congo, and elsewhere. Yet such existentialist fears need not only arise in fragile states, and may indeed be widespread in well-functioning states, such as Israel.

A second factor often invoked is fear of assimilation or domination. Indeed, attempts at ethnic domination, and real or perceived discrimination against linguistic, religious, and other cultural practices, may be a source for grievance and even violence. One thinks here of Sri Lanka, Nigeria, Liberia, Nepal, Burma, the Philippines, and Thailand – as well as, among Western liberal democracies, the American Indian Movement in the United States, Quebec in Canada, and the Basque region in Spain.

There are a range of theories concerning how fear drives violence. Lake and Rothchild contend that "ethnic conflict is most commonly caused by collective fears of the future. As groups begin to fear for their physical safety, a series of dangerous strategic dilemmas arise that contain within them the potential for tremendous violence."[10] Their view takes a rational choice approach, hypothesizing that fear, or uncertainty about the group's future, drives a "security dilemma" – a case in which each group's attempt to make itself more secure is perceived as threatening to other groups, which then attempt to make themselves more secure. In this phenomenon, groups spiral toward violent confrontation through their successive efforts to ensure that they can defend themselves. Another rational-choice approach explains ethnic

See Oliver Ramsbotham, Tom Woodhouse, and Hugh Miall, eds., *Contemporary Conflict Resolution*, 2nd ed. (Cambridge, UK: Polity Press, 2005).

[10] Lake and Rothchild, "Spreading Fear," 4.

conflict as a consequence of "predatory" elites. Here, elites utilize fear to maintain mass support and keep themselves in power, a strategy that all too often drives them toward war.[11] A final, more multilayered approach, promoted by Stuart Kaufman, argues that "fear of ethnic extinction" is but one important factor in ethnic conflict.[12] Kaufman agrees that security dilemmas do happen in ethnic conflicts, but he lays stress on several preconditions that make security dilemmas possible: the existence of powerful myths, existential fear, and the opportunity for people – whether elites or masses – to mobilize politically around these myths and fears.

Myths

One way in which identities, as symbolic formations, are important is because they often offer important resistances to change – and potentially to justice of any kind. Here, the link between a person's identity and the beliefs that support that identity are important. Myths – about, say, historical Serbian victimhood, the divine nature of the caste system, or inherent superiority of a "white race" – provide important and stubborn frameworks for interpreting contemporary politics, precisely because they are highly resistant to facts. As political scientist Murray Edelman put it in his classic 1971 book, *Politics as Symbolic Action*, "Political beliefs and perceptions are very largely not based upon empirical observations or, indeed, upon 'information' at all. More than that, [they] are the most resistant to revision based upon observations of the world."[13]

What, then, is a "myth-symbol complex"? A myth is, of course, a story: a depiction of past events that typically mixes legend with fact. When used in connection with collectivities, it is an account, usually about a group's origins and past struggles, that is believed by a large number of people and that "gives events and actions a particular meaning."[14] A symbol is "an emotionally charged shorthand reference to a myth." It's not a story but a place, an object, a person, and so forth. As Kaufman describes, "In Serbian mythology, for example, the meaning of the Battle of Kosovo Field is the martyrdom of the Serbian nation in defense of Serbian honor and of Christendom against the Turks. 'Kosovo' therefore is a symbol referring to the myth of Serbian martyrdom."[15] Symbols not only convey information, however, they also are intended to provoke emotion – whether it be pride, sorrow, or pity. This is an important point, as those who stress the importance of myths and symbols also stress

[11] See Rui J. P. Figueiredo and Barry Weingast, "The Rationality of Fear: Political Opportunism and Ethnic Conflict," in Barbara F. Walter and Jack Snyder, eds., *Civil Wars, Insecurity, and Intervention* (New York: Columbia University Press, 1999).

[12] Stuart Kaufman, *Modern Hatreds: The Symbolic Politics of Ethnic War* (Ithaca, NY: Cornell University Press, 2001), 212.

[13] Murray Edelman, *Politics as Symbolic Action* (Chicago: Markham, 1971), 31.

[14] Kaufman, *Modern Hatreds*, 16.

[15] Ibid.

their affective power in mobilizing people, especially on the nonelite, popular level. A "myth-symbol complex," then, is the set of ideas that solidify a collective's identity.

It is agreed that such myths can have a variety of disruptive effects, although there are disagreements about what precise role they play in fomenting conflict. "Political memories and myths can lead groups to form distorted images of others and see others as more hostile and aggressive than they really are," Lake and Rothchild aver.[16] Nonetheless, they do not see myths and memories as causal factors in explaining why ethnic conflict breaks out in some places but not in others. In the conflict resolution literature, theorists who focus on the role of intercultural miscommunication in conflict, such as John Burton, often highlight misunderstandings around symbols and rituals as a key source for the evocation of threat and fear.[17] Kaufman, of course, sees the existence of hostile myth-symbol complexes as an important precondition for the emergence of an identity-based security dilemma. For him, societies in which hostile myth-symbol complexes are absent will not devolve into ethnic violence.

Need for Recognition and Self-Worth

An important group of researchers has mined sociopsychological investigations of Henri Tajfel and others into identity, coming to the conclusions that the drive for recognition and a feeling of self-worth is universal, and that it plays a critical role in the emergence of ethnic conflict.[18] Since an individual's personal sense of worth is tied to the collective identifications he or she has, denial of the value of those identifications through discrimination, repression, and worse should be seen as a root cause of conflict. Some have framed this idea in terms of "basic human needs" – the name of a school of thought in conflict resolution studies, led by John Burton, Herman Kelman, and others – which includes identity, recognition, and dignity as required, nonnegotiable elements for human development.[19] Others have simply integrated the idea specifically into theories of ethnic conflict.

The process by which lack of recognition may lead to conflict has been traced in greatest detail by Donald Horowitz. His theory of ethnic conflict is grounded in the anthropological assumption that all human beings want to feel worthy. He sees self-worth as bound up with the relative status – or "rank" – of ethnic groups. "Self-esteem is in large measure a function of the esteem accorded to groups of

[16] Lake and Rothchild, "Spreading Fear," 20.

[17] See Marc Howard Ross, "Creating the Conditions for Peacemaking: Theories of Practice in Ethnic Conflict Resolution," *Ethnic and Racial Studies* 23, no. 6 (November 2000): 1018–19.

[18] Tajfel's experiments with groups in the 1970s showed that mere categorization of people into groups leads to discriminatory behavior, as people hold a bias in favor of their own group. See Tajfel, "Experiments in Intergroup Discrimination," *Scientific American* 223, no. 2 (1970): 96–102. For a more developed theory of the phenomenon, see, H. Tajfel and J. C. Turner, *An Integrative Theory of Intergroup Conflict* (Monterey, CA: Brooks/Cole, 1979).

[19] Ross, "Creating the Conditions for Peacemaking," 1013.

which one is a member – the more so for memberships central to personal identity, as ethnic membership tends to be in Asia and Africa," he claims.[20] This starting point has important consequences for politics. For Horowitz, the political goals of ethnic groups are heavily influenced by symbolic considerations of recognition and rank. Because of both the symbolic dimension and the fear of domination, basic constitutional issues such as citizenship, electoral systems, and designation of official languages and religions are generally unsettled, and they become the stuff of politics itself, rather than a framework for it.

Horowitz recognizes that political demands run along a continuum from exclusion to inclusion, and that they are often asymmetrical: absolute control of the state, ethnic cleansing, and population exchange may coexist with less radical demands such as regional autonomy, equal access to the state, power sharing arrangements, and so forth. On this point, he concludes that what is desired by ethnic groups in addition to group worth is also group legitimacy, or a "rightful place," which groups may argue is based on prior occupation, traditional rule, a sense of special mission, or a right to succeed the colonial power. Whichever argument for legitimacy an ethnic group makes, there will be varying political consequences, particularly on the constitutional level. Finally, Horowitz continues to emphasize how politics functions as an arena for struggle over important symbols, such as the status of languages, the names of official places, the holding of honorific positions, just to name a very few. At stake is the allocation of *prestige*, which Horowitz claims is mostly accomplished by the state in postcolonial societies, since other institutions are relatively weak.

Kaufman draws heavily from Horowitz's model, as well as from his sources; for him as well, the struggle among groups is partly a struggle over relative rank. Although Lake and Rothchild echo the assumption that all human beings desire recognition, it is not granted a role in explaining ethnic conflict, on their theory.[21] Human needs theorists, by contrast, stress that conflict may result in cases where basic, nonnegotiable needs are not met. According to this theory, needs – which are distinguished from values and interests – are a matter of human development.[22] As such, they are morally compelling, but also practically so, since ignoring them is to ignore the causes of deeply rooted conflict.

Although it remains unclear why members of a group resort to dehumanizing strategies that would seem to go far beyond what might be required in order to feel appropriately recognized and worthy, these pathological outcomes are all too often on display – whether it is a matter of the wholesale destruction of cultural heritage in the Balkans and Afghanistan, or whether that of murdering indigenous elders in Guatemala. Moreover, these strategies frequently map onto gender roles. In Rwanda and Bosnia and Herzegovina, women from enemy communities were

[20] Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985), 143.
[21] Lake and Rothchild, "Spreading Fear," 19.
[22] Ibid.

targeted for rape as part of a strategy of domination and even genocide. There is thus also an important gender dimension at the heart of many ethnic conflicts, which turns around the issues of male/female rank and prestige.

Miscommunication and Mistrust

When groups do not trust one another, the potential for messages to be misinterpreted or even lost is exacerbated. Miscommunication, lack of communication, and "information failures" are central aspects of many theorists' accounts of ethnic conflict. Indeed, the question of communication – central to the issue of negotiation and bargaining – plays a key role in preventing conflict, and failures of communication may even lead to conflict. But what, precisely, is special about the communication problems at stake in ethnic conflicts? It would seem that the propensity for mistrust among parties is greater in the case of ethnic conflicts, because the stakes – for example, a group's bid to dominance, a group's very existence, or nonnegotiable needs (such as identity) – are quite high.

Mistrust factors into ethnic conflicts in several ways. First, it may color the prospects for negotiation as a preferred solution. Relying on game theory, Lake and Rothchild describe a situation in which groups must make costly investments to acquire accurate information about the opposing side in order to bargain effectively. Yet, sometimes, groups may deliberately withhold or misrepresent information, leading to suspicion, mutual mistrust, and potentially violent conflict – even when this is the least desirable outcome for both sides. "When information failures occur," they argue, "groups cannot acquire or share the information necessary to bridge the bargaining gap between themselves, making violence possible despite its devastating effects."[23] They thus cite "information failures" as one of the core causes of ethnic conflict.

Among conflict resolution specialists, there are a number of related approaches. Kelman, who is associated with human needs theory, agrees that information failures are crucial stumbling blocks to avoiding conflict. He emphasizes that, owing to a history of mistrust, enemies "are reluctant to be open, truthful, and generous in their interactions, because they consider it likely that the other side will take advantage of them. Although each party may have a genuine interest in making peace, it is unwilling to risk acting on the assumption that the enemy shares that interest."[24] He emphasizes that the perceived risks are all the greater when nonnegotiable factors are in play, such as identity, rights, and national existence.[25]

Another theory, called "intercultural miscommunication," takes a rather different approach to the issue. It holds that conflict is related to the fact that there exist

[23] Ibid., 12.

[24] Herbert C. Kelman, "Building Trust among Enemies: The Central Challenge for International Conflict Resolution," *International Journal of Intercultural Relations* 29, no. 6 (November 2005): 641.

[25] Ibid., 648.

different styles of communication, which "produce significant divergence in how actions are understood."[26] These researchers analyze the role of communications style in negotiations processes, but also the implication of different styles on the broader level of social interaction and everyday life. Thus, "Intercultural miscommunication readily occurs when symbols and rituals which mark and celebrate ethnic identity for one group evoke threat and fear for another. When intergroup tension is high, even inadvertent provocation of powerful symbols can be problematic in day-to-day relations."[27] The political use of symbols, in particular, can be a mechanism for maintaining differences. Moreover, in polarized contexts in which "culturally meaningful rituals and symbols emphasize differences between communities, contain negative images of the other community, or evoke strong opposite reactions from each community," miscommunication is likely to be a key factor in heightening the potential for conflict.[28]

Horowitz seems to echo this latter perspective. He notes the propensity for miscommunication, particularly in societies where groups are in competition for rank and prestige, although he does not allocate to it a central role in his theory of conflict: "Relations among members of unranked ethnic groups are far less predictable [than in ranked societies, such as slave societies and apartheid]. Characteristically, there is a lack of sufficient authority to establish a high level of reciprocity premised on inequality. Misunderstandings and misperceptions abound."[29]

Finally, as the previous discussion of myths would suggest, communication and trust in contexts where hostile myths are pervasive are likely to be challenging. As hostile myths become more widespread, moderate and "bridging" figures between communities may come under attack as "traitors" to their group – thus closing off concrete pathways for communication and mutual trust. The role of myths in these processes is only exacerbated when elites take the lead in propagating them.

Elite-Led Mobilization

The role of elites in fomenting ethnic conflict has been much discussed. Evocations of the predations of "ethnic entrepreneurs" were especially widespread in the wake of the break-up of Yugoslavia. Many observers charged that politicians in the region had strategically cleaved to newly refurbished ethnoreligious identities, which they then used to gain political support.[30] In some cases, these leaders are "true believers." That is, their adherence to a collective identity is not a cynical ploy to obtain power but rather a deeply held conviction; nonetheless, it may be useful in gaining

[26] Ross, "Creating the Conditions for Peacemaking," 1018.
[27] Ibid.
[28] Ibid.
[29] Horowitz, *Ethnic Groups in Conflict*, 28.
[30] See Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 2nd ed. (Palo Alto, CA: Stanford University Press, 2007).

support among a set of followers. In other cases, these elites are strategic players who opportunistically manipulate a given set of symbols and sympathies in order to achieve a political end. Sometimes, it may be hard to tell these two actors apart.

Elites' actions are important, but the question is what role they might play in ethnic conflict. In general, theories have focused on what elites do when they want to gain power or stay in power. In terms of gaining power, one influential thesis (which clearly points to events in the former Yugoslavia) posits that nationalist elites in newly democratizing countries are essentially an *un*democratic force who use nationalism as a means to afford only the partial implementation of democracy – only insofar as to entrench their own power in a way that precludes real accountability to large swathes of the people that the elites govern. Minorities, workers, and other political elites are excluded from participation, often on the rationale that their nationalist credentials are suspect or that they are in league with a foreign power.[31] Yet another important thesis posits that elites sometimes deliberately mislead mass publics (who want peace) through surreptitiously provoking another group and thus causing the public to believe that the other group is a direct threat.[32]

Relatedly, many researchers have shown that divisions *within* ethnic groups may be more important to understanding the role of elites in ethnic conflict than divisions between groups. The explanation here is that elites are often divided between ethnic extremists and moderates, in which the extremists try to accrue power through strengthening boundaries between groups, and insisting that moderates may be "traitors" to the other side. In some cases, in order to force moderates to hew to the extremists' line, they provoke a violent confrontation in order to generate uncertainty among ordinary people. Moderate elites then find themselves in the position of having to quell people's fears through taking a harder line in order to remain in power. This was the case, it has been argued, in Rwanda in the early 1990s, when the extremists gained the upper hand by using violence against Tutsis to induce an invasion by the Tutsi army from Uganda in 1993. This action, which subsequently created enormous fear among ordinary Hutus, fed into the events of 1994 that resulted in an extremist-led genocide.[33]

One question that consistently arises with respect to explanations for ethnic conflict that rely on elite action is why, in fact, do the masses often follow? If, as so many researchers show, elites lead mass publics down a path to war that is risky and potentially very costly to ordinary individuals, then why do people go? The answer to this question is not to discount the role of elites – they are important – but rather

[31] See Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (New York: W. W. Norton & Company, 2000).

[32] See Rui J. P. Figueiredo, Jr., and Barry R. Weingast, "The Rationality of Fear: Political Opportunism and Ethnic Conflict," in Barbara Walter and Jack Snyder, eds., *Civil Wars, Insecurity and Intervention* (New York: Columbia University Press, 1999).

[33] See Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1997). Also on this point, see Marc Howard Ross, "Ritual and the Politics of Reconciliation," in Yaacov Bar-Siman-Tov, *From Conflict Resolution to Reconciliation* (Oxford: Oxford University Press, 2004), 200.

not to discount the role of mass publics. The notion that ordinary people are easily deceived by their leaders neglects to deal with the fact that many ordinary people avidly and actively support their leaders' policies. Thus, as Marc Howard Ross puts it, "It is obvious what the 'sellers' hope to gain; but what explains the 'buyers?'"[34] Here, other factors clearly come into play, many of which have been previously mentioned: for example, fear and uncertainty; an escalation of everyday miscommunication and mistrust; people's desire for recognition and worthiness; and memories and beliefs in hostile myths about others. Fearon and Laitin point out that ordinary individuals seem to be the only people who actually hold the primordialist view of groups as unchanging entities. They refer to this as "everyday primoridalism"[35]: it helps animate notions that out-groups are "eternal enemies," along the lines of claims that Arabs and Jews have always been in conflict, or that ancient hatreds have always existed between communities in the Balkans.

Also factoring into the process of mass participation, as Fearon and Laitin argue, may be class and gender identities – in particular, the "availability of thugs (in most cases young men who are ill-educated, unemployed or underemployed, and from small towns) who can be mobilized by nationalist ideologues, who themselves, university educated, would shy away from killing their neighbors with machetes." The idea here is that those who actually do the fighting may be pursuing interests that have little to do with being "true believers" in the ethnic cause, but rather are related to pursuing individual agendas for economic gain, revenge, or "honor." "Perhaps publics do not follow, at least not at first," Fearon and Laitin say. "Instead, if elites 'let the thugs go,' who have motivations besides or in addition to ethnic hatred, processes begin that leave the moderates in the group little choice but to follow a similar path. By initiating tit-for-tat sequences, thugs bring about the construction of more antagonist group identities, making it rational to fear the other group and to see its members as dangerous threats." They also make the point that these men "police dissent from the ethnic extremist agenda," since such dissent is likely to put their own legitimacy in doubt.[36] Cases in which the availability of such groups of young men is a factor are rampant: Rwanda, Northern Ireland, and the Balkans are but a few. In some of these cases, especially in Rwanda and the Balkans, the targeting of women from other communities for rape only serves to underscore the role that both male and female gender roles play in ethnic conflict.

Competition for Resources

Interest-based competition over material goods is widely acknowledged as a source of conflict, including ethnic conflict. A key divergence concerns how much weight to

[34] Ross, "Ritual and the Politics of Reconciliation," 215.
[35] Fearon and Laitin, "Review: Social Construction of Ethnic Identity."
[36] Ibid., 871.

assign interests relative to values and needs. In 2002, Paul Collier and Anke Hoeffler famously engaged political scientists in what has come to be known as the "greed vs. grievance debate," in which they contended that competition among greedy elites, rather than identity-based grievances, better accounted for the outbreak of ethnic violence in the large-scale, quantitative studies he had done. Although Collier's position has softened somewhat since then, and he has come to recommend minority rights protections and preventing the capture of the state by a single ethnic group as key elements of a conflict prevention strategy, he remains an important voice in stressing the role of economic interest.[37]

There are many ways in which economic competition may come into play. As Lake and Rothchild note, "Property rights, jobs, scholarships, educational admissions, language rights, government contracts, and development allocations all confer benefits on individuals and groups. Whether finite in supply or not, all such resources are scarce."[38] The combination of scarce resources and a fight over the state, which regulates access to those resources, may produce harmful competition.[39] There are two strategies that can be pursued: one is to use state policy to increase aggregate social wealth, so that everyone benefits from economic gains. The other is to advocate for group-specific benefits, called "rents." These are essentially redistributive policies. Indeed, economists such as William Easterly have based their models on the relationship between economic factors and ethnic conflict on the propensity for ethnically heterogeneous societies to pursue rent-seeking (rather than profit-seeking) strategies.[40]

In the end, it is agreed that economic interests do play a role, but it is difficult to conclude that they are the only important factors in ethnic conflict. On economists' models, all ethnic losers should attempt strategies of assimilation in order to try to gain access to wealth controlled by other groups. Yet they do not always try to assimilate, and indeed they often adhere ever more stubbornly to their wealth-losing ethnic identifications. Moreover, as Horowitz has noted, purely economic-based rational-choice models do not take into consideration the obvious noneconomic calculations that intrude into economic activities such as job finding. Here, he emphasizes that in most ethnically divided societies, trades and occupations are themselves typically ethnically divided, meaning that particular ethnic groups will monopolize or largely dominate discrete sectors of the economy. Under such conditions, a person's aspirational goals and occupational path are likely to be highly structured

[37] Paul Collier and Anke Hoeffler, "Greed and Grievance in Civil Wars," *Oxford Economic Papers* 56, no. 4 (2004): 563–95.

[38] Lake and Rothchild, "Spreading Fear," 9.

[39] Ibid.

[40] See William Easterly and Ross Levine, "Africa's Growth Tragedy: Policies and Ethnic Divisions," *Quarterly Journal of Economics* 111, no. 4 (1997): 1203–50; and Alberto F. Alesina, Arnaud Devleeschauwer, William Easterly, Sergio Kurlat, and Romain T. Wacziarg, "Fractionalization," Harvard Institute Research Working Paper No. 1959 (June 2002).

against choices outside of the options offered by the ethnic group. In segmented societies such as these, economic competition is unlikely to be a source of ethnic conflict for the simple fact that individuals from different ethnic groups simply will not be competing against one another. Rather, there will be stronger incentive for ethnic groups to cooperate, since this will be necessary for the overall functioning of the economy.

WHAT ROLE FOR TRANSITIONAL JUSTICE IN THE WAKE OF ETHNIC CONFLICT?

In thinking through the role of transitional justice measures in the wake of ethnic conflict, I will presume that the goal for transitional justice is not to prevent ethnic conflict – which is not something that it could do on its own – but rather to make a modest contribution to the amelioration of the factors judged to cause it. Again, I focus here on the instrumental beliefs animating transitional justice, in an attempt to flesh out strategies for specific transitional justice measures to contribute to the amelioration of ethnic conflict. It should be noted, however, that transitional justice is prima facie better suited to addressing some factors in ethnic conflict than others. Since, for example, transitional justice does not usually deal directly with distributive issues, its effects on the competition for resources that often animates ethnic conflicts is likely to be scant.

Given the strong role that security fears play in fomenting ethnic conflict, I will also presume that transitional justice measures should be timed in direct relationship with the security situation in any particular context. The best time to undertake transitional justice measures is probably not in the midst of a security dilemma, which may erupt around moments of contestation, such as elections or processes of integrating formerly warring armed forces. The OECD-DAC guidelines on evaluating peacebuilding activities similarly note that "elections and controversial celebrations" act as potential triggers for violence.[41] Since some moments pose obvious risk factors for the reeruption of conflict, they may jeopardize the chances for transitional justice to be successful.[42] Therefore, I will assume that for transitional justice to have ameliorating effects, rather than destabilizing effects, it should be implemented in a consolidation or peacebuilding phase of conflict resolution. This is not to imply that it should not be discussed or even agreed on at other stages, particularly at the negotiation stage.

[41] OECD-DAC, *Guidance on Evaluating Conflict and Peacebuilding Activities: Working Document for Application Period* (Paris: OECD Publishing, 2008), 31.

[42] There is a question here about the role that the threat of prosecutions may play in de-escalating or escalating a security dilemma. For the moment, we have very little guidance on this issue. Some may think here of the role of the ICC arrest warrants for the leaders of the Lord's Resistance Army in Uganda, around which there has been much debate. However, the context there is not one of a security dilemma, but rather of ongoing conflict.

Crosscutting Issues

There are several issues that are likely to cut across all transitional justice measures. The first concerns public consultation and outreach. Transitional justice measures typically undertake public consultations as part of their preparation phase in order to engage with civil society, refine mandates, create buy-in and legitimacy, and ensure that victims' voices are heard. It may consist of activities such as qualitative and quantitative surveys, focus groups, workshops and meetings, and public commentary on key documents. Outreach, on the other hand, refers to activities that span the life of the transitional justice measure itself, including messaging, media relations, civil society involvement, and so forth. Up to now, consultations have generally been more robust than outreach efforts, perhaps owing to the fact that they occur first and are thus more likely to have dedicated funding.

Two questions arise here. Do practitioners need to communicate differently with different communities, in order to engage them effectively? As we learned earlier, there is the potential for miscommunication if people use the wrong cues in trying to do outreach. There may thus be a need to assess how best to reach various communities. Also, when is it feasible and desirable to bring communities together for discussion? Contact among groups may raise tension rather than ameliorate it, especially if that contact involves discussion of contentious subjects, such as the ones transitional justice is likely to raise. Here transitional justice practitioners may try to learn from the work of conflict resolution specialists who have a strong track record of experience in problem-solving workshops and other techniques for bridging divides. In some cases, bringing communities together may simply be undesirable.

A second crosscutting issue concerns decisions about which identity categories – if any – transitional justice measures should use. Will a particular measure, for example, simply adopt the ethnic categories that were operative in the conflict? Or will it attempt to contest those categories? Will it ignore categories altogether, using the more general label of "human rights abuse," no matter who was the subject of it? Since the South African TRC's bracketing of the issue of race in its definition of human rights violations, there has been much discussion about appropriate strategies.[43] Discussions at the International Criminal Tribunal for Rwanda around the "ethnic" nature of Hutu and Tutsi – a requirement for the charge of genocide – have raised related questions.

One way of assessing the issue is to follow a set of concepts developed in the social-psychological literature on ethnic conflict: decategorization, recategorization, and mutual differentiation.[44] These three rather intuitive processes are widely discussed

[43] See Madeleine Fullard, "Dis-Placing Race: The South African Truth and Reconciliation Commission (TRC) and Interpretations of Violence," CSVR Race and Citizenship in Transition Series (Cape Town: CSVR, 2004); available at www.csvr.org.za/papers/paprctp3.htm.

[44] I owe the reference to this set of concepts to Elizabeth Cole; see Elizabeth A. Cole and Karen Murphy, "History Education Reform, Transitional Justice, and the Transformation of Identities," Chapter 11 in this volume.

in the literature on conflict resolution.[45] In decategorization processes, people's ethnic identities are downplayed in favor of personal identities, such that people are asked to relate to one another on a purely personal level. In recategorization processes, people's ethnic identities are downplayed in favor of a more encompassing, "superordinate" category, such as gender or national identity. Mutual differentiation processes do not so much challenge the boundaries of ethnic categories, but rather ensure that differentiation does not entail demeaning the value of other groups.[46] Different researchers have posited different sequential relationships among these processes, which I will not develop here, since the idea is simply to offer a way of sorting through the myriad of proposals I will review later on.

