After Dictatorship

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Instruments of Transitional Justice in Post-Authoritarian Systems

Edited by
Peter Hoeres and Hubertus Knabe

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Preface

What has to happen after a dictatorship has been overcome? For several decades, lawyers, political scientists and historians in numerous countries have been preoccupied with this question. After the end of the Second World War, this mainly concerned how Germany dealt with National Socialism. However, coming to terms with the past is now an issue worldwide. Under the term 'transitional justice', it is no longer exclusively about dictatorships, but also about civil wars, genocides and other politically motivated mass crimes, the legacy of which weighs heavily upon countless societies in Europe, America, Asia or Africa. Whilst the main discussion initially addressed the question of what to do with those responsible for the most serious human rights violations, the focus today is also on compensation for the victims, appropriate commemoration, and institutional reforms to prevent a repetition of similar crimes.

Since February 2020, a project at the University of Würzburg has been looking into the question of which instruments for coming to terms with the past have proven particularly effective over the last decades.[1] In order to determine this, developments in selected countries on several continents are being analysed and compared with each other. The project is based at the Chair of Modern History because coming to terms with dictatorships and civil wars now has a past of its own, which has thus far been insufficiently researched in relation to many countries. It is flanked by a second project dealing with the dictatorships in Spain and Portugal, which ended almost fifty years ago.[2]

This book presents the first results of this research. At the centre of the volume are