Of course, applying these categories to the real world is messy and incomplete, and achieving decategorization, recategorization, or mutual differentiation surely is no easy feat, whether on the personal or the social level. As an example, many countries – Rwanda and South Africa included – have attempted to depoliticize ethnicity by encouraging the adoption of nonethnic, civic political identities. On this model, citizens would identify first and foremost with a set of values acceptable to all, rather than with the particularist values of their own community; they would put the needs of a well-functioning political community above the needs of their own ethnic group; and so forth. France and the United States are often cited as cases in which this civic identity model has been more or less successful. Such top-down, state-led attempts at recategorizing identity may, however, have little effect if the underlying social organization and patterns of civic alignment do not change as well. Thus, in Rwanda, the state has officially outlawed "divisionistic" identity claims, all the while being dominated de facto by Tutsis – a fact that everyone recognizes and that fundamentally undermines the principle of civic equality that the government officially espouses. Additionally, although there has been a proliferation of identities on the popular level since the genocide – including labels for Tutsi refugees from Uganda, returnees from camps in the Congo, and others – two observers conclude that "ethnic identities remain the most potent symbol of inequality and verticality.... The various meanings underlying Hutu and Tutsi stereotypes generated in an authoritarian social environment have given rise to a variety of ways to perceive society as divided between the controllers and the controlled."[47]

Whatever choice with respect to identity categories is made, it will be important to anticipate the consequences. A decategorization approach in transitional justice

[45] See Sam Gaertner, Jack Dovidio, Brenda Banker, Missy Houlette, Kelly Johnson, and Elizabeth McGlynn, "Reducing Intergroup Conflict: From Superordinate Goals to Decategorization, Recategorization, and Mutual Differentiation," *Group Dynamics* 4, no. 1 (2000): 98–114.

[46] For an overview, see Michele Andrisin Wittig and Sheila Grant-Thompson, "The Utility of Allport's Conditions of Intergroup Contact for Predicting Perceptions of Improved Racial Attitudes and Beliefs," *Journal of Social Issues* 54, no. 4 (1998): 795–812.

[47] Marc Sommers and Elizabeth McClintock, "On Hidden Ground: One Coexistence Strategy in Central Africa," in Antonia Chayes and Martha Minow, eds., *Imagine Coexistence: Restoring Humanity after Violent Ethnic Conflict* (San Francisco: Jossey-Bass, 2003), 42.

measures may gloss over the way difference motivated abuse. On the other hand, using the same categories as those operative in the conflict may help "freeze" them in the public sphere. There is no single model to adopt here, and the categories used by a commission are probably best developed in a way that works in a mutually reinforcing way with other reforms.

This latter point brings us to the third crosscutting issue, that of coherence.[48] I am thinking here primarily of insuring that transitional justice measures reinforce – rather than come into conflict with – one another and with other initiatives. This is an extremely difficult task, and probably theoretical at best given the range of activities that are likely to be taking place during a transitional period. There are, nonetheless, a few key strategies to highlight. One is the importance of having a clear analysis of the conflict in order to identify which factors were most salient to the eruption of violence. Was it manipulative elites? Particular myth-symbol complexes? Divisive commemorative practices such as parades? A sudden abrogation of certain minority rights? A privileging of soldiers from one region over those from another during an integration process? Presumably, it is those factors that should be targeted by a range of activities, including transitional justice measures.

Also important for coherence might be to achieve consistency in the way that ethnic categories are used – or not used – across initiatives. A truth commission that deemphasizes the salience of ethnic identities to human rights abuse might work at cross-purposes with reparations programs that stress mutual differentiation and a celebration of diversity. The same could be said of coherence with other reforms. If a truth commission deemphasizes identities, it may not be able to feed into a new multicultural school curriculum. If a vetting process takes ethnic categories into account in reforming the judiciary, then it might bump up against strictures in a new constitution that outlaw making discriminations based on ethnicity.

A question might arise, however, with respect to whether or not coherence is ultimately desirable. Where a government (or internationally led regime, perhaps) is pushing for measures that entrench divisions between communities, as happened with the Dayton Accords in Bosnia and Herzegovina, it might be worth thinking about strategies to mitigate these divisions. Nonetheless, one would have to know what those measures are in order to try to counteract them.

The final crosscutting issue concerns the role of third parties. Even a quick glance at past transitional justice efforts would confirm that they often involve third parties, most often the UN (for example, the ICTY/ICTR, El Salvador, Guatemala, East Timor, and Liberia). There are many positive roles that third parties can play. They can arbitrate disputes by making a judgment about them. They can mediate disputes by fostering communication and trust and helping to conceptualize ways forward.

[48] For the application of the idea of coherence to transitional justice measures, see Pablo de Greiff's work on reparations: Pablo de Greiff, "Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations," in Pablo de Greiff, ed., *The Handbook of Reparations* (New York: Oxford University Press, 2006), 1.

They can also ensure the credibility of guarantees that adversaries make to one another. But third parties can also play more ambiguous or even negative roles. For example, they can support or be perceived to support one of the sides (this is often the case with neighboring countries, and is perhaps obviously the case with irredentism).

In transitional justice efforts, one of the main critiques of third-party involvement has been that it has inhibited buy-in to genuine reform on the local level, or in some cases generated outright resistance and hostility. In the wake of ethnic conflict, when people fear for their basic security and mistrust based on identity affiliation may run very high, the presence of a neutral third party may be critical. That very presence may, however, serve to delay or prevent altogether the social learning needed to foster changed relationships. We can see both edges of this sword with the UN's administration in Bosnia and Herzegovina.

None of these four issues is easily dispatched, and much will depend on the political context. But awareness of them should help in making transitional justice measures – which I turn to now – more sensitive to ethnic conflict.

Truth Telling

Truth-telling initiatives, such as official and unofficial truth commissions, may have effects in reducing intergroup fear, in debunking myths, in reducing the attractiveness of elite agendas, and in recognizing the identity and dignity of all groups within a society. The key here will be to identify some of the processes by which these effects might occur, and also to think through the potential for unintended or harmful effects.

The general aims of a truth commission are to find out facts about past abuses, to counter official state narratives (which may be deliberately misleading), to give victims and survivors a chance to tell their stories, and to better understand the role of state and social institutions in aiding and abetting abuse. It may have a variety of effects, depending on the context and how well the commission is carried out. Its main impacts are thought to be on the level of public discourse. It reduces the range of permissible lies, according to Michael Ignatieff, and offers recommendations for the reform of institutions, which may then be publicly debated and pushed forward by civil society groups and politicians alike. Outreach activities, such as public consultations, civil society involvement, press conferences, and media coverage are therefore key elements of fostering a truth commission's potential for success.

What, then, would be the important discursive effects of a truth commission in the wake of ethnic conflict? In terms of performing a "truth-telling" function, a commission can bring to light the motives of elites, especially those who are cynical operators (rather than "true believers"), as well as the relationship between nationalist elites and undemocratic practices. It can explore and publicize divisions within ethnic groups, rather than treating them as monolithic blocs – which may

in turn allow for an understanding of potentially crosscutting cleavages. Further, truth telling may expose the ways in which extremist elites may have provoked conflict in order to demonize other communities and to force moderates to fall in line. Presumably, one method of examining the role of elites is through truth commissions' focus on the institutional actors that play a role in human rights abuse – whether this means military or political leaders, or leaders in the media and other social institutions.

Beyond analyzing the harmful effects of elite manipulation, a truth commission may also offer an opportunity to examine the role of mass publics and the "everyday primordialism" that may motivate them to be fearful of and to demonize members of other groups. In order to do this, truth commissions would likely have to tackle the issue of myth-symbol complexes head on, since they often motivate the pervasive sense of difference and threat. In this case, it would be important for truth commissions to identify which myth-symbol complexes operate within a given context, in order to ensure that a demystification of these narratives becomes a core element of its work. One strategy for minimizing the pull of myth-symbol complexes could be to investigate acts of righteous dissenters – people who crossed identity "boundaries," often at great risk to themselves – to help protect people from other groups. There are always such acts of sacrifice and heroism, but they often go unnoticed.[49] They might act as powerful countersymbols to demonizing myths that may color people's everyday perspectives on other groups. Alex Boraine has suggested that the South African TRC should have done this.[50]

Moreover, truth commissions might introduce into the public sphere a serious discussion of the issues of dignity and respect for identity. This might be done simply through offering victims a public forum in which to demonstrate their agency, although whether or not giving testimony is empowering or disempowering will turn on the structures that the commission has put in place. The commission will likely have to think seriously about the categories it will use in its investigations and expect that those giving testimony might wish to assert their own understandings of their identity nonetheless. The key thing is that the issues of dignity and identity be dealt with as part of the initial discussions around a truth commission, even if the commission decides to take a "decategorization" approach to identity in the end – eschewing ethnic categories in favor of a focus on individuals.

Although exploring each of these truths may be important, the more pertinent question is how to go about doing it. As I previously mentioned, even if new information is presented in the public sphere, people may resist accepting facts that do not fit into heroic narratives of their own community's past. They may refuse to believe that "their own" could commit atrocities. Or, they may believe that even if there were

[49] See Tzvetan Todorov, *Hope and Memory: Reflections on the Twentieth Century* (Princeton, NJ: Princeton University Press, 2003).

[50] Alex Boraine, Presentation given at ICTJ Transitional Justice Essentials Course, Istanbul, March 2008.

excesses, they were the result of self-defense. Here there are no easy answers. Careful outreach may be needed, including working with the media and with a wide variety of civil society organizations representing the interests of a range of ethnic groups – and not just those groups who might already be predisposed to working with the commission. An analysis of the resistances, in terms of narratives and also the main actors advancing them, may be useful, as well as a strategy for overcoming them. Currently, in Northern Ireland, civil society groups are acting as liaisons between the police-led Historical Enquiries Team (HET) investigating deaths during the Troubles and victims' families. Here, one of the key problems has been that families' memories of events may differ from the findings of the HET. When this is the case with families of Catholic/Republican victims, it only magnifies their traditional distrust of the police. As a result, one important Catholic/Republican group operates as a trusted mediator between the HET and families, explaining the contents of the report and even taking victims to the sites of the killing in order to demonstrate how it might have occurred differently, and thus lending legitimacy to the findings.[51]

Forming bridges with other initiatives is a natural part of a truth commission's work, since it typically aims to analyze state and social institutions in its investigations. In the light of the factors in ethnic conflict previously highlighted, one obvious point where truth commissions can intersect with other reforms is in the domain of education. Of all transitional justice measures, truth commissions are best placed to have an impact on school curricula, and some have had direct impacts, for example in Guatemala.

Memorialization

Similarly, memorialization efforts can operate on the level of public discourse, although they in fact have two functions, which may come into tension with one another. The first is to honor and mourn the victims (something that may be undertaken privately), and the second is to teach lessons about past violence (a distinctly public activity). Memorialization efforts can take many forms, including physical sites, such as museums and memorials, and names of streets, parks, and schools, and so forth, as well as practices, such as parades and days of commemoration.

Memorialization is likely to be a key site of contention for communities emerging from ethnic conflict, precisely because it is achieved through symbolic measures, and the symbolic level is especially crucial to these kinds of conflict. Memorialization might thus be thought to be most relevant to the factors of offering recognition to groups and, perhaps, debunking myths. The crucial question for ameliorating ethnic conflict will be if it does so in a way that does not demean the dignity of other groups,

[51] Author's meetings with members of the Historical Enquiries Team and the Pat Finucane Center, Belfast, Northern Ireland, June 23, 2008.

and if it does not foment a sort of tit-for-tat escalation of competing group symbols in the public sphere – which may reinforce a sense of group threat.

Indeed, the proposal that memorialization should offer recognition of the equal status of marginalized groups is hardly a stretch for transitional justice. The question, rather, is to assess the potential pitfalls of memorialization for intercommunal relations, as well as some positive examples of how it has been done. There are numerous instances of memorialization practices' capacity to escalate rather than reduce tensions between groups. One example concerns competing memorials that ex-combatant groups have erected in and around Sarajevo. Recently, a Bosnian Serb group proposed putting a large cross commemorating its dead on a hill overlooking the city. Though perhaps innocuous on its own, the memorial provoked outrage because it was both sited on the very hill from which Serb forces shelled Sarajevo during the war, and it would be plainly visible to all – even at night, when it would be lit up. The ex-combatant group claimed that their memorial was no worse that the memorials of other ex-combatant groups that they found offensive.

One way forward in these kinds of disputes might be to adopt the model used in the Good Friday agreement in Northern Ireland with respect to regulating Protestant/Loyalist parades during the summer marching season. Such parades wending their way through Catholic/Republican communities have provoked (sometimes deliberately) outrage and even violent confrontation resulting in numerous deaths. The Good Friday agreement established a Parades Commission to regulate all aspects of the parades, including the routes they could follow, the music they could play, and the number of marchers that could participate. The animating idea behind this strategy was one of mutual respect for the other group's symbols and narratives, which required that those symbols and narratives not be demeaning.[52] Thus, in the case of controversial memorials, an authority comprised of members of all communities might be able to defuse the tension, allowing all sides to pursue memorialization in a way that would offer the minimum level of offense to other communities. It is unclear whether or not this option would do much to foster communication and trust, much less recognition of dignity and identity, but it would have the merit of not enflaming passions further.

A much more difficult alternative would be to foster the creation of intercommunal memorials. This might well be a Herculean task for societies emerging from conflict, such as Northern Ireland and the former Yugoslavia. In Northern Ireland, ten years after the Good Friday agreement, communities are still reluctant to commemorate the death of those *within* their communities who "colluded" with the other side – much less actually commemorate deaths *on* the other side. In the Bosnian town of Mostar, communities that came together to attempt a joint memorial found that they could agree on admiration for only one thing: the work of Bruce Lee. When they unveiled a monument to him in 2005, one local youth group leader

[52] Ross, "Ritual and the Politics of Reconciliation."

said, "We will always be Muslims, Serbs or Croats, . . . But one thing we all have in common is Bruce Lee."[53] Only closer scrutiny of the decision-making process can tell us whether this might be a positive development as a sort of decategorization approach to memorialization, or whether it worked well in defusing fear or promoting communication and trust. At the very least, such an outcome would seem to do little to foster recognition of the dignity and identity of all groups.

There may also be debate about what to do with existing memorials that may foster divisiveness: should the public landscape be swept free of them, or should they remain as reminders of a past to which no one would want to return? This debate has been taken up in Northern Ireland, which is famous for the large murals that decorate buildings in Catholic/Republican and Protestant/Loyalist areas. Many of these are strongly heroic and didactic, directly depicting the use of violence as a legitimate tool against state or nonstate "terrorism," depending on which side one is on. Some critics are concerned that the murals both reinforce a sense of threat as well as a demonization of other groups that may be particularly harmful for children growing up in these neighborhoods. Others argue that they should be kept as remembrances and supplemented with newer images depicting the benefits of peace. Thus, in the Catholic/Republican Bogside neighborhood in Derry, where the Bloody Sunday massacre took place in January 1972, the latest mural shows images of John Hume, one of the architects of the peace process, alongside Martin Luther King, Jr., Mother Teresa, and Nelson Mandela.[54]

It might be hoped that the process itself of creating memorials could foster intercommunal trust and communication. The symbolic landscape can be a minefield, however, and such efforts will have to be considered and careful.

Reparations

Reparations provide recognition directly to victims of gross human rights violations, usually through a combination of material benefits and symbolic gestures of acknowledgment and regret.

Throughout the literature on ethnic conflict, researchers refer to intergroup apologies as an important method of offering recognition, reducing the fear of domination, and promoting communication and trust. Apologies may offer a signal that a state – or another group – takes seriously the wrongs of the past, especially when they are coupled with other measures, such as material reparation and reform of discriminatory institutions. Sometimes, apologies are done in a highly public way. The recent apology to the Stolen Generation in Australia, for example, was broadcast live throughout the country, fed into schools from elementary to university level,

[53] "Bosnia Unveils Bruce Lee Bronze," *BBC News Online*, November 26, 2005; available at http://news.bbc.co.uk/2/hi/entertainment/4474316.stm.

[54] Author's site visit to Derry, Northern Ireland, June 2008.

and drew sizeable crowds to public spaces where large video screens had been set up for viewing. In other cases, such as apologies for slavery issued by state legislatures in the United States, few may take note.

Although it might seem as though apologies would be an easy, low-cost option for dealing with past abuses, in fact they are not. In the Northern Ireland case, committed people on the Protestant/Loyalist side of the conflict would see state acknowledgment for abuse against "terrorist" Republican/Catholics as a betrayal of them and of their identity. Even proposing an apology can thus have real political consequences since, in many postconflict societies, political parties tend to break down along ethnic lines.

Aside from apologies and other forms of symbolic recognition, one other aspect of reparations salient to identity-based violence may concern material reparations given on a collective basis. There is, in fact, an emerging debate on collective reparations, the terms of which I cannot hope to capture here, but that revolves around questions of whether or not reparations should be folded into development programs that target areas where marginalized groups live, or whether they should be part of a redistribution strategy that aims to remedy the exclusions suffered by marginalized groups. Depending on how this debate plays out, there may be reasons to think that reparations can make some small contribution to ameliorating conflicts over resources among ethnic groups, at least on the community level. On the other hand, if groups are singled out for financial reparations, this may only incite further competition. Much more work on the issue needs to be done before any recommendations might be made.

Vetting

The vetting of public employees responsible for direct abuses or for enabling abusive policies is an important aspect of transitional justice that, to be successful, should form one part in a larger process of institutional reform. In the context of ethnic conflict, vetting should be thought about with respect to state entities, paramilitary structures, shadow governments, and illegal/unrecognized political parties, especially as these elements merge together in transitional or postconflict institutions. To take a very complex case (albeit one in which vetting was not, unfortunately, done), in Northern Ireland the relevant actors would likely be the government of Northern Ireland (including the Northern Ireland police), the British military, the Provisional Irish Republican Army, the Protestant paramilitaries, and the IRA's political arm, Sinn Fein.

Vetting might be thought to have positive effects in ameliorating elite-led mobilization, promoting intergroup trust, and diminishing a competition for resources (especially in those societies in which access to resources is strongly dependent on one's relationship to the state). If done well and with sufficient political buy in, vetting

might remove or sanction divisive leaders; it could promote greater trust between marginalized communities and the security forces; and it could both open new career paths for marginalized groups and confirm a sense of ownership of the state. Vetting is especially important with respect to societies in which ethnic domination has been maintained – or was perceived to be maintained – through the military or the police. Burundi and Northern Ireland come to mind as such examples.

A key question in any vetting process in the wake of identity-based conflict will be that of creating a process that coheres with broader goals of achieving ethnic "balance" within institutions – often understood as numerically defined targets. In the Burundi peace accord, for example, there is a requirement for the military, which has long been dominated by the minority Tutsi, to contain no more than 50 percent of any one ethnic group. There are a number of potential pitfalls, not least of which is the fact that when vetting is coupled with preferential policies, there is the possibility that the vetting process itself will not be seen to be neutral, but rather biased toward one group or another. Although it is hard to identify an example of this in practice, one could think of similar problems with respect to coupling the process of integrating military ranks (especially officer/command ranks) with preferential policies. In Burundi, struggles over which ranks would be taken by members from which groups (Hutu and Tutsi) have been a significant problem in integrating the state army and rebel forces there.

Relatedly, in Bosnia and Herzegovina as well as South Africa, to take two examples, the question of the specifically ethnic composition of the public sector was a key issue for transitional justice efforts. In the reform of abusive state institutions, the issue of building trust across ethnic lines is a crucial one. Is that trust to be built, however, around the notion of numerical representation or around the notion of neutral professionalism – or both? In Bosnia and Herzegovina, the UN-led vetting of judges and prosecutors was done in such a way as both to shore up professionalism and to try to effect greater representation of certain collectivities in certain regions.[55] In South Africa, the integration of liberation movement combatants into the national armed forces was accompanied by preferential policies, but not by vetting for past human rights abuse.[56]

Vetting is not an easy task, as it requires investigation on a case-by-case basis. It is significantly aided by solid documentation – precisely the kind of thing that might be lacking in the wake of ethnic conflict, in which nonstate actors may have been involved. Being able to marshal UN resources in undertaking such an extensive

55 Alexander Mayer-Rieckh, "Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina," in Alexander Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: SSRC, 2007).

56 Jonathan Klaaren, "Institutional Transformation and the Choice Against Vetting in South Africa's Transition," in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention*.

process, as was the case in Bosnia and Herzegovina, is something that is likely out of reach of most countries.

Vetting is certainly an area where an eye toward coherence is important, because it is directly linked to institutional reforms, which themselves will set the conditions for doing vetting, and which may in turn be affected by vetting processes. The main institutional approaches for managing ethnic conflict – constitutionalism and electoral design – may be in play here, as politicians may be screened and prevented from gaining access to public office. This, in turn, may reduce chances for elite-led mobilization along ethnic lines. The UN authority in Bosnia and Herzegovina has used its powers to annul election results when strongly nationalist candidates have won, for example.

Over the long term, vetting and institutional reform have enormous potential to reduce fear and anxiety through creating less biased institutions. In Northern Ireland, the extensive reforms to policing proposed by the Patten Commission have largely been implemented. The name of the police service was changed from the Royal Ulster Constabulary to the less divisive Police Service of Northern Ireland; new uniforms were created; preferential policies were put in place and recruiting from Catholic/Republican communities was encouraged. The result has been mainly positive so far, with a more representative police force and one that is more trusted by the Catholic/Republican community. On the other hand, recent reports suggest a significant drop-off in recruits from Protestant/Loyalist communities, suggesting an unforeseen backlash against the more inclusive reforms.[57]

Finally, there may be reason to believe that vetting on integrity grounds alone may not do much to change pernicious institutional subcultures, underpinned by racism and sexism.[58] Any top-down reform is likely to bump up against these subcultures, in which within-group intimidation of dissenters and moderates may prevent a transformation of institutional culture.

Prosecutions

Criminal accountability for perpetrators of gross human rights violations is one of the most well-known transitional justice responses. As a tool, it may have a variety of effects for ameliorating ethnic conflict. First, the truth-telling function of prosecutions may help combat myths about the past, reveal motives of elites who are cynical operators, and highlight the role of mass publics as their supporters. As mentioned earlier, people are sometimes disinclined to believe that members of their own group could commit abuses, dismissing such claims as propaganda or perhaps the work of a few bad apples. Pieces of evidence may come to light through criminal trials that

57 Meeting with Mike Ritchie and Kieran McEvoy, Committee on the Administration of Justice, in Belfast, June 23, 2008.

58 See Mary O'Rawe's "Security System Reform and Identity in Divided Societies: Lessons from Northern Ireland," Chapter 3 in this volume.

may powerfully counteract such beliefs. In Bosnia and Herzegovina, for example, the ICTY's release in 2005 of a gruesome videotape showing an elite Bosnian Serb group called the Scorpions murdering unarmed captives from Srebrenica had a profound effect on Serbs, forcing many of them to rethink their denial about atrocities at Srebrenica in the face of apparently incontrovertible evidence.[59]

Second, prosecutions may reduce fear and anxiety, especially as sense of physical threat, by incapacitating direct perpetrators and masterminds of criminal policies, usually by putting them in jail. Payam Akhavan has argued that this was indeed the case when Hutu leaders still operating in refugee camps across the Rwandan border were arrested in order to be brought to trial at the International Criminal Tribunal for Rwanda.[60] Similar claims have been made for war crimes trials of lower-level perpetrators in Bosnia and Herzegovina. One recent study argues that such prosecutions remove abusive local power holders, thus promoting a sense of security for minorities and thus encouraging the return of displaced minorities.[61]

Third, and relatedly, by targeting the "big fish," prosecutions may reduce chances for elite-led mobilization. Removing from the political scene radical nationalists such as Slobodan Milosevic and Vojislav Seselj may have contributed to the ongoing moderation of politics in Serbia in the early 2000s, for example.[62]

Fourth, and on the flip side, extremist elites may invoke criminal trials as evidence of a group's further "victimization," thus reinforcing hostile myths. In fact, this was a widespread response to the establishment of the ICTY in 1993 and was also a response to the recent establishment of the Bosnian War Crimes Chamber. In the Democratic Republic of Congo, ICC arrests of alleged criminals from one ethnic group have led to charges of discrimination. One way of handling this reaction has been to "balance" prosecutions to include a range of groups. Such a strategy, however, may be as easily interpreted as evidence of bias as it might be of a lack of bias. Some groups might view the strategy as one that makes the court a neutral, honest broker. Others will see it only as further evidence of the irredeemably political nature of the process.

A FRAMEWORK FOR SENSITIVITY TO ETHNIC CONFLICT

The foregoing sections have assessed the ways that transitional justice measures might ameliorate the factors at work in ethnic conflict, and also given reason to believe that they can indeed contribute to this goal. A more systematic approach is needed,

[59] Anthony Dworkin, "Serbian Court Convicts Four over Killings in Scorpions Tape," April 12, 2007; http://www.crimesofwar.org/news-srebrenica3.html.

[60] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *The American Journal of International Law* 95, no. 1 (Jan. 2001): 7–31.

[61] See Monika Nalepa, "Why Do They Return? Evaluating the Impact of ICTY Justice on Reconciliation," unpublished ms. (2007).

[62] See Diane Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (New York: Open Society Institute, May 2008).

however, in order for transitional justice measures to ensure that they are taking stock of the role that fear of domination, a pervasive sense of threat, ethnic entrepreneurs, dehumanizing myths and narratives, and other factors in ethnic conflict have played in the past and continue to play in the present.

Expanding the Horizons of Transitional Justice

The first step is to begin with an analysis of the conflict that highlights its most salient factors. This approach requires transitional justice actors to ask broader questions of the context than they are perhaps used to asking. One important reason is that the kinds of abuses that occur in ethnic conflicts typically either have a discriminatory intent, or they disproportionately affect a particular group, often because that group has been systematically marginalized on the basis of an identity singled out by the state or by other dominant social forces. These abuses may form part of, or just be symptomatic of, longer-term social processes that create and reinforce exclusion, primarily by keeping *everybody* – not just victims of human rights violations – "in their place," so to speak, through both symbolic and physical means.

There are three ways that transitional justice actors could expand their horizon and take into account these larger concerns. The first concerns the assessment of the *relationship between human rights violations and a broader universe of harms*. Here, transitional justice actors could go beyond the basic question of what violations there have been – torture, disappearance, rape, and so on – and ask how these violations fit within a broader range of harms related to ethnicity, religion, and language. The everyday harms – both physical and symbolic – of the apartheid system in South Africa gives a good example. These harms, because they are not categorized as "gross human rights violations," are often not captured in a standard human rights framework. It is also important to understand the temporal relationship between human rights abuse and the broader harms, which may span generations and be a consequence of a history of cultural, religious, linguistic, or other forms of domination. In these cases, the legacy of the harms may be transmitted from parent to child. Finally, one would want to assess the potential for further human rights violations as a result of ongoing harms. Signals of this include a pervasive sense of physical threat, including existential threat to the group (fear of ethnic cleansing, forced displacement, large-scale massacre, and so on).

The second way of expanding horizons concerns the *assessment of past political and conflict dynamics*. In this case, it will be important for transitional justice actors to know whether or not there has been a history of domination, and whether this history has been supported by myths and narratives of group superiority/inferiority. They will want to identify the key points on which interpretations of the conflict diverge – this often takes the form of events imbued with very

different symbolic meaning on each side. There should be an assessment of the past sources of tension. One example would be unequal access to the state among groups, whether formally or informally. There should also be an assessment of the actors instrumental to the conflict, especially political or cultural elites who may have mobilized political support through appeals to identity-based solidarity, or media outlets that fomented hate speech and disinformation (and still may continue to do so).

The third way concerns *assessment of present political and conflict dynamics*. This aspect is crucial, because conflicts change over time. Transitional justice actors will want to assess the long-term trends of increasing or decreasing tensions. To do this, they should analyze whether or not groups' relationships to the state have changed, and whether their access to resources has changed. They will want to assess the level of disinformation and hate speech in the media. They should determine whether protections for minorities are in place and whether these are credible and enforced. They will also want to assess short-term trends – in particular, triggers that may escalate tension or cause violence. These may include divisive festivals, parades, commemorations, and other events freighted with symbolism. They also certainly include elections. Transitional justice actors should assess what institutions are in place to manage these long- and short-term tensions. Examples are the reform of political arrangements in ways that benefit all groups and oversight mechanisms regulating divisive events. Finally, it is important to understand the different social actors' perspectives on how to deal with past human rights abuse. Courtney Jung, in her chapter about indigenous peoples for this volume, notes indigenous and minority groups may see transitional justice as an opportunity to expand claims for justice beyond individual human rights violations, whereas the state may see it as an opportunity to limit them. That is, both of these actors may have an interest in pursuing transitional justice but have very different motives for doing so. States may seek to draw a line under the past, whereas indigenous and minority groups want to link the past to the present.[63]

A Set of Framing Questions

The three modes of analysis just suggested are intended only to indicate directions for thinking through some very complex issues. They certainly do not exhaust the possibilities. Similarly, there can be no overarching framework for "applying" transitional justice to situations of ethnic conflict, as each context is different.

Rather than offering a blueprint for transitional justice initiatives to follow in cases of ethnic conflict, the approach here is to set forth some guiding questions. It

[63] See Courtney Jung's "Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society," Chapter 7 in this volume.

is influenced by the approach that the Patten Commission took in proposing a series of reforms to the police service following the 1998 peace agreement in Northern Ireland.[64] The questions are:

1. Will the initiative provide for accountability, both to the law and to all the communities it aims to represent?
2. Will the initiative be perceived as legitimate by all affected groups?
3. Will the initiative promote social learning between communities?
4. Will the initiative promote trust between groups?
5. Will the initiative make state and/or social institutions more representative of the society they serve?
6. Will the initiative promote and protect the dignity of all?

Proposals for transitional justice measures could be tested against these questions to determine whether or not they will be sensitive to the particular challenges that ethnic conflict poses. This involves using judgment – but judgment based on informed analysis and an awareness of the actors and tools that are relevant in these kinds of contexts. Let us take each question in turn, in order to better understand how they could apply to transitional justice measures.

Will the initiative provide for accountability, both to the law and to the communities it aims to represent?

It may do so by ensuring that oversight for the initiative is plural or neutral. It could be plural through power sharing of some form, perhaps modeled on new constitutional arrangements. It could be neutral through bringing in a third party, such as the UN or a trusted power. Also, the initiative could provide for outreach to and feedback mechanisms for all affected communities; these mechanisms should be designed to get beyond the view of elites alone (including communal elites).

Will the initiative be perceived as legitimate by all affected groups?

It may do so by employing fair, nondiscriminatory procedures; special attention should be paid to official languages and to ceremonial ritual. It could provide for meaningful, decision-making-level participation by members of all groups. It could emphasize the need for careful outreach, including a variety of targeted messages, to all groups (including a “dominant” group – perhaps especially so). Finally, where sovereignty is contested, the initiative could incorporate a pluralist approach to law and sovereign authority in its operations, while still maintaining a strong commitment to individual rights and the right to “opt out” of culturally specific arrangements if desired.

[64] See O’Rawe’s “Security System Reform and Identity in Divided Societies: Lessons from Northern Ireland,” Chapter 3 in this volume.

Will the initiative promote social learning across communities?
It may do so by modeling successful cooperation among groups. It could also highlight examples of behavior that all groups can identify with, such as people who crossed identity "boundaries" to help others in need.

Will the initiative promote trust across groups?
It may do so by modeling competence of marginalized groups (especially where there are prejudices around groups' intellectual or professional capacities). It could demonstrate cooperation among elites. And it could debunk myths and divisive narratives.

Will the initiative make state and/or social institutions more representative of the society they serve?
It may do so by facilitating the participation of marginalized groups in decision-making forums. It could build the organizational capacity of marginalized groups so as better to participate. Moreover, it could enact preferential policies, especially if these are in use in other state institutions as a means of reversing discrimination. Careful messaging around the logic of preferences will be necessary in order to help prevent negative reactions from a dominant group.

Will the initiative promote and protect the dignity of all?
It may do so by anticipating the use of hate speech and distortions of the truth, putting in place a strategy to publicly and swiftly combat them when they arise. It could also employ a culturally sensitive approach in its outreach, its daily functioning, and the delivery of services and benefits.

This is but a small sample of how the six questions might work. In effect, through grappling with these questions, transitional justice actors could try to model the norms they would like to see reflected in politics and society. They could also identify and try to influence the levers of power that would help create political and social change.

CONCLUSION

The unique dynamics of ethnic identities and conflicts among them create special challenges for transitional justice – both on the levels of operation and of achieving the instrumental goal of ameliorating ethnic conflict. This chapter suggests that these challenges may be overcome through sophisticated analysis of the specific dynamics of ethnic conflict, as well as the application of a set of framing questions to help ensure that these dynamics are taken into account in the design and implementation of transitional justice measures.

Still, it should be recognized that transitional justice is unlikely on its own to lead to the kind of social transformation that is often expected in societies where one or more groups have been systematically abused on the basis of their identity. A truth commission cannot end racism; prosecutions of a handful of masterminds cannot make up for genocide; and a state-run reparations program cannot restore lost lands and centuries of lost dignity to indigenous peoples.

Where this approach can make a difference is in encouraging and reinforcing activities going on in other aspects of political and social life – constitutional reforms, media oversight, preferential policies, local-level reconciliation initiatives, and so on. Indeed, it has become something of a truism among transitional justice actors today that a holistic approach to transitional justice, and to transitions more generally, is of key importance. A range of measures will be necessary, not just mutually reinforcing judicial and nonjudicial forms of recognition and accountability, but also reform of state and important social institutions. Transitional justice will not by itself address all past injustices or effect social transformation – this is too high a goal for it. It could, however, help empower key actors who would make such transformation possible. This is why stress is laid on creating interventions that promote dignity and trust, that debunk harmful myths, and that insist on representation of all groups. It is through the good practice of transitional justice that new actors may be empowered and new political behaviors modeled.

10

Transitional Justice, Federalism, and the Accommodation of Minority Nationalism

Will Kymlicka

The dramatic growth of the field of transitional justice (TJ) since the late 1980s is connected to the idea that TJ can serve as an instrument to consolidate democratic transitions. This instrumental justification is not the only rationale for adopting TJ. One can make a plausible normative argument that there are moral duties to expose the truth about gross human rights violations, to prosecute their perpetrators, and to compensate their victims, even if such programs have little or no effect on the larger processes of democratic transition. But the international popularity of TJ is undoubtedly connected to the idea that it also may contribute to democratization, which has increasingly become an accepted goal of international organizations.[1]

There are many ways in which TJ has been said to help consolidate democracy, but one familiar claim is that in societies that have been scarred by ethnic animosity or religious intolerance, TJ can help reshape identities and, in particular, to weaken those aspects of people's identities that were the source of violence and conflict and to replace them with a strengthened sense of shared identity related to common membership in the national political community. For example, the ethnic identities of "Hutu" and "Tutsi" had become interpreted in Rwanda as inherently antagonistic and monolithic, and hence were capable of being mobilized for acts of genocide. Processes of TJ, it is said, can help reduce the salience of these divisive identities, depoliticizing them, and replacing them with a shared inclusive national identity as "Rwandan" based on equal citizenship in the polity. Similarly, the South African TRC was often defended as a way of weakening the salience of inherited racial

* An earlier version of this chapter was presented at workshops at the ICTJ and the Oxford Centre for the Study of Inequality and Democracy, and I am grateful to the participants for the many helpful comments and questions. Special thanks to Paige Arthur and Pablo de Greiff for their detailed suggestions and advice.

[1] See Paige Arthur, "How 'Transitions' Re-shaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 321–67, on the relationship between the principled/normative arguments for TJ, and the instrumental/causal arguments.

identities, and of building a new inclusive panracial sense of South African "rainbow nationhood."[2]

This is often described as the "nation-building" dimension of TJ – it can be a vehicle for weakening inherited identity divisions, and for building new national identities. Countries will become peaceful democracies only if all citizens come to share a sense of identification with, co-ownership of, and perhaps even pride in, their political community. This is difficult to achieve in contexts where members of one group have traditionally viewed the state as alien and oppressive, dominated by another identity group. Nation-building forms of TJ, it is widely believed, can help overcome this legacy, and enable all people to feel that they have a rightful place in the new national imaginary.

Of course, TJ can serve this nation-building function only if the national identity is indeed an inclusive one – if the members of different ethnic groups can see a place for themselves within this new national identity. If not, nation building can simply exacerbate the problem. This has been recognized by practitioners of TJ. For example, although the Guatemalan Commission for Historical Clarification (CEH) firmly insisted that truth telling and reparations can play a nation-building role in helping to relegitimize the Guatemalan state as the locus of people's loyalties, it acknowledged that this will work only if the state repudiates earlier "monocultural" ideas of Guatemalan nationhood, based almost exclusively on Ladino identity. Such exclusionary ideas of nationhood, it argued, have historically denigrated the value of indigenous peoples and rendered them publicly invisible, thereby helping to create the conditions under which severe human rights abuses became more likely.[3] Nation building of this sort has been the cause of historic injustice toward indigenous peoples, not the solution to it. To avoid this danger, Guatemala's reconciliation framework insists that it is promoting a different sort of nation building, one that is "pluricultural" rather than monocultural, and hence accommodating of indigenous difference.[4]

The Guatemalan case stands in interesting contrast with the Rwandan and South African cases, where nation-building TJ was used to delegitimize inherited ethnic and racial identities. In the CEH's model of multicultural nationhood, explicit

[2] Brandon Hamber and Hugo van der Merwe, "What Is This Thing Called Reconciliation?" (South Africa: Centre for the Study of Violence and Reconciliation, 1998); available at: www.csvr.org.za/wits/articles/artrcbh.htm.

[3] The Peruvian truth and reconciliation commission made a similar argument – i.e., that the centuries of denigration and invisibility of indigenous peoples made human rights abuses more likely during the conflict between the military and Shining Path.

[4] Commission for Historical Clarification, *Memory of Silence* (Guatemala, 2000); available at shr.aaas.org/guatemala/ceh/report/english/toc.html. For the appeal to multicultural nation building in Guatemala's CEH, see Jeff Corntassel and Cindy Holder, "Who's Sorry Now? Government Apologies, Truth Commissions and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru," *Human Rights Review* 9, no. 4 (2008): 465–89; and Ruth Rubio-Marín, Claudia Paz y Paz Bailey, and Julie Guillerot, "Indigenous Peoples and Claims for Reparation: Tentative Steps in Peru and Guatemala," Chapter 1 in this volume.

public recognition must be given to indigenous ethnic identities (e.g., in the form of language rights, customary law, legal protections of Mayan sacred sites or dress). Indigenous peoples must be included in the nation, not just as undifferentiated individual Guatemalan citizens, but also collectively, as a constituent component of the nation. The Rwandan government, by contrast, did not give explicit recognition to its constituent ethnic groups – rather it attempted to suppress public discussion of ethnic labels, which it dismissed as inauthentic colonial inventions used for divide and rule purposes. Its aim has been to "extinguish" ethnicity, not simply to build new national identities that can encompass diverse ethnic identities.[5] Similarly, the ANC often treats racial identities as the artificial product of apartheid that can and should fade in the new democracy.

This contrast between the Guatemalan and Rwandan/South African approaches points to an important choice facing all attempts to use TJ for nation-building purposes. Both approaches can be seen as pursuing the project of "citizenization" – that is, they both seek to replace earlier uncivil relations of distrust, animosity, and intolerance with relations of democratic citizenship.[6] And they both therefore seek to reduce the likelihood that identity cleavages will be mobilized in ways that are violent or destabilizing. But they differ in how to achieve this. For many commentators, the best way to avoid the destabilizing political mobilization of ethnicity is to reduce the political mobilization of ethnicity tout court – that is, to depoliticize ethnicity. This is the route chosen in Rwanda and South Africa, and it has been pursued in other countries as well, often reflected in prohibitions on ethnic political associations or parties, or prohibitions on the voicing of particular types of ethnic demands, or on the public discussion of "sensitive" political topics.

But this is not the only option. Another option, reflected in the Guatemalan case, is to acknowledge and legitimize the political mobilization of ethnicity, but to channel this mobilization in peaceful and democratic ways. On this approach, the best way to avoid destabilizing ethnic mobilization is precisely to stabilize it – that is, to regularize and normalize ethnic politics, to treat it as an accepted and everyday part of democratic political life, subject to the same rules and conditions as any other form of democratic participation and claims making. This can involve many different forms of public recognition of ethnocultural difference, including both substantive cultural rights (e.g., language rights, recognition of "uses and customs," accommodation of religious practices) and procedural mechanisms of consultation, representation, and participation (e.g., advisory councils, guaranteed parliamentary representation, various forms of self-government). These policies do not reduce the political salience of ethnicity but seek to reduce the potential for violence or instability associated with identity cleavages by normalizing ethnic politics within a

[5] See Chris Chapman, "Transitional Justice and the Rights of Minorities and Indigenous Peoples," Chapter 8 in this volume.

[6] On "citizenization," see James Tully, "Introduction," in Alain Gagnon and James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001), 25.

larger democratic constitutional order that all citizens can identify with and endorse, and that compels all political actors to respect constraints of human rights and democratic accountability.

It is an interesting and important question – beyond the scope of this chapter – to determine which of these two approaches to citizenization is more appropriate under which conditions. Each has obvious risks. The first strategy of de-ethnicization carries the risk that the "national" identity, which in theory is supposed to transcend ethnic differences, will in practice be strongly associated with just one group. For example, although the Rwandan TJ measures explicitly avoid ethnic categories, the putatively nonethnic categories (e.g., of victim or perpetrator) have become strongly ethnically coded.[7] More generally, the idea that there can be a purely "civic" form of nationhood, neutral among the languages, identities, and practices of the various ethnic groups in the state, has been strongly disputed. Claims to the construction of a civic or postethnic form of nationhood often simply mask the ways in which the language and culture of the dominant group continue to shape the national identity. Moreover, there is something paradoxical about pursuing democratic consolidation by prohibiting the democratic mobilization of ethnic groups. Any country that fears the exercise of democratic freedoms by its ethnic minorities is likely to develop a stunted form of democracy. As Istvan Bibo put it, referring to the way Central European countries in the interwar period attempted to limit the political mobilization of their minorities:

> In a paralyzing state of fear which asserts that freedom's progress endangers the interests of the nation, one cannot take full advantage of the benefits offered by democracy. Being a democrat means, primarily, not to be afraid: not to be afraid of those who have different opinions, speak different languages, or belong to other races. . . . The countries of Central and Eastern Europe were afraid because they were not fully developed mature democracies, and they could not become fully developed mature democracies because they were afraid.[8]

However, the option of normalizing ethnic politics through a multicultural conception of citizenization also carries risks. In some circumstances, there is simply no way to guarantee that ethnic politics will stay peaceful and democratic. No matter what "paper guarantees" exist, the risk that ethnic politics will degenerate into violence may simply be too high. (This presumably was part of the rationale in Rwanda.) But even if one is confident that ethnic politics will remain peaceful and democratic, one may worry that multicultural models of TJ will not achieve their "nation-building" or "community-building" goals. They may lead to "parallel societies" – groups living side-by-side in relative peace, but unable or unwilling

[7] This dynamic in Rwanda is discussed in Chapman's Chapter 8 and Cécile Aptel, "International and Hybrid Criminal Tribunals: Reconciling or Stigmatizing?" Chapter 5 in this volume.

[8] Istvan Bibo, "The Distress of East European Small State," in Karoly Nagy, ed., *Democracy, Revolution, Self-Determination* (Boulder, CO: Social Science Monographs, 1991), 42.

to work together, not feeling any sense of shared purpose or solidarity. As Pablo de Greiff notes, this picture of mere coexistence doesn't live up to our ideals of "reconciliation."[9] And we may also worry that institutionalizing ethnic politics can have detrimental effects within ethnic groups, leading to the reification, essentializing, or freezing of ethnic identities, as self-proclaimed ethnic leaders attempt to impose their own views of the group's "authentic" culture or identity on group members, particularly where these leaders are not properly constrained by norms of democratic accountability.

Much has been written on the pros and cons of these models of citizenship, as defenders and critics debate the severity of these risks.[10] I cannot hope to resolve those debates here. For the purposes of this chapter, I want to focus on one particular context where this issue arises: namely, in cases where a country undergoing a democratic transition contains a strongly mobilized minority nationalist movement seeking some form of self-government on a territorial basis, either through federalization or even independence. Consider the case of the Catalans during Spain's democratic transition in the 1970s, or the case of the Kurds in Iraq today, or the Acehnese in Indonesia.

These cases raise some acute dilemmas about the relationship between transitional justice, citizenization, and nation building. In the rest of the chapter, I would like to outline these dilemmas, and suggest avenues for future research to help address them. I will begin by describing one familiar model of accommodating substate nationalism – namely, multination federalism – and how this model can generate a distinctive, but potentially successful, form of citizenization. I will then explore some of the risks associated with adopting this model under conditions of transition, and conclude with some reflections on the implications for the practice of transitional justice.

DEMOCRATIC MULTINATION FEDERALISM

Although all countries contain a plurality of identities and identity cleavages, the phenomenon of territorially concentrated minority nationalism is a very distinctive sort of challenge, and we need to understand its specificity.[11] In these cases, the

[9] See the discussion of the modus vivendi among Macedonians and Albanians in Pablo de Greiff, "Theorizing Transitional Justice," in Melissa Williams, Rosemary Nagy, and Jon Elster, eds., *Transitional Justice*, Nomos 50 (New York: NYU Press, forthcoming).

[10] For a helpful overview of these debates, see Paige Arthur, "'Fear of the Future, Lived through the Past': Pursuing Transitional Justice in the Wake of Ethnic Conflict," Chapter 9 in this volume.

[11] For the purposes of this chapter, I am focusing on substate nationalist minorities (like the Catalans, Quebecois, Kurds, and Acehnese) rather than indigenous peoples (like Aboriginals in Canada, Sami in Norway, or Maori in New Zealand), in part because the indigenous case is discussed in other chapters in this volume. However, as I note later in this section, there are some important similarities between the two categories (and indeed there are ongoing scholarly and legal debates about whether or how to distinguish them).

members of a regionally concentrated group exhibit a nationalist consciousness – that is, they conceive of themselves as forming a "nation" within a larger state, and mobilize behind nationalist political movements or parties to achieve recognition of their nationhood, either in the form of an independent state or through territorial autonomy within the larger state. To be sure, the depth of this nationalist consciousness varies from member to member and over time, and the leaders of nationalist movements often exaggerate the depth of support they have among group members. Yet we also know that, when these nationalist parties are able to compete in free and fair elections, they often do gain the support of the plurality or majority of the group on a consistent basis (e.g., in Flanders, Quebec, Catalonia, South Tyrol, etc.). So we should neither exaggerate nor underestimate the depth of nationalist consciousness.

In such cases, we can say that the state is, sociologically speaking, a "multination" state, although states themselves have been reluctant to acknowledge this. The presence of such minority nationalist movements has traditionally been seen as a threat to the state, putting into question its legitimate right to rule all of its territory and population. In a world of "nation-states" where states legitimate themselves by reference to norms of the self-determination of peoples, to have a group that claims that it forms a distinct "people," with its own rights to self-determination, is often perceived as a serious threat. Indeed, many commentators have argued that democratic stability is impossible in such cases. Democracy is rule by "the people," but this requires an agreement that the citizens of a state do indeed form a single "people" who exercise their popular sovereignty through a common state within agreed borders. Without agreement on the unit of self-determination, democracy becomes unstable.[12]

As a result, many states in the past have adopted a wide range of measures to erode any sense of distinct nationhood among their territorially concentrated minorities, for example, by restricting minority language rights, abolishing traditional forms of regional self-government, and encouraging members of the dominant group to settle in the minority group's homeland in an effort to outnumber the minority even in its traditional territory. Where these assimilationist policies failed, as they often have, more radical solutions have been considered, such as partition – breaking up multination states into two or more states that are more nationally homogenous – or population transfer, to encourage members of minorities to move to a neighboring kin-state. Indeed, international organizations themselves have sometimes endorsed these solutions (e.g., after the two world wars), and some academic commentators support partition or population transfer as the more realistic alternative to naïve hopes for stabilizing multination states.[13]

[12] For a recent version of this argument, see Claus Offe, "Political Liberalism, Group Rights and the Politics of Fear and Trust," *Studies in East European Thought* 53 (2001): 167–82.

[13] See, for example, Chaim Kaufmann, "When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century," *International Security* 23, no. 2 (1998): 120–56.

Although the challenges of minority nationalism are severe, they are by no means rare. On the contrary, as Walker Connor notes, the phenomenon of minority nationalism is a truly universal one. The countries affected by it

> are to be found in Africa (for example, Ethiopia), Asia (Sri Lanka), Eastern Europe (Romania), Western Europe (France), North America (Guatemala), South America (Guyana), and Oceania (New Zealand). The list includes countries that are old (United Kingdom) as well as new (Bangladesh), large (Indonesia) as well as small (Fiji), rich (Canada) as well as poor (Pakistan), authoritarian (Sudan) as well as democratic (Belgium), Marxist-Leninist (China) as well as militantly anti-Marxist (Turkey). The list also includes countries which are Buddhist (Burma), Christian (Spain), Moslem (Iran), Hindu (India), and Judaic (Israel).[14]

Given its pervasiveness, we can reasonably expect that more and more cases of transitional justice will arise in countries that confront the challenge of minority nationalism.

It is thus important to determine whether there are in fact ways of accommodating minority nationalism that are consistent with democratic stability. Are there ways of constructing relations of democratic citizenship in such countries? In my view, we have growing evidence for the success, at least under favorable conditions, of one model of accommodation, which I will call "multination and multilingual federalism." This model has two key features: (a) it involves creating a federal or quasi-federal subunit in which the minority group forms a local majority and can thereby exercise meaningful forms of self-government; (b) the group's language is typically recognized as an official state language, at least within its subunit, and perhaps throughout the country as a whole.[15]

At the beginning of the twentieth century, only Switzerland and Canada had adopted this combination of territorial autonomy and official language status for substate national groups. Since then, however, virtually all Western democracies that contain sizeable substate nationalist movements have moved in this direction. The list includes the adoption of autonomy for the Swedish-speaking Aland Islands in Finland after the First World War, autonomy for South Tyrol and Puerto Rico after the Second World War, federal autonomy for Catalonia and the Basque Country in Spain in the 1970s, for Flanders in the 1980s, and most recently devolution for Scotland and Wales in the 1990s.

In each case, the adoption of territorial autonomy for nationalist groups was initially controversial and viewed as potentially destabilizing. But I think we now have sufficient experience to say that this model of accommodation can indeed be

[14] Walker Connor, "National Self-Determination and Tomorrow's Political Map," in Alan Cairns et al., eds., *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (Montreal: McGill-Queen's University Press, 1999), 163–4.

[15] On the difference between multination federalism and other forms of federalism, see my *Politics in the Vernacular: Nationalism, Multiculturalism, Citizenship* (Oxford: Oxford University Press, 2001), chapter 5.

a vehicle for citizenization, at least in the Western cases mentioned earlier. Where it has been adopted in the West, the historic relations of animosity and exclusion between states and nationalist minorities have been reduced and replaced with relations of democratic citizenship.

To prove this conclusively would require detailed measurements of the quality or resilience of relations of democratic citizenship, but for the purposes of this chapter, let me just suggest four relevant indicators of "citizenization":

1. *Peace and individual security*: the multination federations referred to herein are managing to deal with their competing national identities and nationalist projects with an almost complete absence of violence or terrorism by either the state or the minority.[16]
2. *Democracy*: ethnic politics is now a matter of "ballots not bullets," operating under normal democratic procedures, with no threat of military coups or authoritarian regimes that take power in the name of national security.[17]
3. *Individual freedom*: these reforms have been achieved within the framework of liberal constitutionalism, with firm respect for individual civil and political rights, including freedom of speech, conscience, political dissent, and increasingly gay rights, gender equality, and so on. Since substate governments are subject to the same constitutional constraints as the central government, they have no capacity to restrict these individual freedoms in the name of maintaining cultural authenticity or cultural purity, and in any event the evidence suggests they have no wish to do so.[18]
4. *Intergroup equality*: multination federalism has promoted equality between majority and minority groups, where "equality" is understood here as non-domination, such that one group is not systematically vulnerable to the domination of another group. Equality in this sense is multidimensional and can be assessed along economic, political, and cultural lines. Multination federalism has helped create (i) greater economic equality between majority and

[16] The Basque Country is the main exception, although the ETA campaign of violence began in the 1960s and 1970s as a response to the highly centralized Fascist regime, and is unlikely to have emerged had Spain been a democratic multination federation. Similarly, in Cyprus violence arose in the 1960s when the state attempted to subvert the multination federal arrangements adopted at independence. It was the abrogation, not the adoption, of multination federalism that generated violence.

[17] Saul Newman, *Ethnoregional Conflict in Democracies: Mostly Ballots, Rarely Bullets* (Westport, CT: Greenwood Press, 1996).

[18] Indeed, minority subunits are sometimes more liberal than the central government. Policies on gender equality or gay rights, for example, are more progressive in Scotland than the rest of Britain; more progressive in Quebec than in other parts of Canada; and more progressive in Catalonia than other parts of Spain. Moreover, support for cosmopolitan values is also typically higher in these substate regions than in other parts of the country, as is support for strengthening the role of the European Court of Human Rights, or other international human rights instruments. For some of the evidence, see my *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007).

> minority; (ii) greater equality of political participation and influence, so that minorities are not continually outvoted on all issues; and (iii) greater equality of cultural respect and recognition, reflected for example in more equitable recognition of the minority's language and culture in public space, and in reduced levels of prejudice and discrimination between groups. In short, the historic patterns of economic disadvantage, political subordination, and cultural marginalization that have characterized the status of these national minorities have been reduced.

As measured by these criteria, Western cases of multination federalism surely qualify as successful examples of creating relations of democratic citizenship in states with minority nationalism.[19] This is confirmed, I think, by the fact that there has been virtually no significant movement in any of the Western democracies to roll back either the territorial autonomy or the official language rights granted to substate nationalist minorities. If this experiment in accommodating substate nationalism had been a failure or a threat to democratic stability, we surely would have seen some backlash and retreat from it in those countries that have adopted it. Instead, we see the reverse trend: it has not only become more securely entrenched in those countries where it has historically been adopted, but is also spreading to new countries. The success of this model is also confirmed by the repeated statements of various international organizations – such as the UN, Council of Europe, and OSCE – that multinational federalism and territorial autonomy are "best practices" for the democratic inclusion of national minorities.[20]

To be sure, like any form of multicultural citizenship, multination federalism poses risks, such as that of creating "parallel societies," mentioned earlier. Indeed, we might say that the whole purpose of multination federalism is to create parallel societies – that is, to enable national minorities to sustain themselves as distinct and institutionally complete societies within the larger state. Yet the evidence suggests that the institutionalization of such parallel societies has not undermined solidarity, at least as reflected in the ability to cooperate in the production of public goods and redistribution. Countries that have adopted multination federalism

[19] For more detailed evaluations of these new models of multination federal states, and the sort of democratic citizenship they support, see Alain Gagnon and James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001); Scott Greer, *Nationalism and Self-Government: The Politics of Autonomy in Scotland and Catalonia* (Albany, NY: SUNY Press, 2007); Monserrat Guibernau, *Nations Without States: Political Communities in a Global Age* (Cambridge: Polity Press, 1999); Siobhan Harty and Michael Murphy, *In Defense of Multinational Citizenship* (Vancouver: UBC Press, 2005); Wayne Norman, *Negotiating Nationalism: Nation-Building, Federalism and Secession in the Multinational States* (Oxford: Oxford University Press, 2006); Ferran Requejo, *Multinational Federalism and Value Pluralism: The Spanish Case* (London: Routledge, 2005); and Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004).

[20] For examples of this endorsement by international organizations, see my *Multicultural Odysseys*, chapter 6.

have, for example, fared no worse than others in building or sustaining their welfare states.[21]

So I would argue that the model of multilingual, multination federalism emerging in the West is a promising example of how to accommodate minority nationalism in a way that deepens relations of liberal-democratic citizenship, reducing intergroup hierarchies while protecting individual freedom. And yet this is a very distinctive form of citizenization, which requires us to rethink our standard ideas of democracy and political community.

This process of reconceptualization includes the ideas of citizenship that have informed existing models of TJ. As I noted previously, traditional conceptions of democracy have presupposed that the state is the embodiment of a single "nation" or "people" that is the bearer of rights of self-determination exercised through popular sovereignty. Democracy requires a consensus that citizens form a singular sovereign people. This presupposition has been implicit in most TJ processes as well, even in the "multicultural" conception of nationhood endorsed by the Guatemalan CEH. Although it emphasized that the Guatemalan people were diverse and multicultural, and that these differences needed to be publicly acknowledged and respected, it nonetheless presupposed that rights of sovereignty and self-determination rest with the Guatemalan people as a singular whole, not with any ethnic groups inside the state. Indeed, it said that one goal of "reconciliation" was precisely to relegitimize the Guatemalan state as the bearer of popular sovereignty and self-determination. Similar assumptions underlie accounts of the "nation-building" function of TJ in other countries. Indeed, we could say that one aim of TJ is precisely to resolve and foreclose debates about the legitimate right of the state to rule over all of the citizens and territory of the state. The success of TJ can be measured, in part, by whether this legitimacy is no longer disputed.

Multination federations, however, require a different model. Minority nationalist movements are characterized precisely by their claims to peoplehood or nationhood, and the adoption of multination federalism reflects an acknowledgment of the need to accommodate this nationalist aspiration and identity. Territorial autonomy both acknowledges this sense of minority nationhood and provides the institutional means to reproduce and consolidate it (e.g., by enhancing regional control over education, public symbols, public media). The result is to open up, rather than to foreclose, the question of the larger state's legitimacy. Once a substate group is (implicitly or explicitly) recognized as a distinct nation or people, the question arises as to how the state's assertion of authority over the group's members and historic territory is to be justified. Nationalist leaders within the minority may argue that the larger state never acquired legitimate authority, since the incorporation of the minority into a

[21] See Keith Banting and Will Kymlicka, eds., *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (Oxford: Oxford University Press, 2006), for a review of this evidence.

larger state was the result of conquest or coercion rather than voluntary consent. Or even if there had been an initial agreement or treaty at some earlier point of history, the larger state may have violated the terms of that agreement, stripping the minority of its historically agreed-upon rights. Or even in the (null?) case of incorporation based on voluntary agreements that have been scrupulously respected, nationalist leaders can still claim that the right to self-determination is not a one-shot affair in which one generation's decisions bind all future generations in perpetuity, but rather is an *ongoing* right of each people to "freely determine their political status and freely pursue their economic, social and cultural development."[22]

In short, multination federalism opens up and suspends, rather than resolves and forecloses, questions about the bases of legitimate authority. It creates the institutional framework in which multiple and conflicting claims to legitimate authority, popular sovereignty, and national self-determination can be advanced and debated. Political actors in a multination state will disagree about which political authority is inherent or delegated (e.g., whether the central state gains its authority by delegation from the consent of the sovereign constituent national groups, or conversely whether regional autonomies gain their authority by delegation from the consent of the sovereign central state), and about the nature of the agreements that have founded the state (e.g., whether it is a "union" state, a devolved state, a federation, a confederation, etc.). For some minority nationalist actors, the larger state is a usurper of the inherent sovereignty of the substate nation; for others, the larger state is a "union" or "confederal" state that arose from the voluntary pooling of the sovereignty of its constituent units; for yet others, regional autonomy is simply one form of devolution or decentralization that a sovereign state can pursue. These sorts of disagreements are the background to, and bread and butter of, ethnic politics in many multination states.

This indeterminacy regarding the nature of sovereign peoplehood in multination states may puzzle political theorists who think that agreement on peoplehood is a precondition of democracy. However, it appears that most citizens in multination Western states take this indeterminacy and contestation in stride. As we have seen, this phenomenon of conflicting nationalist projects is not inherently unstable or violent. It appears that citizens of multination federations in the West are capable of managing whatever conceptual ambiguities and political controversies arise from the fact of overlapping claims to sovereignty and self-determination. Public opinion polls reveal a seemingly stable pattern of what David Miller calls "nested nationalisms."[23] For some purposes, in some contexts, most Scots view themselves as a distinct people with self-originating claims to sovereignty and self-determination that the British state must respect; but for other purposes, in other contexts, they view

[22] See S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2004) on self-determination as an ongoing, not one-shot, right.

[23] See David Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000).

themselves as members of a British nation that also possesses self-originating claims to sovereignty and self-determination. And we can even see the emergence of yet a third possible layer, as the European Union comes to be seen as the rightful bearer of rights of popular sovereignty on certain issues. Each is an appropriate locus of loyalty and of self-determination, and each can legitimately adopt policies aimed at consolidating a sense of "we, the people" among its members. These identity-building projects can sometimes be contradictory: British politicians may promote a common British identity in a way that downplays the significance of regional identities; Scottish politicians may promote a sense of Scottish nationhood that views British authority as usurped or derivative; and EU politicians may imply that both British and Scottish national identities are anachronisms in an increasingly postnational European demos. And yet citizens themselves seem able to reconcile these identities, loyalties, and claims to legitimate political rule, and get on with the business of building (multilevel) political orders that are peaceful, democratic, and free.

In short, in the context of Western multination federations, citizenization is not about resolving disputes over legitimacy, but about learning to live with their ambiguous and contested character, and building peaceful and democratic forums for continuing that conversation.

I have been focusing so far on cases of territorially concentrated minority nationalist groups for whom some form of federal/regional autonomy is possible, but it is worth noting that we can see a similar dynamic in Northern Ireland, where the 1998 Good Friday Peace Agreement adopted a nonterritorial model for accommodating Irish-Catholic substate nationalism. Since Irish Catholics are not regionally concentrated within Northern Ireland, nationalists have not pursued regional autonomy, but rather (a) consociational power sharing within Northern Ireland and (b) transborder linkages to the Republic of Ireland. From an institutional point of view, this nonterritorial and transborder model of accommodating substate nationalism is very different from multination federalism, but the underlying conception of citizenization has remarkable similarities. Although the peace agreement is firmly committed to constructing relations of democratic citizenship, it acknowledges that this cannot be achieved by resolving issues of peoplehood and sovereignty. In recognition of the fact that many Irish Catholics do not see themselves as part of a British people,[24] the Good Friday agreement not only allows for a future referendum on unification with Ireland, but also explicitly states that "the two Governments recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland" (Article 1.6). One could not get a clearer statement of the principle that citizenization in a

[24] Only 8.5 percent of Irish Catholics acknowledge a British identity. See John Cockley, "National Identity in Northern Ireland: Stability or Change?" *Nations and Nationalism* 13, no. 4 (2007): 573–97.

multination state requires acknowledging and suspending, rather than resolving and foreclosing, issues of the definition of peoplehood and sovereignty.

It is too early to tell whether the innovative consociational and transborder features of the Good Friday agreement will work, but so far at least, there are grounds for cautious optimism. In any event, the Northern Ireland experience seems to reflect the emerging consensus in the West that new forms of citizenship are both possible and necessary in multination states.

FEDERALIZATION, DEMOCRATIZATION, AND TRANSITIONAL JUSTICE IN THE WEST

Given the positive experiences with multination federalism in the West, it is not surprising that this model has often been recommended for democratizing countries around the world that confront minority nationalisms. And indeed I think it is likely that an increasing number of TJ processes will arise in countries in which federalization is a component of peace agreements or democratic transitions. Federalization or regional autonomy has been part of several recent peace agreements (e.g., Iraq, Sudan, Indonesia, Bosnia), and many commentators expect it to be part of potential agreements in other countries in the future (e.g., Cyprus, Burma). It is important to ask, therefore, whether or how TJ can contribute to the consolidation of these distinctive relations of multination citizenship. We know what kinds of TJ processes have been adopted to promote "nation building," but what kinds of TJ processes would help promote "multination building"?

Unfortunately, this question has rarely been studied in the literature.[25] So my discussion will inevitably be sketchy and speculative. The first question is whether processes of TJ provide an appropriate forum for even raising "the national question." One might think that TJ should simply avoid the national question in multination states and focus entirely on vetting and prosecuting perpetrators of human rights abuses and on compensating their victims, without taking a stand on, or even attempting to understand, conflicting claims of self-determination and peoplehood.

[25] The literature on TJ in Bosnia touches on this question, since the adoption of TJ has been stymied by unresolved contestations around its ethnofederal structures. See, e.g., Ivana Franović, "Dealing with the Past in the Context of Ethnonationalism: The Case of Bosnia-Herzegovina, Croatia and Serbia," *Berghof Occasional Paper* No. 29 (Berlin: Berghof Research Center for Constructive Conflict Management, October 2008); and Iavor Rangelov and Marika Theros, *Maintaining the Process in Bosnia and Herzegovina: Coherence and Complementarity of EU Institutions and Civil Society in the Field of Transitional Justice* (Bonn: Working Group on Development and Peace, 2007). However, this literature is generally hostile to the ethnofederal structure imposed by the Dayton Agreement, and so does not ask whether or how TJ can help make that structure work. Instead, the literature asks whether or how TJ can be used to overcome Dayton, on the assumption that true democratization (and true TJ) requires depoliticizing ethnicity. According to Rangelov and Theros, for example, the Dayton Agreement "contributed to the continued politicization of ethnicity that undermines the process of transitional justice" (3). On this view, we can have ethnic federalism or we can have TJ, but not both. I will return to this later.

In Iraq, for example, a process of TJ might focus on identifying those guilty of crimes against humanity under Saddam Hussein's regime, disconnected from any assumption or even aspiration that this will help rebuild a sense of Iraqi nationhood, or relegitimize the Iraqi state as the locus of loyalty or popular sovereignty (or, for that matter, legitimize Kurdish nationalism). On this view, it would unduly politicize TJ programs, particularly in multination states, if they took it upon themselves to try to engage in (multi)nation building.

This approach has obvious drawbacks. For one thing, it leaves unexplored the deeper cultural and political forces that made human rights violations possible in the first place. From the perspective of many Kurds, the human rights violations they suffered were not just the result of the abusive exercise of state power by a military dictatorship, but were also the result of long-standing and deeply rooted supremacist Arab nationalism. Without the latter, the former would not have been possible. The Arabization campaigns and Anfal genocide were made possible by the widespread support among the general Iraqi population for such ideologies. Just as the Guatemalan and Peruvian TRCs insisted that human rights violations by the military were made possible by centuries of denigration of indigenous peoples, so too we might think that human rights violations in Iraq were made possible by long-standing assumptions that Iraq is an Arab state that belongs exclusively to the Arab people. If so, then simply vetting or prosecuting individual officials, without examining the "national question," may fail to address the underlying causes of human rights violations, and hence fail to ensure their nonrecurrence. If members of the Arab majority are not asked to critically reflect on their assumptions of nationhood, and the way it was complicit in human rights violations, then the conditions for future violations remain in place.[26]

Of course, Kurdish nationalist leaders may be exaggerating the significance of this factor in order to justify their claims to autonomy or independence. Commentators often note (and bemoan) the extent to which minority nationalists are invested in a "victimization" narrative that exaggerates their history of mistreatment and ignores more complex patterns of cooperation and conflict within and between groups.[27] This, indeed, is precisely why it might be important for processes of TJ to tackle the national question, in order to provide an open and impartial forum for airing these contesting national narratives and claims.[28]

In any event, the goal of avoiding the national question is probably unrealistic. Even the most basic logistical issues, such as the physical location of TJ processes, or the language in which they operate, or the level of government that authorizes them,

[26] For discussion of the role of TJ in encouraging reflection on complicity by the larger society, see Aptel's Chapter 5 and Christiane Wilke, "Staging Violence, Staging Identities: Identity Politics in Domestic Prosecutions," Chapter 4 in this volume. As Arthur puts it in the introduction to this volume, TJ needs to explore the sources of "ordinary violence" against particular groups that make possible the outbreak of "extraordinary" violence.

[27] For the Yugoslav case, see the discussion in Franović, *Dealing with the Past.*

[28] For a similar argument, see Chapter 9 by Arthur in this volume.

will be inflected with ethnonational connotations.[29] If processes of TJ are located in Baghdad and held in Arabic, they will inevitably be seen as efforts at relegitimizing the authority of the central state. If they are located in Erbil and held in Kurdish, they will inevitably be seen as efforts at legitimizing Kurdish nationalism.[30]

Indeed, these are often the most controversial issues regarding TJ in multination states. A recent UNDP survey in Kosovo, for example, revealed a remarkable consensus across ethnic lines on the basic principles of TJ, such as uncovering the truth about missing persons and about war crimes, the importance of reconciliation between ethnic groups, and the need to vet police and judges. There were profound disagreements, however, about *who* should be doing these things, and *where*. Whereas 72 percent of ethnic Serbs believed that the Serbian courts in Belgrade should be in charge of war crimes committed in Kosovo (thereby reaffirming Serbia's claim to rule Kosovo), only 4 percent of ethnic Albanians supported this option, preferring either local Kosovo courts or the international ICTY (thereby disputing Serbia's claim over Kosovo).[31] Decisions about the location of TJ inevitably reflect contested ethnonational claims to sovereignty and territory.

We can see the outlines of similar debates over TJ in Aceh.[32] The 2005 peace agreement contained a provision for a provincial-level TRC, which would undoubtedly be used as a vehicle for legitimizing Acehnese nationalist struggles for autonomy (particularly since the ex-rebel Acehnese nationalist GAM party won the provincial elections). So the central government in Jakarta has attempted to reestablish its control by passing a law saying that the provincial TRC is an "inseparable part" of an anticipated national TRC, which will undoubtedly be used as a vehicle for relegitimizing the Indonesian state. The result, to date, has been a standoff. Here again, the basic principles of TJ are not in dispute, but the implementation of TJ has been caught up in the broader disagreement over who exercises appropriate authority or jurisdiction in Aceh.

Confronted with these duelling claims to jurisdiction over TJ, commentators often accuse the various actors of "playing politics" with TJ and argue that the pursuit of human rights violations in Kosovo or Aceh should not be hostage to such nationalist agendas. But there is no neutral or apolitical way to institute TJ. Decisions

[29] On the significance of these choices about location and language, see Chapter 5 by Aptel in this volume.

[30] The use of TJ to legitimize Kurdish nationalism has been widely noted: "What happened at Halabja, and the international community's muted response to it, has become a rallying cry for those seeking an independent Kurdish state based in northern Iraq – an argument for a Kurdish state just as the Jewish Holocaust was part of the rationale for creating the state of Israel." Mark Mackinnon, "The Painful Lesson of Betrayal: Iraq 20 Years after the Halabja Massacre," *Globe and Mail*, March 17, 2008, A11.

[31] UNDP, *Public Perceptions on Transitional Justice: Report on Transitional Justice Opinion Polling Survey Conducted in April May 2007 in Kosovo* (Pristina, 2007).

[32] See Ross Clarke and Gulah Wandita Samsidar, "Considering Victims: The Aceh Peace Process from a Transitional Justice Perspective" (New York: ICTJ, 2008); available at http://www.ictj.org/images/content/7/7/771.pdf.

about where TJ is held, in what language, and under the control of which level of government all inevitably involve taking a stand on issues that are the subject of ethnonational contestation in multination states.[33]

The reality is that all political processes in a multination state – including TJ – inevitably become filtered through the lens of competing nation-building projects. The best way to deal with this, therefore, may not be to deny or ignore this dimension, but precisely to address it head on. Indeed, TJ could provide one of the first lessons for citizens in a newly democratic multination state in how to learn to live with the ambiguities of contested nationhood.[34] Since multination states will become peaceful and democratic only if citizens learn this lesson, why not start the learning curve with TJ? Why not adopt an explicitly multinational and federalized conception of TJ?

What would this mean? As I said earlier, the question has rarely been addressed in the literature on TJ (or in the literature on multination federalism). Moreover, we have very few real-world examples to study. Whereas there are many examples of Western states that have adopted multination conceptions of citizenship, none of them was accompanied by processes of TJ. If we examine the shift to multination federalism in the United Kingdom, Canada, Switzerland, Belgium, and Spain (and related shifts to territorial autonomy for substate national minorities in South Tyrol, Puerto Rico, and the Aland Islands), none involved processes of TJ. (As I will discuss later, there are examples of TJ being adopted in relation to indigenous peoples, but not in relation to substate nationalist minorities.)

In most cases, this is because the pluralization of the state to accommodate substate nationalist groups occurred long after its democratic consolidation and hence was not part of a transition from authoritarianism to democracy (or from violence to peace). There was no period of gross human rights violations that preceded this shift, and hence no call for TJ.

However, there are two exceptions to this generalization: Spain and Northern Ireland. In both cases, the dramatic restructuring of the state to accommodate substate nationalism was part of a broader transition from fascism to democracy

[33] Defenders of the ICTY might say that holding trials in The Hague (and in English) avoids this problem, by providing a neutral location and language. But as various chapters in this volume suggest, the very remoteness of the ICTY undercuts its ability to promote new models of reconciliation (or citizenization) on the ground. Moreover, the evidence suggests that local communities in the former Yugoslavia view the ICTY as (implicitly or explicitly) passing judgment on the legitimacy of collective ethnonational projects, and not simply judgment on the guilt of individuals. Indeed, Dan Saxon argues that the ICTY "has failed as a pedagogical tool" precisely because it seeks to sidestep, rather than engage with, the ethnonational sentiments that shape people's perceptions of its work. See Dan Saxon, "Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian and Muslim Communities in the Former Yugoslavia," *Journal of Human Rights* 4, no. 4 (2005): 559–72.

[34] Moreover, as several other chapters in this volume emphasize, attempts to de-ethnicize or depoliticize individual participants in TJ processes – to force them into the universal human rights category of "victim" to the exclusion of the identities under which they struggled and suffered – often simply means that these processes no longer connect up with their actual self-understandings.

(Spain) or from violence to peace (Northern Ireland). These are the two Western cases where one might have expected processes of TJ to accompany the emergence of multination citizenship. It is striking, therefore, that neither in fact adopted TJ as part of their transitions.

In Spain, federalization (to accommodate Basque and Catalan nationalisms) was undertaken as part of a broader process of democratic transition from Fascist rule. There were calls at the time for transitional justice, most strongly in the Basque Country,[35] presumably as a tool to remember and legitimize Basque nationalist struggles. However, the major political actors involved in the transition rejected TJ as potentially divisive and destabilizing.

Interestingly, claims for TJ mechanisms are now resurfacing in Spain, thirty years after the transition, and predictably minority nationalists have again been at the forefront of this development. The first TJ law in Spain was adopted in Catalonia in October 2007 (the Law on Democratic Memory, or *Llei del Memorial Democràtic*). Further, a Catalan separatist party (*Esquerra Republicana de Catalunya*) was one of the initial co-sponsors of the November 2007 Law on Historical Memory at the central level.[36] Survey evidence suggests public support for TJ remains higher in minority nationalist regions,[37] so that negotiating minority nationalist issues will be an important part of the evolution of TJ in Spain.

In that sense, Spain may become the first case in the West of TJ operating in the context of multination federalism. Indeed, the recent process of negotiation between the various centralist parties and regionalist parties over these TJ measures is a paradigm of "multination citizenship" in action.[38] But the fact that these developments are occurring thirty years after the transition is revealing.

[35] Paloma Aguilar, "Justice, Politics and Memory in the Spanish Transition," in A. Brito, C. Gonzalez Enriquez, and P. Aguilar, eds., *The Politics of Memory and Democratization* (Oxford: Oxford University Press, 2001), 92–118.

[36] The ERC "demanded the creation of a Committee of the Truth and asked the King to apologize in the name of the Spanish state for the crimes committed against Catalonia during the Civil War, the implication being that Spain, not the Francoists, were responsible for postwar repression in Catalonia." Sebastian Balfour and Alejandro Quiroga, *The Reinvention of Spain: Nation and Identity since Democracy* (Oxford: Oxford University Press, 2007), 143 n11. See also Stephanie R. Golob, "Volver: The Return of/to Transitional Justice Politics in Spain," *Journal of Spanish Cultural Studies* 9, no. 2 (2008): 127–41. The ERC subsequently withdrew its support for the law, on the grounds that it did not go far enough.

[37] Paloma Aguilar, Laia Balcells, and Héctor Cebolla, "Individual, Family and Regional Determinants of Attitudes Towards Transitional Justice: An Empirical Analysis of the Spanish Case" (Paper presented at the Midwest Political Science Association Meeting, Chicago, IL, April 2, 2009).

[38] These negotiations are exemplary not just for the way they involve a peaceful and democratic form of negotiation *between* minority nationalists and centralist parties, but also for the democratic way they handled divisions *within* minority regions. Catalan nationalists are divided between the left-wing ERC and the conservative CiU, who have very different views about "the politics of memory" (e.g., over the role of the Catholic church). A truly democratic form of multination citizenship must provide space for these internal divisions within minority national groups as well as for divisions between minority nations and dominant groups, and this appears to have been the case in the process of negotiating the Law on Historical Memory.

Some commentators suggest that they are better understood as cases of "posttransitional justice" rather than transitional justice, precisely because they are emerging as a result of the successful long-term embedding of democratic norms, and the rise of a new posttransition generation of political leaders, rather than as tools of transition per se.[39]

It seems likely that it is precisely because Spain has thirty years of the successful practice of multination citizenship that it now feels confident in tackling a multination form of TJ. The idea that the central government would negotiate with a separatist party over the terms of TJ would have been inconceivable in 1977, but it is now part and parcel of a well-established practice of federal and coalitional politics. In short, the recent emergence of TJ in Spain seems dependent on the fact that a practice of multination citizenship is already well-established; it does not provide any lessons about whether or how TJ can be used to help establish that practice in the first place.

We see a similar dynamic in the Northern Ireland case. As I noted earlier, although this is not a case of multination federalism – since the accommodation of substate nationalism is occurring through consociational and transborder mechanisms rather than regional autonomy – it shares with Spain the intention to construct new relations of multination citizenship as part of a broader democratic transition. And here too there have been calls for TJ, primarily from victims' groups and civil society organizations. Yet, as in Spain, the main political actors decided not to include TJ as part of the 1998 Good Friday Peace Agreement, in large part because the recognition of "victims" requires agreement on the legitimacy of the state and of armed rebellion, which is precisely what is in dispute between the national groups. Recognizing that this issue was irresolvable, the Good Friday agreement decided to focus on building new security institutions, rather than holding people accountable for past (mis)uses of violence.[40]

To be sure, the call for TJ remains strong in civil society in Northern Ireland, and there are several nongovernmental initiatives related to healing and bridging. There are also some governmental initiatives, although as yet they remain peripheral to the main peace process. These include an official commission on the Bloody Sunday massacre, the creation of a victims' commissioner and ombudsman within government, and the establishment of a Historical Enquiries Team to reinvestigate and report to families about politically related deaths that took place during the Troubles. The recent Consultative Group on the Past (an official body)

[39] Paloma Aguilar, "Transitional or Post-transitional Justice? Recent Developments in the Spanish Case," *South European Society and Politics* 13, no. 4 (2008): 417–33.

[40] For debates around TJ in Northern Ireland, see Fionnuala Ni Aolain and Colm Campbell, "The Paradox of Transition in Conflict Democracies," *Human Rights Quarterly* 27 (2005): 172–213; Colm Campbell, Fionnuala Ni Aolain, and Colin Harvey, "The Fronteirs of Legal Analysis: Reframing the Transition in Northern Ireland," *Modern Law Review* 66, no. 3 (2003): 317–45, and Mary O'Rawe, "Security System Reform and Identity in Divided Societies: Lessons from Northern Ireland," Chapter 3 in this volume.

has recommended that these various initiatives within both civil society and government be brought together within a single commission, which might also have a mandate to provide reparations to families of those who died.

If the recommendations of the Consultative Group are accepted, we may yet see the emergence of a "posttransition" form of TJ down the road. But as in Spain, this is likely to be the outcome of a process of citizenization, not a source of that process. If the various consociational and transborder mechanisms in the Good Friday agreement designed to promote "parity of esteem" in Northern Ireland are successful, then perhaps these practices of multination citizenship will make possible the emergence of TJ.

So to date at least, we have no examples from the West of how TJ has been used as a vehicle for building of new relations of citizenship for substate nationalist groups. Given this absence, it is worth considering the role of TJ in a closely related context – namely, indigenous peoples. In much of the social science and legal literature, substate nationalist movements such as the Catalans, Quebecois, and Scots are sharply distinguished from those of indigenous peoples, such as the aboriginal peoples of Canada or Australia, the Sami in Scandinavia, or the Maori of New Zealand. Yet the two types of groups raise some of the same issues. Like minority nationalisms, indigenous peoples often claim to be distinct "peoples" or "nations" with inherent rights of sovereignty and self-determination that predate the state. And, as with minority nationalisms, this claim is invoked to contest the larger state's claim to legitimately rule indigenous peoples and their territories. Moreover, as with minority nationalisms, various Western states have started to acknowledge (if only in a grudging and partial way) the legitimacy of these claims. We see trends toward the recognition of indigenous customary law, for example, or the recognition of treaty rights, or the affirmation of self-government rights – all of which (implicitly at least) recognize indigenous peoples as possessing a legal and political standing that predates and constrains that of the larger state. And these trends have recently been endorsed in the 2007 UN Declaration on the Rights of Indigenous Peoples, which affirms the right of indigenous peoples to self-determination and to autonomy. So here too we see new models of citizenization emerging that seek to acknowledge rather than foreclose disputes over sovereignty and peoplehood.

It is interesting, therefore, to ask whether or how TJ has contributed to this process of defining new models of citizenship for indigenous peoples. At first glance, it appears that TJ has been more important in this context than for substate nationalist groups, since there have been several recent apologies and reconciliation programs in relation to indigenous peoples. However, if we dig deeper, it seems that existing models of "reconciliation" with indigenous peoples have rarely addressed the issue of contested sovereignty. Reconciliation has focused on discrete injustices – such as the "stolen generation" in Australia or residential school abuses in Canada or massacres in Guatemala and Peru – but not on the deeper question of contested sovereignty. Corntassel and Holder review recent reconciliation programs relating

to indigenous peoples in Canada, Australia, Guatemala, and Peru and argue that in all four cases, these programs failed to seriously acknowledge the contested nature of the state's authority over indigenous peoples and their territories.[41] As I noted earlier, the Guatemalan CEH, while promoting a more "pluricultural" conception of nationhood, still sought to relegitimize a single sovereign Guatemalan people, rather than recognizing a plurality of legitimate indigenous claims to sovereignty or authority. The same is true in Australia[42] and Canada.[43]

This is not to say that reconciliation programs for indigenous peoples have been a failure. Policies addressing the more discrete human rights violations (such as the apology to the Stolen Generation in Australia) are enormously important in their own right, and they almost certainly have brought healing to many survivors. They may help create a more sympathetic public opinion for indigenous peoples to make a wider range of claims, including those of contested sovereignty. That is, acknowledging the ways in which settler states have abused their authority over indigenous peoples may make people more receptive to claims that settler states never legitimately acquired this authority in the first place. In that sense, TJ processes addressing discrete injustices may operate alongside other more explicitly political and legal tracks that focus on renegotiating the underlying claims to sovereignty. Indigenous peoples may agree to suspend their objections to the assumptions of state sovereignty implicit in TJ processes if they are confident that they are able to contest those assumptions in other forums, and if they believe that TJ processes can serve more immediate goals of healing and public education.

To date at least, however, TJ processes have not themselves provided a space for indigenous peoples to raise these larger questions about state authority and sovereignty. They continue to operate within a framework that takes state authority over indigenous peoples as a given. Indeed, critics argue that these exercises in "reconciliation" are more concerned with reaffirming the legitimacy of settler states in a postcolonial age than with redressing the core injustices of colonialism. They are seen as attempts to dampen or undercut, rather than to acknowledge and accept, indigenous peoples' contestation of state authority.[44]

This may be a premature judgment. I do not think we have clear evidence to assess whether TJ mechanisms to deal with discrete injustices against indigenous peoples are helping or hindering broader processes of renegotiating citizenship. We do not

[41] Corntassel and Holder, "Who's Sorry Now?"

[42] Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (U.K.: Ashgate, 2008).

[43] See Courtney Jung, "Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society," Chapter 7 in this volume.

[44] See, for example, Andrew Schaap, "Reconciliation," in Brian Galligan and Winsome Roberts, eds., *Oxford Companion to Australian Politics* (Melbourne: Oxford University Press, 2007); Paul Muldoon, "Reconciliation and Political Legitimacy: The Old Australia and the South Africa," *Australian Journal of Politics and History* 49, no. 2 (2003): 182–96; and Paul Muldoon, "'The Very Basis of Civility': On Agonism, Conquest and Reconciliation," in Will Kymlicka and Bashir Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008), 114–35.

know whether TJ processes are preparing the ground for addressing issues of self-determination in other forums, or distracting attention from those more fundamental issues.[45] But to date at least, it seems clear that TJ has not itself provided the vehicle by which indigenous peoples engage in that struggle.

In short, in the case of both indigenous peoples and minority nationalisms in the West, TJ has not been used as a vehicle for addressing underlying questions about how to build citizenship under conditions of contested authority. In response to concerted mobilization by minority groups, some Western democracies have started to acknowledge that citizenization for substate national minorities and indigenous peoples requires opening up, not foreclosing, the contested nature of state claims to legitimacy, sovereignty, and self-determination. However, TJ has not been a part of this process, and we have no precedents or models of how TJ can be used to advance this process.

THE CHALLENGES OF MULTINATION FEDERALIZATION IN TRANSITIONING STATES

I can attempt to sketch only some preliminary lessons for the practice of TJ in multination settings. Before I do, however, it's important to begin by noting the many ways in which the sort of multination federalism that has emerged in the West is likely to differ from the sort of multination federalism that is emerging around the world. The reality is that multination federalism faces obstacles and challenges in much of the world that are not present in the West, at least not to the same degree, and these obstacles have implications for the role of TJ.

I have elsewhere discussed a number of these obstacles,[46] but let me focus here on three: the securitization of state-minority relations, the absence of human rights guarantees, and the lack of democratic accountability.

The first challenge concerns securitization. Where states feel insecure in geopolitical terms, fearful of neighboring enemies, they are unlikely to treat fairly their own minorities. More specifically, states are unlikely to accord territorial autonomy to minorities that they view as potential collaborators with neighboring enemies. In the past, this has been an issue in the West. For example, prior to World War II, Italy, Denmark, and Belgium feared that their German-speaking minorities were more loyal to Germany than to their own country and would support attempts by Germany to invade and annex areas of ethnic German concentration. These countries worried that Germany might invade in the name of liberating their coethnic Germans, and that the German minority would collaborate with such an invasion.

[45] Defenders of reconciliation in Australia argued that it would help prepare the ground for negotiations of a new "treaty" relationship with aboriginals. However, according to Short, there is no evidence that the ten-year reconciliation process has had any effect in enhancing support for a treaty process, or for other positive political rights (Short, *Reconciliation and Colonial Power*, 153).

[46] See my *Multicultural Odysseys*, particularly chapters 6 and 7.

Today, this is a nonissue throughout the established Western democracies with respect to historic national minorities and indigenous peoples, although it remains an issue with respect to certain immigrant groups, particularly Arab/Muslim groups after September 11. It is difficult to think of a single Western democracy where the state fears that a national minority would collaborate with a neighboring enemy and potential aggressor.[47] This is partly because Western states do not have neighboring enemies that might invade them. NATO has removed the possibility of one Western country invading its neighbors. As a result, the question of whether national minorities and indigenous peoples would be loyal in the event of invasion by a neighboring state is moot.

Of course, Western democracies do have long-distance potential enemies – such as Soviet Communism in the past, Islamic jihadism today, and perhaps China in some future scenario. But in relation to these long-distance threats, national minorities and indigenous peoples are on the same side as the state. If Quebec gains increased powers or even independence, no one in the rest of Canada worries that Quebec will start collaborating with Al Qaeda or China to overthrow the Canadian state. An autonomous or independent Quebec would be an ally of Canada, not an enemy.

In most parts of the world, however, minority groups are still seen as fifth columns collaborating with neighboring enemies. This is particularly true where the minority is related to a neighboring state by ethnicity or religion, or where a minority is found on both sides of an international border, so that the neighboring state claims the right to protect "its" minority. Consider the ethnic Serbs in Bosnia, or Kashmiris in India.

Under these conditions, ethnic relations become "securitized." Relations between states and minorities are seen, not as a matter of normal democratic debate and negotiation, but as a matter of state security, in which the state has to limit the democratic process to protect itself. Under conditions of securitization, minority political mobilization may be banned, and even if minority demands can be voiced, they will be rejected by the larger society and the state. After all, how can groups that are disloyal have legitimate claims against the state? So the securitization of ethnic relations erodes both the democratic space to voice minority demands, and the likelihood that those demands will be accepted.

In most Western countries, by contrast, ethnic politics have been "desecuritized." Ethnic politics is just that – normal, day-to-day politics. Relations between the state and minority groups have been taken out of the "security" box and put in the "democratic politics" box. This is one essential precondition for multinational citizenship to emerge and take root.

47 If we move outside Western Europe, Cyprus and Israel are consolidated democracies that still exhibit this dynamic of viewing their historic Turkish and Arab minorities as potential collaborators with external enemies, and not coincidentally have been unable to agree on minority autonomy.

The second challenge is that of human rights protection. An important precondition concerns the security, not of the state, but of individuals who would be subject to self-governing minority institutions. States are unlikely to accept minority self-government if they fear it will lead to islands of local tyranny within a broader democratic state.

This too has been a worry in the past in the West, where some historic national minorities were seen as carriers of illiberal political cultures. And this fear persists in relation to some recent immigrant groups. But at least in relation to national minorities, it is now widely assumed that there is a deep consensus across ethnic lines on basic values of liberal-democracy and human rights. As a result, it is assumed that any self-government powers granted to national minorities will be exercised in accordance with shared standards of democracy and human rights. Everyone accepts that minority self-government will operate within the constraints of liberal-democratic constitutionalism, which firmly upholds individual rights. Where national minorities have gained autonomy in the West, their self-governing institutions are subject to the same constitutional constraints as the central government, and so have no legal capacity to restrict individual freedoms in the name of cultural authenticity, religious orthodoxy, or racial purity. Not only is it legally impossible for national minorities in the West to establish illiberal regimes, but they have no wish to do so. On the contrary, all of the evidence suggests that members of national minorities are at least as strongly committed to liberal-democratic values as members of dominant groups, if not more so.

This removes one of the central fears that dominant groups have about territorial autonomy. In many parts of the world, there is the fear that once national minorities acquire self-governing power, they will use it to persecute, dispossess, expel, or kill anyone who does not belong to the minority group. In Western democracies, this is a nonissue. Where there is a strong consensus on liberal-democratic values, people feel confident that however issues of federalism are settled, their own civil and political rights will be respected. No matter how the claims for autonomy are resolved, people can rest assured that they won't be stripped of their citizenship, fired from their jobs, subjected to ethnic cleansing, jailed without a fair trial, or denied their rights to free speech, association, and worship. Put simply, the consensus on liberal-democratic values ensures that debates over accommodating diversity are not a matter of life and death. As a result, dominant groups will not fight to the death to resist minority claims. This, too, is a precondition for the successful adoption of multinational citizenship.

Where these two conditions are absent, it is extremely unlikely that states will voluntarily accept federalization to accommodate minority nationalism. Indeed, there may be little reason to hope or expect that federalization would actually achieve the sort of success we see in the West. In a condition of regional insecurity surrounded by neighboring enemies and hostile international powers, autonomy arrangements

can be a threat to the very security of the state. And in the absence of democratic consolidation, autonomy arrangements can be a threat to the very life and liberty of individual citizens who belong to the "wrong" group. Under these circumstances, the intended goal of multinational federalism – namely, replacing uncivil relations of enmity and exclusion with more equitable relations of liberal-democratic citizenship – may be subverted. Institutions and policies designed to promote "citizenization" in multination states may be captured by internal and external actors who seek to perpetuate and exacerbate relations of enmity and exclusion.

The third challenge is establishing democratic accountability of elites who claim to speak for substate national minorities. Throughout the Western democracies, members of national minorities can choose, in free and fair elections, between a range of political parties, representing quite different views on both ideological and nationalist issues. Voters in Catalonia, for example, can choose between left-wing and right-wing Catalan nationalist parties, but they can also vote for centralist Spanish parties (of both the left and right). All of these parties have reasonably fair opportunities to organize, raise funds, access the media, and so on, and citizens can vote as they see fit without fear of violence or intimidation. So if nationalist parties receive a plurality of votes, we have good reason for thinking that this reflects the depth of nationalist identities in the population, and that these parties have a democratic mandate to pursue nationalist policies. Indeed, it is precisely the fact that nationalist parties have consistently received such a democratic mandate in free and fair elections that finally compelled Western states to accept the need to adopt new multination forms of citizenship. In the past, states had the hope or expectation that minority nationalism was simply an elite phenomenon, disconnected from any real popular discontent or aspiration, but this belief has been repudiated by the consistent ability of nationalist parties to demonstrate their democratic mandate in free and fair elections.

In much of the world, however, there are lingering doubts about the democratic mandate of minority nationalist elites, and about the depth of nationalist identities and consciousness. Consider again the case of Aceh. In the recent peace agreement, the previously separatist GAM rebels agreed to renounce violence in return for significant autonomy within Indonesia. The international community has generally applauded this as a successful case of accommodating a distinct sense of "peoplehood" or "nationhood" among the Acehnese, through something akin to the Western model of multination federalism. But many commentators dispute this assumption that the Acehnese display a "nationalist" consciousness. The Acehnese were active participants in the Indonesian national liberation movement and historically viewed themselves as founding members of the Indonesian nation. While GAM emerged as an effective insurgent force in the 1970s, many commentators insist that most Acehnese sought only democratization and economic development, not independence or "national" recognition. On this view, GAM managed to maintain the façade of popular support for its nationalist agenda only by suppressing or

intimidating any rivals, and the international pressure on Indonesia to negotiate with GAM further suppressed the space for democratic voice and dissent within Aceh.[48] In this context, there are genuine questions about the extent to which GAM reflects the real aspirations of the group members they claim to speak for.

Some commentators go further and argue that this is true of most or all ethnonationalist movements – that is, that they rest on elite manipulation and intimidation, without a genuine democratic mandate – and that citizenization therefore requires contesting ethnonational narratives and loyalties.[49] This is clearly an overgeneralization: I see no reason to assume that the average voter for the Scottish Nationalist Party is any more manipulated or misinformed than the average voter for the Conservative or Labour Party. But it is a legitimate concern about many specific cases, whether GAM in Aceh, or Islamic militants in Kashmir, or the Tamil Tigers in Sri Lanka. In the absence of free and fair elections and a free press, we have no reliable mechanisms for assessing the democratic mandate of minority nationalist elites. Although states are often too quick to dismiss the level of popular support for minority nationalist movements,[50] minority nationalists are also too quick to claim such support, leaving it systematically unclear who has a democratic mandate.

In short, in much of the world, the prospects for multination federalism are undermined by concerns about geopolitical security, human rights protection, and democratic accountability. Moreover, none of these concerns is likely to be resolved in many of the countries undergoing transitions to multination federalism in the foreseeable future.

Given these obstacles, one may wonder why any of these countries are in fact contemplating federalism. The simple answer, in most cases, is that substate minorities have taken up arms and seized territory, and they are in a position to insist on territorial autonomy as part of a peace agreement. Unlike the Western cases, these are not examples of countries agreeing to federalize after a peaceful and democratic debate. Rather, they are federalizing at the point of a gun.

As a result, we cannot assume that ideas of federalism or territorial autonomy have any legitimacy among the dominant group. They are instead likely to be viewed as coerced concessions to belligerent minorities or unrepresentative elites, not reasonable accommodations of claims of justice, and as concessions that pose an existential threat to the state and its individual members. The experience to date suggests that such arrangements are fragile at best.

[48] See, for example, Elizabeth Drexler, *Aceh, Indonesia: Securing the Insecure State* (Philadelphia: University of Pennsylvania Press, 2008); and John Bowen, "Normative Pluralism in Indonesia: Regions, Religions and Ethnicities," in Will Kymlicka and Baogang He, eds., *Multiculturalism in Asia* (Oxford: Oxford University Press, 2005), 152–69.

[49] For versions of this argument in the Bosnian case, see Franović, *Dealing with the Past*; and Rangelov and Theros, *Maintaining the Process in Bosnia and Herzegovina*.

[50] In the case of Aceh, GAM has won two postagreement elections, which suggests that there was a significant depth of nationalist consciousness, although there remain questions about its use of intimidation.

This is not to say that the alternatives are any better. On the contrary, attempts to cling to the fiction of unitary peoplehood and uncontested sovereignty under these conditions have an equally dismal track record and often survive solely through repression. Indeed, in most cases multinational federalism is being considered precisely because all the other options have already been tried and failed. Under these circumstances, multination federalism may appear as both inevitable and impossible, or to put it less dramatically, as a matter of lesser evils and long odds.

LESSONS AND IMPLICATIONS FOR TRANSITIONAL JUSTICE

This, then, is the difficult terrain in which processes of TJ are likely to unfold in multination states that are simultaneously democratizing and federalizing. To recapitulate the key points of the analysis so far, I have argued:

(a) Traditional accounts of democracy (and of the democratizing potential of TJ) have assumed that democratization requires a consensus among citizens that they form a single sovereign people, and that TJ can contribute to democratization in part by building inclusive national identities that enable all citizens to identify themselves as members of that single sovereign people.

(b) This model is unlikely to work in societies containing sizeable, mobilized and territorially concentrated national minorities who assert their own nationhood or peoplehood. In such cases, successful democratization is likely to involve new and innovative forms of "multination citizenship" that open up and suspend, rather than resolve or foreclose, disputes over sovereignty and nationhood.

(c) Although we have successful examples from the consolidated Western democracies of how to construct such innovative forms of multination citizenship, particularly through multination federalism, their success has depended on certain preconditions (such as geopolitical security, human rights guarantees, and democratic accountability) that are absent in much of the world. In the absence of these conditions, models of multination citizenship are unlikely to be adopted voluntarily, and if adopted under threat of violence or international pressure, are unlikely to have their intended "citizenizing" effects.

(d) We have no precedents or models, either in the consolidated Western democracies or in transition countries, for the use of TJ to help buttress such multination forms of democratic citizenship, although we see the outlines of a "post-transition" form of TJ emerging in both Spain (where it was long deferred) and Northern Ireland (where it is arising more quickly).

What are the implications of this analysis for the design of TJ? Can we draw any conclusions about which forms of TJ are likely to contribute to the democratic consolidation of multination federalism, and which are unhelpful or counterproductive?

If my analysis is broadly correct, the most obvious conclusion is simply a call for caution and modest expectations. We know very little about the circumstances in which multination federalism in transition countries is likely to succeed, and even less about the role that TJ can play in that process.

If only to stimulate further debate, let me conclude with a few tentative suggestions. One option is to temporarily forego TJ in cases of transitions to multination citizenship. This is more or less the approach taken in Spain and Northern Ireland, the two Western cases that most closely approximate the circumstances in transitional countries. On this model, TJ need not be permanently rejected, but rather is deferred to a "posttransition" phase, once practices of multination citizenship have been developed through other means. Perhaps effective and sustainable forms of TJ cannot be developed where citizens have not yet learned how to deal with unresolved issues of peoplehood and sovereignty. As I said, we are far from having clear evidence about this. Perhaps Spain and Northern Ireland are exceptional in this regard, rather than examples of a more general rule. But their relatively successful experience to date suggests that this option is worth considering, and that we should be hesitant to assume that TJ is a necessary component of democratic transitions in multination countries.

However, from the perspective of victims, and indeed of justice more generally, this option is obviously unsatisfactory. As I noted at the beginning of the chapter, the fundamental argument for TJ is the intrinsic moral obligation to redress wrongs, an obligation rooted in broader human rights principles. Justice delayed is justice denied, and so victims and civil society organizations, and their international allies, are likely to push for TJ in the transitional phase, whether or not it fits into some social scientific account of the most effective "sequencing" of reforms to achieve democratic consolidation. Moreover, even if we have no examples of how TJ contributes to a specifically multination form of citizenship, we have good reasons to believe that TJ can contribute to building citizenship in a more minimal or thinner sense – for example, by challenging a culture of impunity, reaffirming human rights principles, and acknowledging the legitimacy of dissent and diversity.[51] None of these addresses the distinctive challenges of contested sovereignty in multination states, but they are important in themselves, and indeed can be seen as providing some of the resources needed to address the more complex challenges of multination citizenship.

So we need to consider possible ways to make TJ work in the context of building multination citizenship. The key challenge here, I think, is to prevent TJ from being captured by, and subordinated to, the dynamics of ethnonational contestation. As I have tried to indicate, virtually all the decisions about the design and implementation of TJ are likely to implicate contested assumptions about sovereignty and territory. Decisions about where to hold TJ processes, which language to use, and which level of government to administer them all implicate claims to sovereignty and

[51] See de Greiff, "Theorizing Transitional Justice."

territory that are contested in multination states. If a centrally organized TJ is given jurisdiction over the whole country in a multination state, this may well be perceived by national minorities as a denial of their status, and as structurally biased against them. Conversely, enabling substate groups to administer their own TJ – as in Kurdistan, Aceh, or Kosovo – may well be perceived by the larger state as endorsing their ethnonational claims to sovereignty. Supporters and practitioners of TJ may have had no intention or desire to be seen as taking a stand on such contested claims, but this is the frame within which their actions will inevitably be perceived. After all, it is often precisely these contestations over sovereignty and territory that engendered the violence in the first place, and so local actors will be exquisitely sensitive to any hint or implication that TJ is being implemented in a way that either advances or subverts their claims. When TJ is perceived in this way as endorsing one side's claims to territory and sovereignty, the entire process will quickly be delegitimized in the eyes of other key actors. If so, TJ will not only fail to promote multination citizenship, it will fail to achieve even its more basic goal of gaining public acknowledgment of wrongdoing.[52]

The question then is how TJ can avoid being instrumentalized in these ethnonational struggles, and thereby delegitimized. A first step is to ensure that practitioners of TJ are conscious and reflective about the ways in which their decisions inevitably, if unintentionally, implicate contested ethnonational claims. And this in turn requires setting aside many of the assumptions of traditional models of TJ, which take for granted that the goal is some sort of "nation building." In many models of TJ, it is taken as obvious and self-evident that the goal is the consolidation of a shared sense of membership in, and co-ownership of, a single sovereign nation. This assumption infuses the rhetoric as well as the practice of much of the TJ literature. All of this needs to be carefully reviewed and revised to make clear that decisions about the implementation of TJ in multination states are not intended to preempt or prejudge contested issues of territory and sovereignty.

But being self-conscious of these risks is not sufficient. After all, the concrete challenge remains: how precisely can TJ avoid being implicated in these contestations? TJ needs to operate in specific locations and languages, and it needs to be authorized by specific levels of government. As I have emphasized, there are no neutral spaces, languages, or jurisdictions that float free of ethnonational contestation in multination states.

I do not see any obvious way around this problem, except the banal suggestion that wherever possible such decisions should be based on consensus and dialogue,

[52] See Saxon, "Exporting Justice," for the failure of the ICTY to gain public acknowledgment among its intended audience for its judgments of wrongdoing owing to the way the entire process has been read through ethnonational filters. (For example, Croatian war criminals condemned by the ICTY have been welcomed home as national heroes.) Since the ICTY is seen as being biased against Croatian claims to sovereignty and territory, its judgments are seen as suspect.

not unilateral dictate by either the central government or substate groups (or of course international organizations). In principle, it should be possible to design innovative forms of TJ that are endorsable by all parties despite their differing views of sovereignty. Perhaps one could have a model of TJ that moves between different cities and regions, operates in different languages, and is authorized (and staffed) by multiple levels of government, in such a way that all sides can see it as consistent with their own views of state legitimacy. Where all parties agree to the process, contested questions about who has the ultimate authority to take this or that decision over this or that territory can be finessed. Parties may disagree about which level of government has original or ultimate sovereignty over particular peoples or territories, but this disagreement can be finessed if an ethos and practice of consensus develops. This ethos of consensus (and hence of creative ambiguity regarding sovereignty) is a familiar feature of multination states in the West that enables them to function even though groups have very different views about the underlying sources of sovereignty. We can also see this at work in some of the cases of TJ for indigenous peoples, where efforts are made to secure indigenous consent to state-administered TJ processes and to emphasize that these processes are not intended to preempt or foreclose debates in other forums that allow for the contestation of state authority.

But of course this appeal to an ethos of consent just restates or relocates the problem. The experience to date suggests that this ethos is often not present during transitions in multination states. That is what we see in Aceh, for example, or in Bosnia. States and substate groups are too jealous of their powers, and too distrustful of others', to accept the sort of vague or ambiguous formulas that allow all sides to finesse their disagreements. As a result, calls for TJ remain blocked, stymied by the need for consent.[53]

Indeed, appealing to an ethos of consensus and of creative ambiguity over sovereignty as the basis for an effective TJ is putting the cart before the horse. This ethos is, in many ways, simply another name for the practice of multination citizenship, and the task is precisely to build such a practice where it does not yet exist. If a climate of trust and consensus across ethnonational lines had already existed in countries like Sudan, Iraq, Indonesia, Bosnia, or Sri Lanka, they would not have undergone years or decades of ethnonational civil war. Insofar as effective TJ requires such an ethos or practice of multination citizenship, then it surely can

[53] Gaining the consent of indigenous peoples to such TJ processes, despite their contesting of state authority, may be easier because in most of these cases, judgments of wrongdoing and victimhood are clear-cut. No matter who runs the TJ process regarding the Stolen Generation or residential school abuses, it is uncontested that the perpetrators are from the settler society, and that the victims are indigenous peoples. In the case of ethnonationalist violence in Bosnia, say, or Aceh, it is much more contested who are the victims and who are the perpetrators. The ultimate identification of perpetrators and victims is likely to depend on who precisely is in control of the TJ process. And in this context, groups may be much less inclined to yield on or suspend contested issues of sovereignty.

come only at the end of the transition process, not the start (as the Spanish and Northern Ireland cases suggest).[54]

Given these obstacles to creating consensual and effective TJ at the formal state level, we could perhaps consider pursuing TJ in other forums. One option is to take TJ out of the hands of the state and shift it to the international level, under UN jurisdiction, as with the ICTY. The international level has the advantage of seeming to offer a neutral location, a neutral language, and a neutral level of governance, standing at an equal distance from all ethnonationalist claims to sovereignty or territory. But this appearance of neutrality is often deceiving, since the very act of creating international tribunals is seen as making an exception to the normal rules of state sovereignty, and hence as implicitly or explicitly delegitimizing assertions of state authority.[55] In any event, even if distance creates the appearance of neutrality, it also undermines the pedagogical aims of TJ. If TJ is to have transformative effects, wrongdoing must be publicly acknowledged *by the communities involved*, and not just by a remote international body.

Another more radical option is to pursue TJ at the level of civil society, among alliances of victims' organizations and human rights groups that cut across ethnonational lines. We see examples of this in the former Yugoslavia, and some commentators have argued for greater international support and funding of these "bottom-up" processes of TJ activism, as a way of bypassing the inability of state structures to get beyond their anxieties about conflicting claims to sovereignty and territory.[56] These ideas remain experimental, and even their proponents acknowledge that at some point TJ has to penetrate formal state structures if it is to achieve its goals of redressing wrongs and building citizenship.

In short, we have a number of possibilities for thinking about the relationship between TJ and multinational citizenship: we might defer TJ to a posttransitional

[54] Of course, even if a state proceeds unilaterally without the consent of a substate minority, it can nonetheless take steps to make TJ open and inclusive of minority members. For example, it can take proactive steps to accommodate the language and religion of minorities (holding bilingual hearings, publishing in minority languages, recognizing minority religious holidays and rituals, etc.). This sort of "multicultural outreach" is indeed quite common. And for some minority groups it may be sufficient to generate a sense of trust and legitimacy in the process. But this is unlikely to work in the case of nationalist minorities. It is precisely the distinctive feature of such groups that their concern is not only or primarily with cultural accommodation, but rather with asserting claims to sovereignty and territory that compete with state claims. In this context, it is the sheer fact of the assertion of unilateral state authority over the minority and its territory that is problematic, regardless of how much that assertion is garbed in a multicultural form. In all ethnically diverse societies TJ faces the challenge of cultural accommodation and multicultural outreach, but the distinctive challenge in multination states concerns the contested sources of the sovereign power needed to adopt TJ in the first place.

[55] This is one reason why Kosovar Albanians are more supportive of the ICTY than either Serbians or Croatians. The former see it as supporting their contestation of Serbian state legitimacy; the latter see it as contesting the legitimacy of Serbian and Croatian statehood. See Saxon, "Exporting Justice."

[56] See Rangelov and Theros, *Maintaining the Process*; and Franovic, *Dealing with the Past*.

phase; we might try to develop consensual models of TJ that finesse issues of contested sovereignty; or we might relocate TJ to international levels or to civil society. However, all of these are essentially untested and not backed by either clear models or firm evidence. Much research and experimentation is needed to help clarify the different options and their various risks and opportunities. All we can safely say at this point is that all the options require us to radically and creatively rethink current assumptions about how TJ relates to state legitimacy and nationhood.

11

History Education Reform, Transitional Justice, and the Transformation of Identities

Elizabeth A. Cole and Karen Murphy

The prospect of a theory of education is a glorious idea, and it matters little if we are not able to realize it at once . . . we must not look upon the ideas as chimerical, nor decry it as a beautiful dream, notwithstanding the difficulties that stand in the way of its realization.

– Immanuel Kant[1]

History education in common schools, as a part of an officially sanctioned institution, can play an important role in the transformation of historical narratives that are associated with many processes of justice (restorative rather than criminal) and moral repair. These include public apology, broadly understood to include acknowledgment and the presentation of a narrative comprehensible to the victims;[2] recognition of victims and their narratives, hitherto often silenced or distorted through prejudice and stereotyping; public deliberation over the meaning of the past;[3] a message of political and social nonrepetition; and reparations, when schools are founded or reformed to provide new socioeconomic opportunities for formerly marginalized and impoverished groups. Changes in historical narratives – in the ways that groups are portrayed in history textbooks and classrooms – can be a part of creating hope for a future that departs from the past, a distinct dimension of moral

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[1] Immanuel Kant, *Kant on Education*, trans. Annette Churton (Boston, MA: Heath and Co., 1900), 8; cited in Amy Gutmann, *Democratic Education* (Princeton, NJ: Princeton University Press, 1987), 291.

[2] Charles L. Griswold, *Forgiveness: A Philosophical Exploration* (New York: Cambridge University Press, 2007), esp. 49–51.

[3] See David Crocker, "Reckoning with Past Wrongs: A Normative Framework," *Ethics and International Affairs* 13 (1999): 43–64. For a more detailed consideration of the relationship between history education and transitional justice, see Elizabeth Cole, "Transitional Justice and the Reform of History Education," *International Journal of Transitional Justice* 1, no. 1 (March 2007): 115–37.

repair.[4] They are also, through representation and inclusion, a part of the transformation of identities.

In addition to contributing to these abstract goals, history education can also serve as a specific means to support, continue, and deepen the work of other official transitional justice mechanisms, the ones that are more typically thought of as the pillars of transitional justice, especially truth or truth and reconciliation commissions, reparative measures, and memorialization or commemoration. Other subjects within secondary schools could bring some of these materials into their work, especially art and literature as well as religious studies and other interdisciplinary classes. History, strongly connected to civic education in most countries, is, however, the most likely subject in which this work can take place. There are still few published studies of how schools are making use of materials and findings from truth commissions to teach recent history, Elizabeth Oglesby's study of Guatemala and Julia Paulson's of Sierra Leone being two (others are in process).[5] There is also still little evidence of any direct links between the work of official transitional justice institutions and the history classroom. Yet schools offer a way out of two of the main impasses institutions such as truth commissions face, namely, how to get their work to reach beyond an intellectual, usually urban elite, and how to give their work life beyond the sitting of the commission. Schools not only offer ways to effect "bottom-up" justice and reconciliation to accompany the more common "top-down" processes, but they involve a wide variety of actors, teachers, students, parents, and school officials at the local, provincial, and national levels.

In the transitional phase after violence and massive human rights abuses, problems with history education are (as with any other subject) difficult to separate from the rest of the school system. Although this chapter will focus on history reform, it implies as well the importance of targeting the institution of education as a whole for reform – since it is, in many ways, as important as other institutions addressed by transitional justice experts. Despite being a truism, it bears repeating that children and youth are the future citizens of society. In places psychologically, economically, politically, and socially damaged by war or violently unjust systems, the young, especially the rising generation that was not directly involved in the conflict, may represent the only hope for a new postwar reality. Youth are also disproportionately likely to be those involved in violence, including the post-formal-conflict violence

[4] Margaret Urban Walker, *Moral Repair: Reconstructing Relations After Wrongdoing* (New York: Cambridge University Press, 2006), esp. chapter 2. The symbolic importance of schools as a potential locus of acknowledgment and repair is attested, as noted by Ruth Rubio-Marín et al. in Chapter 1 in this volume, by the fact that Peru's Truth and Reconciliation Commission recommended, as a form of symbolic reparations, "the renaming of schools with names of social leaders and civil authorities" of indigenous communities.

[5] Elizabeth Oglesby, "Historical Memory and the Limits of Peace Education: Examining Guatemala's *Memory of Silence* and the Politics of Curriculum Design," in Elizabeth A. Cole, ed., *Teaching the Violent Past: History Education and Reconciliation* (Lanham, MD: Rowman and Littlefield, 2006).

that continues as economic or other forms of criminality, and are thus very important to target via education. Schools before and after conflict can be sites of injustice, mirroring the inequities in the rest of society that often underpin violence. They are frequently targeted in war for destruction or hideous misuse precisely because they, like places of worship, even if imperfect and unequal, represent communities' experiences and expectations of normalcy, safety, peace, collective learning, trust, and hope. They are precisely what people transformed into agents of violence wish to pervert and destroy in order to shock others into flight, terror, or even acts of vengeance so that a cycle is set in motion in which no group will be free of violence. It must also be noted that teachers are adult citizens and they, too, must be part of a wider institutional reform process.

It should be borne in mind, however, that the education systems in which history education is embedded are crucial to social reconstruction and reconciliation, building democracy and economic recovery, but are highly resistant to change. They tend in general to be conservative and, despite the great hopes placed on them, are rarely institutions that spearhead social transformation.[6] Within education, history may be the discipline that is most inherently conservative, as it has traditionally been the place in which group cohesion and patriotism have been inculcated. Thus, reform of history education to serve the goals of justice, no matter how urgent those goals are, is extremely challenging.

The essential goal of education is to transform children into citizens, into adults who can function beyond the circle of the family in society, the workplace, the polity. In this chapter, we explore how reform of history education relates both to transitional justice and to the transformation of identities that lies at the heart of transitional justice processes that, by definition, serve two ends: the *facilitation* of political and social transition by "taking care" of the burdens – unaddressed injustices – left over from the past, as well as the *catalyzation* of transition, or transformation, itself, in the form of new standards of justice. Our analysis will show that many history educators today believe that history as a discipline is inseparable

[6] On schools as sites of both injustice and potential recovery, and their resistance to change, see Anna Obura, *Never Again: Educational Reconstruction in Rwanda* (Paris: International Institute for Educational Planning/UNESCO 2003); Eric Stover and Harvey M. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (New York: Cambridge University Press, 2004); and Kenneth Bush and Diana Saltarelli, eds., *The Two Faces of Education in Ethnic Conflict: Towards a Peacebuilding Education for Children* (Florence, Italy: UNICEF Innocenti Research Centre, 2000). Violence and inequity in the Peruvian education system, from primary school to university, and its direct role in fostering violence during the Sendero Luminoso years was covered in the Final Report of the Peruvian Truth and Reconciliation Commission; it is well-summarized and discussed in Pablo Sandoval, "Educación, ciudadanía y violencia en el Perú: una lectura del informe de al CVR," Documento de Trabajo No. 142, Serie Antropología (Lima, Peru: IEP, 2004). On the hesitations of educators to be agents of change, especially in postconflict societies where intergroup tensions still run high, see Elizabeth Cole and Judy Barsalou, "Unite or Divide? The Challenges of Teaching History in Societies Emerging from Violent Conflict," USIP Special Report No. 163 (Washington, D.C.: USIP Press, 2006).

from the civic development of young people, their understanding of the society around them and how it came to be that way, and their sense of justice and tolerance toward others in their society; yet the goals of secondary school history education may not coincide exactly with those of transitional justice. We will begin by considering what is meant by transformation of identity in the aftermath of severe human rights abuses, and then discuss the problems of history education in this aftermath period and in the process of seeking justice. We will review both efforts to reform the content of history education – generally textbooks – and the still less-common, but possibly less-controversial and more-effective effort to work toward pedagogy reform via training or retraining teachers. We focus on a case study, postapartheid South Africa, to show how pedagogy reform is being pursued in one initiative.

We would like to make two clarifications at the outset. First, although transitional justice in its original conception focused strongly on human rights, accounting for human rights abuses and justice for victims of human rights abuses via criminal justice, we take as our definition the expanded one that has become more common in recent years, which includes societal processes such as reconciliation between groups, and between citizens and the state. Rothenberg points out that

> the rising significance of reconciliation is directly linked to a move away from the classic dichotomy between total amnesties (which have often been used) and large-scale prosecutions (which rarely, if ever, occur). It is now common to consider political transitions as involving an array of possible strategies and policy options, including: truth commissions, monetary reparations, apologies, mechanisms of restorative justice, economic investment, monuments and memorialization, psycho-social healing, the opening of security archives, and other means of facing past violence in order to build the foundations of a new democratic order.[7]

We will define further how history education fits into this list of strategies, as we see history education as belonging more to the part of transitional justice that serves psychosocial healing and building a new democratic society than to criminal justice and accountability for specific human rights abuses, difficult as these goals are to separate conceptually. Second, although the human rights abuses that necessitate transitional justice processes are not always part of full-blown warfare in the traditional understanding in which state-supported militaries are involved as at least one actor, systematic and widespread human rights abuses nearly always involve conflict, whether between guerrillas or insurgents and the state, between the state and minority groups, or between citizens and the state. This chapter is not about education as a part of conflict resolution per se; nonetheless it is often difficult to separate education and transitional justice from the particular needs *of* and *for* education in a postconflict environment, and trying to separate them neatly does not make conceptual sense. We will refer to the context in which widespread abuses

[7] Daniel Rothenberg, "'Let Justice Judge': An Interview with Judge Baltasar Garzón and Analysis of His Ideas," *Human Rights Quarterly* 24, no. 4 (November 2002): 956–7.

have taken place generally as violence, and occasionally as conflict, since much of the relevant literature on political identities and transformation takes conflict as its context.

THE LEGACY OF VIOLENCE: ZERO-SUM IDENTITIES

Identity is a very broad term; all intergroup conflicts involve identity, and identities can be created, imposed or manipulated by those in power. Identities that may precede conflicts but are certainly hardened by them can be political-ideological, ethnic, racialized, linguistic, religious, or more usually some combination of these.[8] It is apparent, however, that ethnic-linguistic-religious identities are more resistant to transformation than ideological ones; however much they are shaped by political forces, many in fact have deep historical roots, often complicated by their intertwinement with economic inequities. Because transitional justice processes have been or are being launched in so many places where these latter are salient factors and extremely resistant to change, this chapter takes identity to be ethnic-linguistic-religious, as in South Africa, Rwanda, Bosnia, Northern Ireland, and states with indigenous populations such as Australia, Peru, and Guatemala. The chapter focuses as well on contexts where deeply divided groups must continue to live together in one polity, thus neglecting international conflicts and those where some groups have left, or been forced to leave, the country and are unlikely to return in anything more than very small numbers (Jews in Germany, Armenians in Turkey, and Serbs in Kosovo south of the Ibar River.) Identity may be salient in long-term reconciliation in these cases, but the greatest challenge for polarized identities is in states that will continue to be multiethnic or multicultural.[9]

Zartman, among others, uses the term "zero-sum" to describe the group identities created in the course of intractable conflicts between groups, whether they are states, ethnic, or ideological groups. Although there are incidents of widespread violence that are part of a larger pattern of recurring conflicts, in which groups within one society or state have been strongly differentiated over time, Zartman points out that highly polarized identities are more often the result of the conflict itself, its various

[8] It could be possible even to define categories like "victim," "perpetrator," "beneficiary," "bystander" as identities, as some authors in this collection do; they seem to us to be closer to social roles.

[9] The literature on identity, including identity formation, race and ethnicity, identity in the context of state building, and the role of history and memory in identity formation is too large to go into in detail here. Classical studies include Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York: Verso, 1983); Ernst Gellner, *Nations and Nationalism* (Ithaca, NY: Cornell University Press, 1983); Eric Hobsbawm and Terrence Ranger, eds., *The Invention of Tradition* (New York: Cambridge University Press, 1983); Maurice Halbwachs, *On Collective Memory* (Chicago: University of Chicago Press, 1992); Iwona Irwin-Zarecka, *Frames of Remembrance: The Dynamics of Collective Memory* (Piscataway, NJ: Transaction Publishers, 2007); David Laitin, *Nations, States and Violence* (New York: Oxford University Press, 2007); Pierre Nora, *Realms of Memory* (New York: Columbia University Press, 1998).

stages, its length, and earlier failed efforts at resolution or peace building, rather than these identities having predated the conflict and having been among its causes. By the time a particularly vicious conflict has run its course or finally become amenable to resolution, and thus to such processes as transitional justice and social reconstruction, the identities of the opposing parties have been forged as conflict identities.[10] Nenad Dimitrijevic effectively describes the process of creating such identities, so deeply intertwined with fear and violence as to become very resistant to normalization. He depicts wartime identity creation as "a political, social, cultural and psychological perception of the present as a state of chaos, terror.... In this new reality, no individual, social or political existence outside the framework of the imposed image of the nation [is] allowed."[11]

One of the greatest challenges facing a society after the formal end to violent conflict is that these hardened or polarized identities stand in the way of any efforts to rebuild a functioning polity, whether to create new intergroup relationships or resurrect older positive ones, to (re)build civic trust, or to build democracy, which requires a high degree of trust and citizen participation. Indeed, Kaufman has claimed that civil wars can harden ethnic identities to the point where they provide resistance to the creation of a common civic identity.

Kaufman sees literacy and history as crucial to the formation of conflict identities: "Even if constructivists are right that the ancient past does not matter, recent history does.... Literacy preserves atrocity memories and enhances their use for political mobilization. The result is that atrocity histories cannot be reconstructed; victims can sometimes be persuaded to accept exaggerated atrocity tales, but cannot be talked out of real ones" – that is, Kaufman believes that atrocity histories become an intrinsic part of victim groups' social memory and are not amenable to the kind of forgetting, or at least softening, that Ernest Renan famously claimed was at the heart of nation-state formation[12] (even if, unfortunately, it is possible to make people believe in atrocities that did not really occur). Kaufman's ensuing claim, that secession or even separation of ethnic groups may be the only solution to this postconflict dilemma, is problematic on many fronts: memories of the Holocaust no longer dominate Israeli-German relations, for example, nor do massacres during the Spanish Civil War appear to be a salient point in relations between individual Spaniards, or regions of Spain, today. He presents in persuasive terms, however, the

[10] William Zartman, "Analyzing Intractability," in Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, eds., *Grasping the Nettle: Analyzing Cases of Intractable Conflict* (Washington, D.C.: USIP Press, 2005). See also Daniel Bar-Tal, "Collective Memory of Physical Violence: Its Contribution to the Culture of Violence," in Ed Cairns and Micheal D. Roe, eds., *The Role of Memory in Ethnic Conflict* (New York: Palgrave Macmillan, 2003).

[11] Nenad Dimitrijevic, "Serbia After the Criminal Past: What Went Wrong and What Should be Done," *International Journal of Transitional Justice* 2, no. 1 (March 2008): 10.

[12] Chaim Kaufman, "Possible and Impossible Solutions to Ethnic Civil Wars," *International Security* 20, no. 4 (Spring 1996): 154; Ernest Renan, "What Is a Nation?" in Homi K. Bhabha, ed., *Nation and Narration* (New York: Routledge, 1990), 11.

challenge that the reform of education, including history, faces in societies in which fears, loyalties, and memories have been forged in the fires of atrocity. Kaufman does qualify his strong claim that some identities, and the intergroup relationships that they imply, are impermeable to transformation when he observes that "it is not clear that there is a specific number of incidents or total deaths beyond which ethnic reconciliation becomes impossible."[13] Yet Kaufman's general position on post–civil war realities should serve to remind us at the outset that not all transitional societies are amenable to all forms of repair, nor are all identities amenable to transformation after violence to the point that those in opposing camps are able to transcend their identities.

TRANSITIONAL JUSTICE AND THE MEANING OF IDENTITY TRANSFORMATION

But if the transformation (not the disappearance) of identities is possible in some, perhaps eventually all, divided societies, what does this actually mean in terms of desired outcomes? As broad and difficult to pin down as the term identity is, the idea of identity transformation is only more diffuse. How would this be described empirically, or measured? Questions about the meaning of identity transformation, what we require from it, include the following. Do we mean a shift toward renunciation of violence and a commitment to resolve conflict, including intergroup conflict, through nonviolent means, including both politics and rule of law? Is such a transformation, then, one in the direction of something often referred to as reconciliation, in its thinner manifestation (but still not easy to achieve) appearing as a willingness to coexist in one polity, a movement away from fear and hatred toward the beginnings of social trust and the ability to cooperate across group boundaries, at least for pragmatic purposes?[14] Or should the transformation be toward acceptance of the basic principles of democracy, including democratic deliberation, public accountability, and rule of law, with the growth of a common civic loyalty to democratic principles, as enshrined in a constitution, in place of loyalty to the group one has identified with in the time of conflict? And is the desired transformation toward a culture of human rights, the acceptance of the human rights of all, and their protection under law, as a guiding principle? Is the transformation acceptance of diversity, via Taylor's "respect and recognition," for individuals and groups different from oneself as long as certain basic civic commitments are

[13] Kaufman, "Possible and Impossible Solutions," 159.

[14] For recent writing on reconciliation, see especially Pablo de Greiff, "The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted," in Mark A. Gibney and Rhoda E. Howard-Hassmann, eds., *The Age of Apology: Facing Up to the Past* (Philadelphia: University of Pennsylvania Press, 2007); and Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (New York: Cambridge University Press, 2007).

shared,[15] caught most poetically, perhaps, in South Africa's attempt to remake itself as a "rainbow nation"? Or is the shift rather to renouncing separate group identities to be part of one nation-state, as implied in the slogan "We are all Rwandan," that, at its best, can inspire citizens to work together to overcome common problems and, no doubt, to protect a minority?

The not very satisfying answer must be that all these are implied by the concept of identity transformation, in greater or lesser measure, depending on the context. It is simply not possible to arrive at one definition, although it could be said that a common theme in all is tolerance, particularly of former enemies, the acceptance of diversity instead of zero-sum loyalties to one in-group. All of the above interrelated processes are needed to build more just and stable societies and functional states in the aftermath of serious violence and moral damage.

Thus, in exploring the relationship of history education reform – specifically, how the massive or systematic violation of human rights is addressed in common primary schools[16] – to the tasks of transitional justice and identity transformation, we will draw at times on all the just-mentioned possible transformations. We do so in the knowledge that transformations in group identities, and hence relationships, after violent conflict do take place, even if the transformations cannot be reduced to one clear-cut definition and are themselves dynamic.

CHALLENGES OF TRANSFORMING HISTORY EDUCATION

History and Violence

Common wisdom among both educators and scholars of conflict resolution is that history education, like historical narratives more generally, is an important component of both political violence and overcoming its legacy. It must be noted here that prevention or redress of injustices at the level of systemic human rights abuses was less a stated goal of history education reform than prevention of armed conflict. The belief in the connection between history education and violence, including persecution of minority groups, in Europe dates back to efforts after World War I to address history textbooks as possible sources of the stereotypes, inaccuracies, and generally negative portrayals of certain groups – other states, or groups within states – that are a factor in rallying populations to war. After a second world war that included genocide and ended with important international war crimes trials, an added sense

[15] Charles Taylor, "The Politics of Recognition," in Amy Gutmann, ed., *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992), 72.

[16] We use the term common school in the sense that it is used by Feinberg, Macedo, and Callan, among others, and primary school as it is used by Amy Gutmann, to refer to U.S. primary, middle, and high school combined. See Eamon Callan, "Common Schools for Common Education," *Canadian Journal of Education* 20, no. 3 (1995), cited in Steve Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge: Harvard University Press, 2000); and Amy Gutmann, *Democratic Education* (Princeton: Princeton University Press, 1987).

of urgency to reform history education narratives as a part of both postwar justice and peacebuilding led to the founding of an institution solely devoted to this work in Braunschweig, Germany, the Georg Eckert Institute [GEI]. GEI pioneered not only assessing textbooks for negative group content but also working with officially convened bilateral historical and history textbook commissions to make recommendations for textbook reform. These activities became common practice throughout Western Europe, facilitated by the framework of a common European community. Since the end of the Cold War, along with the European organization of history educators, Euroclio, GEI has expanded into Eastern Europe and the Balkans.[17] It is unlikely that the educators involved in these efforts ever completely dismissed the importance of history pedagogy; however, until recently the focus has been much more on content, especially in textbooks and other officially approved instructional materials, which bear the imprimatur of the state and reach large numbers of students.

It is important to add here that it is also widely recognized that history education, or learning, is separate from instruction, that history is learned in many ways outside the classroom, beginning with the family and extending to other community groups, religious instruction, and the media.[18] While not discounting these processes, which may in fact be as powerful as classroom instruction, if not more so, history education experts have focused on instruction, since the other forms of learning are diffuse and much more difficult to target through educational policy.

But beyond the dangers of negative stereotyping or teaching blatant untruths that promote prejudice against out-groups and denial of very well-known atrocities committed by the in-group, experts do not agree at all on how history content can be changed to promote more peaceful societies and overcome the divisions that result from violence and human rights abuses. Naveh notes that "many are convinced that the inculcation of a collective, unifying historical heritage remains an essential weapon against enemies of the state and an important source of relief and healing for internal schism,"[19] but this implies the challenges and dangers of history education as well as its promise. How can a narrative be developed that offers a positive collective identity without creating enemy "out-groups," including beyond the borders of the state? And what kind of narrative, exactly, promotes "relief and healing," and a sense of justice, after conflict within a society, especially when the narrative of the events that have most influenced the recent or modern history of the polity is very negative, involving accounts of great harms done by one group against another and the indifference or passive support for these harms by much

[17] For information on the work of GEI and Euroclio, see their web sites, www.gei.de and www.euroclio .eu.

[18] Falk Pingel, "Can Truth Be Negotiated? History Textbook Revision as Means to Reconciliation," in *The Annals of the American Academy of Political and Social Science* 617, Special Issue "The Politics of History in Comparative Perspective," ed. Martin O. Heisler (May 2008): 185.

[19] Eyal Naveh, "The Dynamics of Identity Construction in Israel through Education in History," in Robert Rotberg, ed., *Israeli and Palestinian Narratives of Conflict: History's Double Helix* (Bloomington and Indianapolis: Indiana University Press, 2006), 244.

of the society? Or when, further, the narrative accounts of these events by different groups clash wildly, particularly as to which group committed more atrocities and who bears greater responsibility for the conflict's origins?

The answer, based on a review of writing on this topic, is that, although there is great interest in reforming narratives, and many attempts to create new ones, no one seems to know. It is striking that the strongest recommendations fall into the negative camp: some content – the most "hate-filled" or clearly untrue material – is clearly counterproductive for reconciliation and could create such continued moral harm to those who suffered most from violence that it cannot be allowed to appear in school materials. Social divisions after violence and injustices, whether as replicated in narratives or in the school systems themselves, have proven very resistant to amelioration. Gallagher notes the difficulty of integrating divided school systems in societies ranging from Northern Ireland, with a recent peace agreement, to the United States, half a century since the Civil Rights movement (and a century and a half since a civil war). He also notes the challenges in Northern Ireland in addressing the history of the conflict in the classroom despite creative curriculum initiatives intended to facilitate the process.[20] Spinner-Halev cautions against expecting too much of education in general and history education regarding the violent events in the search for reconciliation. Like increasing numbers of educators, he is skeptical of contact theory, which is based on the belief that simply bringing people from different groups together in contexts where identities have been polarized by violence is effective in overcoming differences and promoting tolerance. And although he says that teaching of hate must be *proscribed*, he is not able to *prescribe* what should be taught and how.[21]

One distinct challenge to identifying changes in history content to promote a sense of justice and eventual reconciliation is the existence of essentially two approaches to teaching the history of recent difficult events, or, beyond the schools, promoting society-wide examination of these events. They represent a deep division between approaches to postconflict social reconstruction in general. One approach holds that the events are simply too divisive to study or debate widely, at least for a long period of time, possibly several generations. This is generally known as the "amnesia" approach to the past. One problem with it, of course, is that it may emanate from states and political leaders who are implicated in past atrocities or who can use enforced national unity to consolidate their own power. The most iconic statement of this position is that of Cambodian prime minister Hun Sen, whose philosophy is that "we should dig a deep hole and bury the past."[22] Until

[20] Tony Gallagher, *Education in Divided Societies* (London: Palgrave Macmillan, 2004).

[21] Jeff Spinner-Halev, "Education, Reconciliation and Nested Identities," *Theory and Research in Education* 1, no. 1 (2003): 51–72.

[22] Seth Mydans, "Cambodian Leader Resists Punishing Top Khmer Rouge," *New York Times*, December 29, 1998, A1. Note that as former member of the Khmer Rouge, Hun Sen is implicated in those events despite having gone over to the Vietnamese, so his call to forget the past is at least as self-serving as it is intended to further peace in Cambodia, if not more so.

this year, history education about the Khmer Rouge period was either nonexistent or extremely limited in postgenocide Cambodia.[23] Despite the self-serving nature of many of these impulses, it is hard to argue, with Kaufman, that discussions of past atrocities would not be divisive, especially in a state where democratic means of debate and disagreement have not yet put forth strong roots, to the point where efforts to create a viable national project would be undermined. Some arguments for society-wide, willed forgetting are based on the belief that this process is necessary for social healing, particularly in certain cultural settings.[24]

The other position, one that aligns more closely with transitional justice, is summarized by GEI's Falk Pingel, a foremost expert on history textbook content revision: "Without recognition of crimes, there can be no reconciliation."[25] Pingel sees this as extending from the political level to that of the schools. The general belief is widespread that outright lies – denial – about something as important and salient in the lives of people after conflict should be reduced whenever possible, but all but the most simplistic commentators agree that how this truth telling should be pursued in practice is not at all clear. To add to the level of the challenge, the schools are perhaps the most difficult arena for such truth telling. School history is much more sensitive than academic history or other social fora involving adults, as schools are a conservative institution in general, where such subjects as history and civics, especially, are closely bound up with national identity and the perceived political impressionability of the young. In addition, schools, whether integrated or

[23] The status of history education in Cambodia is currently in flux. Journalistic accounts and surveys find that people born after the Khmer Rouge period know very little about it and, indeed, question their parents' account of the shocking brutality of what has been called by some an "auto-genocide." See Bertil Lintner, "The Day of Reckoning in Cambodia?" *The Far East Economic Review* 172, no. 2 (March 2009): 43–5. A history textbook on the Khmer Rouge period, *A History of Democratic Kampuchea (1975–1979)*, was published by the Cambodian Documentation Center (DC-Cam) in April 2007, and has been distributed to schools, libraries, and government officials. In mid-2009, media reports described plans by Cambodia's Ministry of Education to have schools begin teaching Cambodia's recent history in the school year that will begin in October 2009, using DC-Cam's textbook. By October, 3,000 teachers are supposed to have been trained in the new subject; a major training workshop was held in July. See Robert Carmichael, "Development: Cambodia to Educate Youth About Painful Past," *Newsmekong*, via Inter Press Service, June 12, 2009, and "Harsh Lessons from the Past Hold Key to Healing," *Phnom Penh Post*, July 2, 2009. It is probably no accident that this dramatic change in policy about teaching the Khmer Rouge period coincides with the holding of the UN-supported trials in the Extraordinary Chambers in the Courts of Cambodia, which are ongoing. It is not yet possible to analyze the educational approach to the period, the effect of implementing teaching about this period, nor the relationship between the trial and the education initiative, but it will be an important case for better understanding history education and transitional justice.

[24] See, for example, Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone," USIP Special Report 130 (Washington, D.C., February 2005). Sierra Leone has a local custom for reintegrating combatants, children, and adults, known as "cooling the heart": "Because having and maintaining a 'cool heart' requires a transformation of social identity, ex-combatants were discouraged from publicly talking about the war after these rituals. Such a process of social forgetting 'unmakes' past violence and 'remakes' ex-combatants as new social persons." Ibid., 9.

[25] Pingel, "Can Truth Be Negotiated?" 194.

segregated, are immersed in the society that surrounds them, including the group identities polarized by violent conflicts and systemic injustices. Teachers, who are the link between narratives and children's reception of them, have group identities themselves; these identities are potentially the objects of pressure or even threats to the teachers' safety, when violence is still present in the society; and, especially directly after conflict, teachers have been affected by all the relevant events. Thus, the ability of teachers to teach sensitive, emotional, and contested issues directly is constrained by many factors, despite the fact that many apparently would like to contribute to more peaceful and just societies and even to be able to at least touch on issues related to past injustices, provided they can find a safe and effective way to do it.

Banish History Education, or Welcome It?

Why not consider banishing history, or at least supporting a policy delaying or curtailing its scope (that is, not teaching recent history, where the injustices of interest for transitional justice generally lie) for a generation? The case could be made that education in general and history in particular may not play a helpful, or at least very large, role in serving justice and reconciliation after conflict; that history education about the conflict may be harmful; that in any case empirical evidence of the efficacy of history education reform is very difficult to find. A concrete rebuttal of the argument in support of banishing history education is important to make here, especially considering that a forceful argument was made to do exactly this in our case study, South Africa.

South Africa has not banished discussions of the past. To the contrary, these discussions have been front and center in the struggle for justice and reconciliation, especially via the Truth and Reconciliation Commission. Many officials and experts in the upper levels of education and history education policy may have been uncomfortable, as members of the old elite, with a history curriculum that included a repudiation of the old Afrikaaner narrative. Yet, unlike in many other contexts, the views of the old elite were not a deciding factor, because South Africa is a state in which the former losers of history, the black majority, became the ruling party. In addition, South Africa's strong commitment to constitutional democracy and a full set of civil-political rights would not allow the government to try to impose one narrative in a repressive way, in any case, as was done in Rwanda and in Spain until Franco's death, for example.

A different argument during South Africa's initial transition was made in favor of banishing history. The 1996 antihistory educational argument had two components, a practical and a philosophical one. First, history was not thought to be useful in helping the majority of South Africa's children – deeply disadvantaged black South African children – finish their compulsory education and prepare to get jobs. In addition, the antihistory vision for new South African identity, transformation and

social justice excluded history, not because it was divisive, but because it was considered politically irrelevant, not part of a "forward-looking" vision for a community that it was hoped would come to exemplify African modernity.

The antihistory approach to education, called the "Outcomes-Based Education [OBE] Priority" of the first postapartheid South African curriculum, "Curriculum 2005," had the support of many political actors, especially the labor unions. It was highly technocratic and pragmatic, with a sharp downplaying of history. Gail Weldon, a former senior curriculum writer for the Western Cape Education Department and the convener of the history writing group responsible for the postapartheid curriculum, characterized this pragmatic, future-focused approach to education as follows: "National identity [in the OBE philosophy] was not to be located in an understanding of our past, but in the recognition of our diverse society, multilingualism, co-operation, civic responsibility and the ability to participate in all aspects of society and an understanding of the national, provincial, local and regional and developmental needs in the present." Weldon herself disagreed with this philosophy and has been part of the group implementing a different, prohistory and prohumanities approach to education that finally triumphed over OBE, but it is important to note that she recognizes the moral impulses behind the antihistory camp; OBE did not downplay tolerance for diversity, but it also did not draw from the past, or attempt to face the injustices of South Africa's past, to build a sense of justice and tolerance in students. Weldon also notes that there was suspicion by some in the new government that history as a discipline was too tainted by the approaches and assumptions of the old, white (and specifically Afrikaaner, since Afrikaaners had dominated the educational elite) order to ever be revisable, relevant, or valuable in the new one.[26]

Curriculum 2005's rejection of history stood in stark contrast to a public reckoning with history that took place daily in South African society via the TRC, which began to work in 1995 and brought the history of apartheid, through the lived experience of South Africans, into daily life. How could history education disappear when the country was engaged in such active remembering? In the end, the bid to banish history was not feasible for a South Africa that drew so strongly on history for the nature of its transition to a society based on human rights guarantees. The OBE

[26] Gail Weldon, "A Comparative Study of the Construction of Memory and Identity in the Curriculum in Societies Emerging from Conflict: Rwanda and South Africa" (PhD dissertation, University of Pretoria, South Africa, 2008), chapter 2. For her discussion of the OBE debate in South Africa, Weldon draws on Colin Bundy, "New Nation. New History? Constructing the Past in Post-Apartheid South Africa," in Hans Erik Stolten, ed., *History Making and Present Day Politics, The Meaning of Collective Memory in South Africa* (Uppsala: Nordiska Afrikainstitutet, Uppsala, 2007); Linda Chisholm, "The Politics of Curriculum Review and Revision in South Africa in Regional Context," *Compare: A Journal of Comparative Education* 35, no. 1 (March 2005): 79–100; and Jonathan D. Jansen, "Setting the Scene: Historiographies of Curriculum Policy in South Africa," in Jonathan D. Jansen and Pam Christie, eds., *Changing Curriculum: Studies on Outcomes-based Education in South Africa* (Cape Town: Juta & Co, 1999).

Priority and Curriculum 2005, and the vision of education that animated them, were replaced in 2001, under the leadership of Kader Asmal, one of South Africa's preeminent human rights legal scholars and moral leaders,[27] who became minister of education in 1999.

Instrumental to the shift was the publication of an important document, "Values, Education and Democracy – Report of the Working Group on Values in Education," which ushered in a new curriculum, entitled "Values in Education." This report makes a strong counterargument to the banishment camp by means of three arguments in defense of history. It could contribute to national pride, tolerance, acceptance of different groups, and democracy – ultimately, to justice and a new South African identity – via three specific approaches to the past: by teaching human evolution with scientific accuracy, to counter pseudoscientific defenses of racism; by presenting the history of "all the people who happen to reside in South Africa who, in turn, are connected to the people of Africa, Asia and Europe to encourage openness"; and by transmitting the history of past human rights abuses in order to "serve as a powerful reminder of the folly of repetition" and prevent the future instrumentalization of the past. In addition, the value of history was seen in its ability to "enable us to listen to formerly subjugated voices, redress the invisibility of the formerly marginalized." The language of this report, strongly reflecting South Africa's commitment to human rights, is a powerful expression of belief in the value of education about the past.[28]

APPROACHES TO HISTORY EDUCATION REFORM

Two approaches to history education reform in the interest of promoting truth telling, acknowledgment, and repair in the wake of massive human rights violations can be identified. Not unrelated, their areas of focus differ, with one working primarily on content and secondarily on the skills of teachers, and the other working primarily on teachers, especially pedagogy, and secondarily on content.

Content-Focused Approaches

The first approach, bilateral or joint-textbook activities, involving representatives of groups in conflict, has been much more common in interstate contexts, or in contexts in which two states are expected to emerge – that is, Israel-Palestine, where many of the most frequently described and analyzed projects are located. These

[27] Asmal is not only a distinguished human rights legal scholar who had been an important actor in the antiapartheid movement, but also originally studied to be a secondary school teacher and taught before going on for advanced degrees in England.

[28] *Values, Education and Democracy – Report of the Working Group on Values in Education*, South African Government Information (May 9, 2000); available at www.info.gov.za/otherdocs/2000/education.htm.

examples, particularly bilateral activities between two states such as Franco-German, German-Polish, or German-Czech textbook commissions, are somewhat less urgent than cases in which deeply divided identities and historical experiences impede the formation of a workable and just state polity, since the affected groups do not have to interact closely with one another or work out educating their youth in the same school system, or even in the same classrooms. In two-state cases, the search has been rather to find "bridging discourse," a vocabulary and discourse that is mutually intelligible and minimizes dissonance, rather than a substantially new narrative that a majority of citizens in one country can agree on.[29] In these cases, which do not involve citizens of one state, "the emphasis remains on developing mutually acceptable areas of inquiry rather than enforcing answers that both sides must accept."

Two historical narratives thus "negotiated" to the point that both sides can endorse them[30] may not be close enough to work as a national narrative based on robust reconciliation. It is a constant paradox of history education reform that progressive history writing and pedagogy oppose the creation of a single, hegemonic narrative, yet the goals of transitional justice – to facilitate public recognition of and accountability for major human rights abuses – at some level assumes something like that.

It should also be noted that the bilateral textbook projects, both those more-developed ones based in Europe and newer ones in East Asia, all concern relatively "cold" conflicts, in which violent conflict dates back to World War II, renewed interstate violence is not likely, and the stakes are rather continued tensions, low-level hostile acts such as angry demonstrations and, in general, reduced capacity for citizens of each state to work collaboratively with the other on what could be problems of significant importance.

The Israel-Palestine case, however, offers more insights for divided societies, despite the fact that an eventual two-state solution still seems the only realistic one: until recently the two peoples' economic lives were substantially intertwined, and the Palestinian narrative applies not only to people living in close proximity to Israelis in the West Bank and Gaza but also, in large part, to Arab Israeli citizens.

Several projects bringing together Jewish Israeli and Palestinian or Arab Israeli teachers and history textbook writers have been or are being attempted. Adwan's and Bar-On's "Learning Each Other's Historical Narrative" project did not attempt to achieve a "bridging" narrative, because the conflict has not yet reached any kind of

[29] Alexander Karns, "Depolarizing the Past: The Role of Historical Commissions in Conflict Mediation and Reconciliation," *Journal of International Affairs* 10, no. 1 (Fall-Winter 2006): 31–51. Karns takes the term "bridging discourse" from Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence and Reconciliation* (Lanham, MD: Rowman and Littlefield, 1999), 293.

[30] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustice* (Baltimore: Johns Hopkins Press, 2001), 21.

political settlement.[31] Their necessarily less ambitious project consisted instead of bringing together history educators from each side of the conflict and having them present their distinct narratives to each other – already a tall order for a conflict in which identities are absolutely at a "zero-sum" level and violence is ongoing. The narratives, which each included accounts of atrocities and illegal appropriations committed by the other side, were presented in columns on each side of the page, with space provided in the middle for students to write down their impressions of comparing the two sides' stories. The project itself promoted recognition of the "other side" and its narrative of injustice, which can be an aim of transitional justice in settings where injustices were committed as part of identity-based conflicts. It provided the physical and rhetorical space for the teachers from the two sides to learn about and reflect on the two narratives and come up with their own thoughts and questions for each other. The value of this exercise was to lay the narratives bare to each group and to compel them to compare and analyze the differences, in the hopes that familiarity with how the Other experienced, remembered, and interpreted events that involved both groups would reduce mutual hostility, or at least make the other group's stances seem less wholly strange and irrational, a product of primordial hostility.

It can be claimed that the results were minimal: the educators involved from each side who took part in the cooperative exercise were small in number, and the books could not be used in any official settings, although, like products from other similar projects, they have been used in informal settings or as supplemental materials.[32] However, given the political circumstances, Israeli-Palestinian projects like these are courageous, building ongoing professional contacts between educators, and at least exposing and deepening understanding of the most contentious areas in history between the two groups. The hope is that, even if extensive joint work on narratives is currently impossible, such projects can assist each of the two sides to begin to reconsider its own narrative of justice and injustice, each in the relative safety of its own homogenous setting, and thus reduce the general "strangeness" of the Other, contributing to a lessening of the polarization that has led Israeli Jews and Palestinians to define their own identities largely in the light of the existence of a fixed, existential enemy – the other group.

These projects, however, reveal some of the greatest challenges to be faced in work on divergent history narratives, including resistance from students and other members of each community. Bar-On and Adwan report that efforts to use the text their project produced in classrooms elicited challenges from students, who asked,

[31] Dan Bar-On and Sami Adwan, "The Psychology of Better Dialogue between Two Separate But Interdependent Narratives," in Rotberg, ed., *Israeli and Palestinian Narratives of Conflict*, 216.

[32] See ibid., 251; Dan Bar-On and Sami Adwan, "Booking Peace for Pupils: The PRIME Education Project for Israeli and Palestinian Youth," in Judy Kuriansky, ed., *Beyond Bullets and Bombs: Grassroots Peacebuilding between Israelis and Palestinians* (Westport, CT: Praeger, 2007); and Cole and Barsalou, "Unite or Divide?" 9.

"If these texts were 'the enemy's propaganda,' why teach them in class, especially at this time of violent conflict?" The implied questioning of the teachers' credibility "created a crisis among the teachers concerning the purpose of the project."[33] In addition to ideological opposition inside the classroom to newly created narratives that attempt to overcome the stark differences or outright untruths in past ones, other challenges for new and controversial material include obtaining official approval of materials, in systems where official approval is required, as well as the financial and bureaucratic obstacles to producing and distributing the textbooks or supplemental materials throughout a national system. However, even when new, more accurate and pedagogically up-to-date materials exist, the largest challenge may be helping teachers to use them effectively in the classroom.

Teacher-Focused Approaches

Even if new, politically controversial teaching materials on recent injustices get written, are politically feasible, and overcome bureaucratic and financial obstacles to become part of the official curriculum, how is this new and sensitive material being taught? It has long been observed that a skilled teacher can make good use of poor materials, or create her own to supplement or replace them, whereas a poorly trained teacher can ruin even the best teaching materials.

Increasingly, experts in history education reform in postconflict and democratizing contexts have begun to focus on the importance of pedagogy reform, on teachers as equal in importance to, often more important than, textbooks and teaching materials. Within this context, content is not overlooked – no new teaching methods could make up for teachers who essentially stick to elements of older narratives that demean or leave out minority groups, defend dictators or policies such as apartheid or ethnic cleansing, or completely deny incidents of major human rights abuses such as disappearances, torture, rape, or mass murder. But particularly in cases where tackling these subjects directly in the classroom is very difficult, what is being tried in postconflict situations is helping teachers learn about new techniques and purposes of history teaching.

Pingel notes that there is a major disagreement virtually worldwide about the ends of teaching history: "Whether the history curriculum should define a body of knowledge, unquestioned values, and moral judgments that represent the shared historical memory of a given society or whether students should be trained in skills that allow them to compare different interpretations, to develop critical thinking, and to form their own judgments."[34] This important debate, sometimes referred

[33] Bar-On and Adwan, "The Psychology of Better Dialogue," in Rotberg, ed., *Israeli and Palestinian Narratives of Conflict*, 213.

[34] Pingel, "Can Truth Be Negotiated?" 182.

to as intrinsic versus extrinsic approaches to history education, is summarized by Barton and McCully in relation to the debate in Northern Ireland: "Should teachers chiefly concern themselves with students' understanding of past events? Or should they overtly seek to confront the present through the past?" – and, by implication, questions of justice and injustice in the present and recent past.[35] It is clear that those who promote history teaching reform in postconflict settings strongly favor the latter, as long as the disciplinary distinctiveness of history is not compromised and history does not become "carrier" for citizenship education, with historical material reduced or stripped out.[36]

For Weldon, based on the South African experience, in history at its best, process is the key rather than content, "a process of enquiry, of interpretation and effective communication" to provide students and teachers with "knowledge and skills to enable them to interrogate the past, to understand historical interpretation and to recognize bias, propaganda and racism, hopefully ensuring that no historical narrative could again dominate to the exclusion of another and that distortions and manipulation in history texts could be identified."[37]

Seixas and Peck have constructed arguments for how critical pedagogy works, attesting to several crucial connections between historical consciousness and moral development. They cite the ability of acquiring historical thinking to understand "significance," defined as being "about a relationship not only among events and people of the past, but also about the relationship of those events and people to us, in the present, who are doing the historical thinking. Defining historical significance involves organizing events in a narrative that will show us something important about our position in the world." Historical thinking also can promote empathy if based on historical evidence, without which it might generate cynicism by appearing too sentimental or easy: "Empathy, or historical perspective taking, is not, in this context, an affective achievement. Rather, it is the ability to see and understand the world from a perspective not our own." Finally, it may engender in students an appreciation for historical agency.[38] Although Seixas and Peck are less convinced about the third possibility, this is the core of the pedagogy developed by the U.S.-based education group Facing History and Ourselves [FH], which encourages students to analyze the choices individuals had in history, especially during events of great moral harm

[35] Keith C. Barton and Alan W. McCully, "History, Identity, and the School Curriculum in Northern Ireland: An Empirical Study of Secondary Students' Ideas and Perspectives," *Journal of Curriculum Studies* 37, no. 1 (2005): 88.

[36] Alan W. McCully, "What Role for History Teaching in the Transitional Justice Process in Deeply Divided Societies?" *European Review of History Education* (forthcoming).

[37] Weldon, *A Comparative Study of the Construction of Memory and Identity*, chapter 3.

[38] Peter Seixas and Carla Peck, "Teaching Historical Thinking," in A. Sears and I. Wright, eds., *Challenges and Prospects for Canadian Social Studies* (Vancouver: Pacific Educational Press, 2004), 111–13; available at www.histori.ca/benchmarks/documents.

to groups, and to look for examples of moral agency being exercised to resist and to aid others. (FH's work will be discussed in more detail later.)[39]

CASE STUDY: HISTORY TEACHER TRAINING IN POSTAPARTHEID SOUTH AFRICA

> The humiliating expectations and traditions of segregation creep over you, slowly stealing a teaspoonful of your self-esteem each day.
>
> – Melba Patillo, one of the nine black students who integrated Central High School in Little Rock, Arkansas, and a central figure in FH's source material about racial relations in America[40]

Theories about pedagogical approaches and their potential contributions to democracy, tolerance, and respect for diversity, all markers of the national identity that South Africa is trying to promote in place of the violently racialized and hierarchical one that had been common during apartheid, are extremely abstract. In order to explore how history pedagogy reform is being tried on the ground, in deeply divided societies that are searching the best ways to promote peace, justice, reconciliation, and hope, we now turn to a case study. The description reflects the work that one of the authors, Karen Murphy of Facing History and Ourselves, has been involved with since 2003 in South Africa. Note that our selection of an FH project is not an endorsement of the work of this organization above others, and our approach to the project is descriptive and analytical, not evaluative:[41] FH's project was selected for inclusion as a case study because FH is one of the few education organizations that is specifically committed to working on issues related to past violence and human rights violations, how they are remembered, judged, and studied as part of a history – not civics, current events, conflict resolution, or human rights – curriculum. It is also one of the few education organizations that works extensively both domestically, focusing on American teacher development, and internationally, in a consultative role. Facing History does not define itself as an organization dedicated to human rights education; nonetheless the effects of its work may be thought of from this perspective in the sense that it is intended to serve the building and strengthening of human rights by making students aware of their own human rights and those of others.[42]

[39] FH is an international education and professional development organization headquartered in Boston, MA. For an introduction to FH's mission, work, and curriculum resources, see www.facinghistory.org.

[40] Interview with Melba Pattillo-Beals on the Scholastic Teacher web site; the online transcript is a combination of her answers to live chats with students in February 1998 and February 1999. Available at teacher.scholastic.com/barrier/hwyf/mpbstory/melchat.htm.

[41] FH has had more than eighty evaluations in the past years. To see a summary of a number of studies that have been done on this organization and its methodology, see the evaluation section of FH's web site at www.facinghistory.org/sites/facinghistory.org/files/eval_summary_1108.pdf.

[42] Resources provided for teachers on FH's extensive online "campus" include many materials directly about human rights, including a five-part module on the Universal Declaration of Human Rights and units on Rafael Lemkin and the Genocide Convention, along with others on broader but related themes like justice, civic courage and citizenship, prejudice, scapegoating, and dealing with difference.

FH has also been involved in history education reform in Northern Ireland and Rwanda, each an important case that contrasts with the others in illuminating ways, but South Africa was selected for inclusion here because it includes both strengths and weaknesses. Among its strengths are the fact that it had some processes for reckoning with past abuses in the form of a truth and reconciliation commission and institutional reform (although there have been few criminal prosecutions and little in the way of a fair and thorough program of reparations) that helped demarcate a break with past racially based injustices; an educational infrastructure that needs improvement but was not shattered by conflict; a rhetorical commitment to reconciliation, to world-class standards of human rights/civil rights, and to rule of law; a generally democratic political system; and no single, state-enforced historical narrative. Among its serious challenges and weaknesses, however, are continued socioeconomic inequities, including unemployment and the HIV/AIDS epidemic; generally weak, under-resourced education; and continuing high levels of violence – now criminal instead of political, but recently explicitly identity based, unleashed against economic refugees and migrant workers from other African countries.

South Africa represents a very interesting case for exploring the role of history education in relationship to transitional justice and national identity. The apartheid system was made up of an infrastructure of laws and public policies that were in turn shaped, informed, and buttressed by social practice, informal interactions among people, and, importantly, violence and humiliation. The latter two "tools" were used widely and regularly, making apartheid both a controlled system and a highly diffused one with countless effects. The education system shaped and reflected all of these conditions and, in turn, reproduced them. History education itself was an incubator for many of these conditions, reproducing and reinforcing apartheid ideologies through not only a historical narrative, but also the conditions of the schools themselves, the realities of segregation, the inequalities of teacher professional development, and the very ways that teachers taught their pupils. Weldon summarizes education under apartheid as follows:

> The segregated education reinforced inequality and the racialised identities (which lowered the self-esteem of the majority of South Africans and enhanced the self-esteem of the minority). Thus education during apartheid was an instrument of division and oppression. The institutional ethos of the education departments was highly authoritarian. The vast majority of those within the bureaucratic hierarchy were male (in white education, Afrikaaner male), and virtually all supported the apartheid system. The education system deliberately set out to inculcate notions of superiority and inferiority; of those born to rule and those born to follow (delineated along racial lines). Apartheid education was Christian and National, ostensibly a policy for white Afrikaans-speaking children, but also spelling out the features of education for black South Africans that clearly articulated the racist ideology nurtured in the 1930s by the ruling National Party during the 1948 election campaign.[43]

[43] Weldon, *A Comparative Study of the Construction of Memory and Identity*, chapter 1.

As is typical in authoritarian states that place a premium on the development of obedience and conformity in its citizens, the content that teachers used in history classes was strictly aligned with a dominant narrative constructed by Afrikaaner nationalist historians. Not unlike the United States' dominant narrative prior to the 1940s, this narrative represented a people, a "volk," who were deeply intertwined with the emergence of South Africa as a nation-state and chosen by God to rule the country: these people arrived in a country that was empty and, through their labor, shaped it into a modern nation. In this triumphant, progressive narrative, a clear hierarchy is articulated with Afrikaaners at the top. This narrative, fused with racialized policies, retained the superiority of Afrikaaners while ultimately merging culture and language with race/color.

In 1953, the Bantu Education Act was introduced. The act created a separate education department for black South Africans that reflected the values of apartheid. Black people were to be educated to become manual laborers and taught not to aspire to other positions in society. Black teacher training colleges reflected these ideas and black schools themselves carried them out. In addition to a lack of resources, a largely nonacademic curriculum, poor professional development opportunities for teachers (and no expectations for them since they were developing workers), students and teachers faced the realities of too few schools and too many students per class.

This system was not dismantled until 1994. At that point there were nineteen different education departments. One of the first acts of the new government led by the ANC was to create one department of education for all South Africans. Fourteen years later, however, South Africa continues to wrestle with the effects of a deeply divided and unequal education system; the violence and humiliation that reinforced it; the deconstruction of a narrative that was not, in any way, merely academic but shaped worldviews and reinforced people's views of themselves, each other, and South Africa; and the long-term effects of inadequate teacher training and professional development.

Revisionist historians began to deconstruct the apartheid narrative in the 1970s and 1980s. This clearly laid a foundation for more critical work by scholars and by some progressive teachers. As Weldon argues, this work also created a basis for the development of a usable past that would inform the deliberations for a new history curriculum after 1994.

Weldon herself was part of the process for developing a new history curriculum. Her reflections on this process suggest the challenges that the writers faced in coming to agreement on the direction the curriculum would take. It also suggests how deeply entrenched the attitudes, behaviors, and ideas of apartheid were. Indeed, the people developing the new curriculum could hardly step outside themselves, their own experiences, and a system that had violated, oppressed, and manipulated everyone – victims, perpetrators, and bystanders. One of the most challenging realities of transition is the (re)development and reform of institutions by the people who were implicated in the former regime. Whether as an exile, freedom fighter,

passive resister, or active participant, being part of South African society meant that apartheid had shaped everyone's identity at some level. The realities of this unjust system included the fact that whites were invariably better-trained teachers and writers for the curriculum development process. The Bantu Education Act and segregation virtually guaranteed that fact.

Upon being appointed minister of education in 1999, Kader Asmal made it clear that there was a central place for history education in schools and that history education was far more than a subject but rather a critical foundation for citizenship in the new South Africa, especially modern and recent history, which were to serve the particular transitional justice goals of teaching about past human rights abuses to prevent "the folly of repetition," and redress the formerly subjugated and marginalized. Importantly, participants in the writing process such as Weldon were insistent that a new, triumphal narrative could not be developed to replace the old, that one story of a chosen people would not be replaced by another. A new national identity could not be taught or imposed. Asmal identified the constitution and democracy itself as the basis for a shared South African identity. In this conception, the reintroduction of history education was not intended to provide a new collective memory and identity, but rather to provide history education with a strong ethical bias within a values framework. In his address to parliament on the TRC Final Report Asmal noted that "a simple factual record of the apartheid past, devoid of an *ethical* basis, would be of little value. What matters is not merely the fact that we remember history but the *way in which we remember it*."[44]

History, of course, cannot be contained by schools. Institutions such as families, churches, mosques, community-centered cafes and bars, and other public sites, all participate in the construction of historical narratives and memories. Because South Africa was so rigidly segregated and because the fall of apartheid did not immediately usher in an integrated society in terms of where people lived and socialized, many of the very structures that buttressed the regime continued to inform the construction of identity. One of the most important among these is the fact that most South Africans use color to identify themselves. As one self-identified "Coloured" teacher in a teachers' professional development project that FH supported, which we describe later, noted, "I know I am not supposed to say this, but I prefer to go to the movies with my Coloured friends. We laugh at the same things."[45] Racialized segregation reinforced the development of communities in relative isolation. People grew comfortable in these communities (not in their physical settings, but with each other), developed shared practices and traditions, and often spoke the same language.

[44] Address of the Minister of Education, Professor Kader Asmal, MP, in the debate on the Truth and Reconciliation Commission Report, National Assembly, Cape Town, April 15, 2003; available at www .info.gov.za/speeches/2003/03041515461001.htm. Italics added.

[45] Karen Murphy, notes from "Facing the Past" seminar, January 2007.

The new history curriculum offers a dramatically different approach to content requirements. For example, teachers are required to teach about apartheid, the Holocaust, and human rights. The TRC is taught both in Grade 9 – as part of a theme of human rights, genocide, transitional justice, and the Nuremburg Trials – and in more detail in Grade 12, as it is the subject of one possible question on the final history subject examination paper.[46] However, the role of the TRC in South Africa's overall educational curriculum should not be overemphasized. In the final matriculation exam, students select seven out of about thirty subjects in which to be examined. History is one choice, although there is concern that the number of students opting for history is dropping. If the student opts for history, he or she selects two essay questions out of four to write on, and in 2008 one of the four was a question on the TRC and national healing. Whereas in 2008 about 93,618 South African seniors chose to take the history exam, there is no way of knowing how many opted to write about the TRC. The TRC, however, is mentioned specifically, if briefly, in the national curriculum as a part of "dealing with the past and facing the future," and in somewhat more detail in the national Assessment Document, which discusses the debates surrounding the TRC.[47]

Crucially, however, the new curriculum fundamentally transforms pedagogy as well as content, so teachers and students will have the skills to approach this content, not as material to be memorized, nor as a sacred text to be accepted, but as material accessible to study, proof, debate, and analysis. Students are to learn the work of historians – to work with sources, analyze, provide evidence, and form hypotheses. In order to do this, teachers need to understand how to do this work themselves. Given their unequal training, white teachers had more practice doing this kind of work and often had access to more resources as well as better-resourced classrooms and smaller classes. They also usually have students who are fluent in English or Afrikaans. Black teachers, as a whole, were trained more traditionally (rote education with teachers lecturing, students taking notes and memorizing) and experienced traditional, authoritarian education themselves as students. They also have fewer resources, under-resourced classrooms, and many more students per class. Their students speak a number of languages and usually speak English or Afrikaans as second or third languages.

The proposed history education content and methodology were sophisticated and not easy to teach, especially for the graduates of black educational institutions. Neither the creation of new teaching materials reflecting a commitment to teaching history as a part of developing human rights consciousness in students, nor access to extraordinary testimonies from the TRC and other resources were sufficient to help teachers teach the new history curriculum effectively and with confidence. South African teachers needed to learn *how* to teach this material; the material

[46] Gail Weldon, personal communication to authors, February 17, 2009.
[47] Gail Weldon, e-mail communication to Cole, July 31, 2009.

itself needed to be made accessible and turned into classroom-appropriate material; and teachers as citizens needed to struggle with the issues themselves before taking the issues to students in discussion. In addition, despite the relative unanimity at the political level on the injustice of the apartheid state, South Africa nonetheless continues to have groups who suffered less from the system than others, or even benefited from the system, whose reactions to this content could make teaching it a tense experience for teachers – especially in newly integrated classrooms.

In 2003, to assist South African history teachers in meeting these challenges, FH collaborated with the Western Cape Education Department [WCED] and the Cape Town Holocaust Centre [CTHC] to form Facing the Past, Transforming Our Future (henceforth Facing the Past), a teacher professional-development and resource-support project. In 2005, Shikaya, a nongovernmental organization formed by South African Dylan Wray, took over primary management of the project.[48] FH and Shikaya still work closely with WCED and the CTHC but are now the main partners for Facing the Past. Since its inception, the project has trained 107 teachers and three curriculum advisors in the Western Cape and held several workshops in Johannesburg; forty schools, including private, religious, and state, and both well-resourced former white and under-resourced former black schools, participate in the project. Shikaya also offers continued support for teachers via e-mail. Facing the Past's methodology is aligned with the required national curriculum in such a way that even if teachers do not technically teach the entire Facing the Past curriculum, they are still able to bring methods and content into their history courses.

FH's pedagogy, which forms the basis of Facing the Past, offers students a framework and a vocabulary for examining the meaning and responsibility of citizenship and the tools to recognize bigotry and indifference in their own worlds. The curriculum offers a rigorous examination of the failure of democracy in Germany during the decades of the 1920s and 1930s and the steps and events that led to the Holocaust, along with other case studies of hatred, massive human rights violations, and collective violence in the past century. Through this – but crucially, through the inclusion of the history of the modern human rights movement and other struggles for justice, such as the U.S. Civil Rights Movement, South Africa's antiapartheid struggle, and the international movement for Darfur – FH teaches adolescents that prevention of collective violence is possible. Students learn to draw connections among events in the past, choices in the present, and the possibilities of the future.

FH is rooted in a pedagogy that identifies the moral concerns and choices adolescents confront each day and uses them as connections for students to move back and forth between understanding choices of the past and the present – between history and their daily lives. Students learn to recognize distinctions among events, to draw appropriate relationships, and to grasp similar issues without making facile comparisons and imperfect parallels. FH uses a "scope and sequence" (the set of

[48] For more information on Shikaya, see www.shikaya.org.

concepts or ideas students should have learned by the end of their program and the defined topics and methods needed to get there) that typically begins with identity, moves into issues of membership and belonging, then into a historical case study that emphasizes human behavior and moral decision making, then into questions of justice, judgment, and reconciliation, culminating in the theme of "participation" or "choosing to participate" in civic and public life, including taking an active stance against injustice.

By using case studies from outside of South Africa, including the Holocaust and race issues in the United States, the project directors have tried to create some distance for teacher participants, allowing them to begin to look at difficult issues and the choices people made in the past and their consequences. FH's experiences in the United States demonstrated that teachers and their students find safety in this distance. They are able to make connections to themselves, to their communities and to other events in a way that they have not when faced with "their" history directly.

In the Facing the Past project, South African history teachers are introduced to core concepts of transitional justice through an online module that Facing History and Ourselves developed. In seminars and follow-up workshops, examples of land restoration, monuments/memorialization, truth seeking (in the form of the TRC), prosecutions, and reparations are raised and explored. Workshops for teachers make use of multimedia materials, in addition to texts. A strong role is given to documentary films, including *Facing the Truth with Bill Moyers*, *Long Night's Journey Into Day* (both about South Africa), Anne Aghion's films about the gacaca process in Rwanda,[49] and the PBS documentary *Not In Our Town*, about efforts to fight hate crime in the United States, as well as local community theater productions. Materials from South Africa's Institute of Justice and Reconciliation are also used and distributed to teachers. Workshop leaders work with clips of testimony from the TRC to model for teachers how this rich resource can be used in a classroom setting and the ways that it can be contextualized.

Typical questions used to structure teachers workshops might include:

- How do we see ourselves and others?
- How is our identity and that of others manipulated?
- How does our identity affect the way we treat others or the way we are treated by others?
- What are the challenges of making a democracy work and the dangers of destroying a democracy?
- How can states manipulate how we think and behave?
- How do policies based on exclusion result in the abuse human rights?
- What are the consequences of the violation of human rights?

[49] In the interest of full disclosure, Aghion has received support in the form of grants from the United States Institute of Peace for her films on Rwanda.

- What are the factors that lead some people to take a stand against human rights abuses? How do we teach about difficult history?
- How do we recognize and deal with the issues of racism and prejudice that exist in our schools today?[50]

Exploring transitional justice approaches with South African teachers invites not only a discussion of the various processes, their limitations, and opportunities, but also an important international comparative analysis. The Nuremberg trials and the ad-hoc tribunals for Rwanda and the former Yugoslavia [ICTR and ICTY], for example, are introduced to raise discussions of the pros and cons of prosecutions: are prosecutions necessary to account for genocide and mass violence? In South Africa, should prosecutions have followed the TRC and been pursued more aggressively?

Examples of specific exercises used in workshops include an FH activity called the "Big Paper" project. This involves having facilitators choose a group of published narratives, including some taken directly from the TRC, that focus on a range of experiences during apartheid. These are distributed to the teachers, who work in small groups of three to four people to read their assigned piece together, discuss it in the light of their own experiences, and then move on to another narrative while leaving behind a short written piece (a comment, question, or even a new story) for the next group to read together with the original narratives. Each small group eventually reads, discusses, and comments on all the narratives, which represent many kinds of behavior during apartheid, based on being a perpetrator, bystander, or victim of violence, and displaying a range of attitudes – shame, humiliation, resistance, or moral courage. Small group discussions are followed by discussion as a large group, after which facilitators invite the group as a whole to reflect on the process itself and which aspects of it can be applied to classroom work, including the skills of facilitating difficult discussions, creating safe spaces for reflection, and helping students listen to and respect competing views. Still other exercises involve reading, discussing, and writing workshop journal entries on literature on the apartheid period (such as Coetzee's memoir cum novel *Boyhood: Scenes from Provincial Life*), or an excerpt from a testimony.[51]

South African teachers, many of whom have been undermined by memories of past humiliation and feelings of professional inadequacy in the new order (where black or Coloured teachers, for example, may be asked to evaluate white teachers), are thus empowered and asked to see themselves, too, as active participants in their country's transition, people who could make a positive difference. Black and Coloured teachers have repeatedly noted that one of the most important aspects of

[50] These particular questions were used to advertise a recent "Facing the Past" teachers' seminar.

[51] A portrait of a South African teacher who is using FH's curriculum, including her experiences as a student when the earliest classroom integration was attempted, can be found on FH's web site: www.facinghistory.org/about/who/profiles/teaching-students-face-past-pos.

the Facing the Past program is the confidence it gives them. This aspect of identity – confidence, an ability to do your job well, that you are prepared to do it – is vital not just for successful teaching but for the ability to imagine yourself as an active participant in society.

An example of the relevance of this sense of civic participation and connecting history with current events is the xenophobic violence that broke out across South Africa in 2008 against migrants and refugees from neighboring countries. Given that transitional justice is both forward and backward looking, discussions with history teachers encouraged them to use South Africa's apartheid-era history, including resistance to it and the challenges of transition, to address human rights abuses in the present and how to motivate their students to resist them in the future. Many of the teachers participating in Facing the Past workshops note the transition they have made from viewing their history as an essential aspect of their identity, often in terms of oppression and victimization, to wanting to use their history and move beyond the old restrictions of identity to take positive action in their classrooms. In a workshop session specifically focused on the recent violence, teachers recalled the tactics of apartheid – the shame, humiliation, violence, and ostracism – as a way to understand what they were seeing in their communities in the present. They also talked about resistance and about prevention in new ways, as people who have a responsibility – and the power – to make a difference in their society, and to model this new role for their students.

CONCLUSION

There are reasons to believe that programs to change history education can serve justice and reconciliation, despite the difficulty in obtaining empirical evidence of transformation of identities via education programs; the many obstacles to changing the different historical narratives of enemies after the formal conclusion of conflict, which underpin identity; and the specific challenges facing history education.

Education systems, although often conservative, are not immune to change. One example concerns the implementation of a principle of egalitarian education in Japan, which includes having all members of the community from the principal down contribute to janitorial work, and making stronger students who finish faster use their time to help slower students with assignments. This change "is a relatively recent product of post-war reforms . . . a promising example of how educational institutions might serve a transformative rather than a conservative social function."[52]

With regard to historical narratives and history as a part of conflict mediation, Bishai and other scholars, such as Barkan, have noted that identities and narratives are not in fact frozen, nor do they exist in a vacuum; they change as those of others they

[52] Gutmann, *Democratic Education*, 54; citing William K. Cunningham, *Education and Equality in Japan* (Princeton: Princeton University Press, 1980), 107–32.

are in contact with change. As Linda Bishai notes, "All identities change and grow in new directions in response to and in relationship to the course of historical events." Nationalists clearly make use of "artificially emphasized histories," but this indicates that, to some degree at least, historical narratives are malleable by nonnationalists.[53] Kaufman's contention that conflict-hardened identities are not infinitely malleable is certainly true, but the literacy to which he ascribes the persistence of atrocity memories also means that literacy can be used to engage new approaches to history and civic identity. Again, he is correct that *victims* cannot be talked out of real atrocity histories, but members of perpetrator groups can learn to recognize these histories, and *succeeding generations*, the descendants of enemy groups, can learn new understandings of history, their own identities, and those of other groups.

In the specific area of history education, one transitional setting with hardened identities, Northern Ireland, has had among the most progressive, inquiry-based history curricula in the world since the 1980s, based on

> developing in students the skills and concepts to enable them to investigate the past through the examination of primary and secondary evidence and to treat any narrative of the past as provisional and open to question. Thus, students were encouraged to view history as enquiry, to recognize that actors in the past often saw events differently, and to evaluate differing (and conflicting) interpretations in the light of available evidence.[54]

In addition, the interaction between Northern Ireland's struggle to overcome its violent past and the history program is also one of the most studied such relationships in the world. Keith Barton and Alan W. McCully, who have studied Northern Irish history education with regard to conflict, transitional justice, and reconciliation for decades, write that Northern Irish educators and policymakers look to school-based history education to counter the divisiveness that characterizes their society after years of violence: "They hope that history education can diminish young people's acceptance of narrow or partisan perspectives on the past, either by providing them with neutral and balanced portrayals of controversial historical issues or by emphasizing non-politicized skills of academic study."[55] Studies they have carried out in Northern Ireland have found that "young people valued school history's commitment to balance and they welcomed exposure to other views of the past as an alternative to the partisan histories they often encountered in their own communities."[56] Belief in this social role for history is not unanimous among educators, and the results of Northern Ireland's consciously crafted history curriculum

[53] Linda Bishai, *Forgetting Ourselves: Secession and the (Im)possibility of Territorial Identity* (Lanham, MD: Lexington Books, 2004), 88; see also Barkan, *The Guilt of Nations*, esp. "Introduction."

[54] McCully, "What Role for History Teaching."

[55] Barton and McCully, "History, Identity, and the School Curriculum in Northern Ireland," 85.

[56] Keith C. Barton and Alan W. McCully, "You Can Form Your Own Point of View: Internally Persuasive Discourse in Northern Ireland Students' Encounters with History," *Teachers College Record* 112, no. 1 (2010): 142–81.

are mixed. Barton and McCully have found evidence that "the current curriculum may have directly influenced students' ability to question the authoritative stories of their communities and to base their own conclusions on evidence."[57] But they have also found that many students, as they get older, "draw selectively from the formal curriculum in order to support their developing identification with the history of their own political/religious communities."[58]

In addition, Pingel cites surveys from Bosnia and Herzegovina and Rwanda showing that pupils "want to know about war and genocide; they want proof of the stories they are confronted with in their families and in the media; but these stories are not permitted within the classroom, and students cannot examine them in a rational environment." And although teachers he has worked with, "especially older ones, prefer a history with a clear narrative, not something that allows for different interpretations [an observation that underscores FH's prioritization of teacher development: it is not only in South Africa that teachers struggle with new, more challenging history pedagogies – Authors] . . . the majority of people, be it parents, teachers, or students, in principle are in favor of teaching history to better understand the roots of the conflict – although they wish to avoid tackling the conflict itself."[59] His final point speaks strongly in favor of FH's methodology of using "remote" cases, either to help students begin to discuss their own history, or, in the case of Rwanda, where teaching about the genocide itself is still forbidden, the methodology used by a consulting group composed of FH and University of California Berkeley educators: they rely solely on remote cases combined with training in new pedagogy to help Rwandan teachers make the connections to Rwanda's history, specifically, the genocide and its origins, in the hope that someday they will be able to teach about recent history.[60]

As is perhaps evident from this chapter, more is known, although not yet enough, about how history education can be made to serve the reconciliatory side of transitional justice by a focus on changing history pedagogy over content. (Nor is enough known about how transitional justice, for its part, can serve needed educational reforms.) Clearly, bringing in new points of view, voices, and narratives in history content can serve as tools of justice via inclusion and recognition; bringing into the narratives past violations of human rights and acts of violence, the experiences of victims, serves as acknowledgment. The *lack* of these voices, narratives, events, and experiences in history content is exceedingly clear in regional relationships in East Asia, where Japan has included them only in small, muted, or hedged ways in textbooks on World War II, and in Turkey, where not only is the genocide against

57 Ibid.

58 Barton and McCully, "History, Identity, and the School Curriculum in Northern Ireland."

59 Pingel, "Can Truth Be Negotiated?" 187–8.

60 Sarah Warshauer Freedman, Harvey M. Weinstein, Karen Murphy, and Timothy Longman, "Teaching History after Identity-Based Conflicts: The Rwanda Experience," *Comparative Education Review* 52, no. 4 (Nov. 2008): 663–90.

the Armenians missing from textbooks, but so are Armenians themselves, along with every other minority group that inhabits the land now belonging to Turkey. A sense of justice denied is palpable among Japan's neighbors, who suffered from Japan's occupation and wartime policies, and in the Armenian community in Turkey, in neighboring Armenia, and among the Armenian diaspora, scattered around the world by the genocide; and all these victims and descendants of victims refer specifically to history education and textbooks when they speak of the justice they seek, along with apology and truth telling by state authorities.

By the time students are in university, they are seen as adults, and studying history is elective. But to what extent middle or high school history education can be the place to insist on and showcase the few unvarnished "truths" about the past, those "truths" that are the stubborn facts René le Sage referred to[61] – the deaths and acts of torture that cannot be undone by any act of interpretation – is not clear. FH's mission statement refers to human rights and is built around the Holocaust as a primary case study, but its teacher training program in South Africa focuses as much on building the professional self-respect of members of formerly marginalized groups, on teaching skills to foster reconciliation, and on overcoming entrenched identities of hierarchy, power, and exclusion, as it does on helping teachers teach about human rights abuses. The Northern Ireland curriculum gets at injustices obliquely, through teaching students to question partisan stories they hear at home and putting Northern Ireland's past into historical context, rather than by focusing on acts of brutality against individuals and deaths of innocent people in bombings. Here, too, the focus is on producing thoughtful adults who can take part in reconciliation with members of other groups, with identities defined more by inquiry, ability to debate nonviolently, and acceptance of diversity than by the old identities associated with conflict, dominance, privilege, suffering, and victimhood. History education is in fact a somewhat oblique response to human rights violations: education about human rights abuses per se would aim for students to understand what the human rights violations were and to care about them, but history's goal is to understand *how* we know what we do about the past, including about human rights violations.

It should be noted here that there could also be arguments for substituting human rights education for history, that is, education about the modern concept and field of human rights, which is closer to civic or democracy education and focuses more on concepts than specific events, even when case studies are used. Oglesby, for example, found some evidence for this in schools in Guatemala, where there are still deep divisions about the extent of the violence and who was most responsible for it, and where the government has neither been willing to open up this chapter of Guatemalan history nor to embrace the findings of the Guatemalan Historical Clarification Commission (CEH). Students in some private, elite schools have had

[61] Alain René Le Sage, *The Adventures of Gil Blas of Santillane*, Vol. IV, "Book x" (London: Printed for the Proprietors, 1797), chapter i.

courses or units on international human rights, including detailed instruction on the Geneva Conventions and major human rights instruments. Educating students in human rights may give them familiarity with principles that states have signed on to via covenants and individuals around the world are committed to, thus making them more familiar as norms. But if history education about the violence and abuses in their own past is missing, then crucial connections are obviously lost. Focusing on human rights alone may independently inspire some students to look critically into their history, but the issue can also remain abstract and a problem of "other" countries and regions.

Human rights education expert Felisa Tibbetts, the director of Human Rights Education Associates (HREA), believes that human rights education can open a space for discussion of difficult issues related to the recent violence when history is still taboo. At its best, Tibbetts says, human rights education is not "context free," as it, along with peace and conflict resolution education, is sometimes accused of being; current and recent events are liberally used as examples, even if by political necessity they have to be drawn from outside cases. Overall, Tibbetts feels that the greatest contribution of human rights education comes from its impact on pedagogy: HREA and other outside human rights and civics education groups can act as conduits for new approaches to teaching in places where teaching has traditionally been conceived of as a "transmission belt," that is, as enabling students to duplicate information passed on from teachers.[62]

The relationship between transitional justice and education was clearly drawn in the final report of the Peruvian Truth and Justice Commission, whose investigation found strong links between the deep problems of Peru's education system and the violence of the Shining Path insurgency and the government's counterinsurgency. The report identified education as a key institution in need of reform, along with the organs of justice and security (the military, police, and prisons). Surprisingly, perhaps, the report's section on recommendations for education did not focus on the specifics of how the years of violence should be taught in schools – except to say that history as taught in Peru was too "past-oriented and defeatist" [*con visión pasadista y derrotista*], that is, not making sufficient connections between history, especially recent history, and the present.[63] Rather, recommendations were offered for a much broader set of reforms, including making schools better able to teach democracy and human rights, strengthening the humanities with the goal of achieving acceptance and knowledge of diversity, and strengthening the sciences in order to reduce prejudice.

Further confirming our argument that reform of pedagogy and teaching, more than content, are key issues in transitional settings, the report has a special section

[62] Felisa Tibbetts, conversation with Elizabeth Cole, June 6, 2008.

[63] Comisión de la Verdad y Reconciliación, ed., *Informe Final de la Comisión de la Verdad y Reconciliación*, Vol. IX (Lima, Peru: Comisión de la Verdad y Reconciliación, 2003), 135; available at at www.cverdad.org.pe/ifinal.

on discipline, decrying corporal punishment and stressing the importance of schools in modeling nonviolent behavior and a culture of respect. Recommendations also focus on the needs of the illiterate and deeply impoverished, especially women and girls, as well as the need for better resources for rural schools, and special incentives and support for teachers in rural schools. The stated goal of the recommendations is to achieve an educational system compatible with democracy, economic justice, and peace via mutual respect in a diverse society. Thus, education is conceived of as a potential site of both civil-political and social, economic, and cultural rights. It should be noted that pessimism exists among both Peruvian educators and transitional justice experts regarding improvements in education since the final report appeared – demonstrating once again that formal recommendations as a part of transitional justice institutions is one thing, but their implementation and effect in people's lives is quite another.

In the area of content, the history education field and transitional justice could work together much more than they currently do to create materials to use in classrooms. Technology, especially, can be used to strong effect to create multimedia teaching tools – such as audio-video materials for podcasts and interactive websites that could accompany texts – to teach about trials, to interview historians, judges, activists and others able to communicate about history and the struggle for justice, and to preserve testimony from truth commissions. The pedagogical value of these technologies is that, at their best, they are interactive, allowing students to be active participants in the process of learning and experiencing how history is made. We should note, however, that our recommendations here are made with the knowledge that they are, in many cases, aspirational. Many school systems, or at least specific schools, in societies trying to recover from violence will not yet have the resources to allow students to access and work with websites and computer-based materials.

Examples of creative educational web sites abound; although its topic is not transitional justice or identity per se, the web site Kyrgyzstan: Revolution Revisited (www.eurasianet.org/kyrgyzstan) shows nicely how pictures, personal stories, videos, timelines, maps, and simulation exercises ("Your Choice: As a policymaker, how would you fight Kyrgyzstan's corruption problems?" and the "Report Card: Grade the government's performance in seven policy areas") can help make students active participants in the study of recent history, with a special focus on how people from a variety of backgrounds experienced historical events. Brown University's extensive Choices educational program has a series of filmed interviews with scholars and others that "brings university scholars into high school classrooms with short informative video clips"; of particular relevance for this chapter, many are related to transitional justice and human rights, such as the interviews with South African judge Dennis Davis and Chinese dissident Xu Wenli (www.choices.edu/resources/whatsNew.php), and the extensive unit *Torturing Democracy*, a collaboration between Choices, which produced the Teaching Guide, the

National Security Archive and Washington Media (www.choices.edu/resources/twtn_torturingdemocracy.php). The web site includes a documentary, interviews, an archive, and interactive timelines.

Oral history, too, is already a popular methodology for teaching about the recent and contested past: oral history archives can provide materials for students, but students themselves can become oral historians by studying this particular genre and then going out to interview older family members, neighbors, and others in their communities.[64]

In addition to working with creators of educational materials, truth and reconciliation commissions as well as historical commissions and courts could have educators who work as liaisons to the educational community, providing outreach and workshops for teachers and creating didactic materials for teachers to use. Despite the costs involved in what are already expensive processes, these activities are crucial to help bridge the distance between these institutions and citizens, to whose more just futures their work is intended to contribute.

However, these materials are not important if they sit on a shelf, if people do not know they exist, if they do not have access to them, if they are not modeled properly, or if the political will to respond to policy recommendations is lacking. Julia Paulson found this to be the case in fieldwork on the educational recommendations of the Truth and Reconciliation Commission in Sierra Leone: the TRC, with assistance from UNICEF, had produced a very clever version of its Final Report in the form of a graphic novel, with cartoon character mice representing the people of Sierra Leone during the war that devastated the country.[65] In addition, it produced a classroom guide for teachers to help them teach these materials, and also made explicit recommendations for the education system, including that corporal punishment (well-attested to have been rife in prewar Sierra Leonean schools, as well as in schools throughout the region and indeed in many systems worldwide[66]) be outlawed in schools, human rights education should be made part of the formal examinable curriculum, and that the content of the TRC should be incorporated into education at all levels. However, in 2008, Paulson could not find a single school that had any of the education materials, and none of the high-ranking education officials she met at the ministry of education had ever seen a copy there.

[64] For accounts of how oral history is being used in some classrooms in Spain and Japan, see Takashi Yoshida, "Advancing or Obstructing Reconciliation? Changes in History Education and Disputes over History Textbooks in Japan," in Cole, ed., *Teaching the Violent Past*, 65; and Rafael Valls, "The Spanish Civil War and the Franco Dictatorship: The Challenges of Representing a Conflictive Past in Secondary Schools," in Cole, ed., *Teaching the Violent Past*, 160.

[65] The materials can be downloaded in PDF format at the TRC's web site at www.trcsierraleone.org/drwebsite/publish/index.shtml.

[66] On violence in schools and their effects on children, documented in the children's own words, see, for example, Rebecca Winthrop and Jackie Kirk, "Learning for a Bright Future: Schooling, Armed Conflict, and Children's Well-Being," *Comparative Education Review* 52, no. 4 (2008): 639–61.

Most depressingly, perhaps, when Paulson asked principals about human rights and peace education in their schools, "one explained briefly how the rights and duties of the child are taught before going into a lengthy description of discipline practices in the school, listing the number of lashes doled out with the case for different offences."[67]

Writing about Rwanda after the genocide, Anna Obura noted that "they [children] crave to have it demonstrated to them, by their education system, that justice can be done."[68] Not only do history teachers and pedagogical methods hold the key to ensuring that materials on transitional justice, identities, and human rights get used, and are used in sound, effective ways, but *how* teachers teach *also* models justice, equity, kindness, and encouragement for students – especially those who have been subjected to violence, displacement, and identity-based exclusion. Reform in this area may represent the greatest achievement of justice, and of transformation of identity, in the lives of children and young people in times of transition.

[67] Julia Paulson, "The Educational Recommendations of Truth and Reconciliation Commissions: Potential and Practice in Sierra Leone," *Research in Comparative and International Education* 1, no. 4 (2006): 335–50, 344–5.

[68] Anna Obura, *Never Again: Educational Reconstruction in Rwanda* (Paris: International Institute for Educational Planning, 2003), 177.

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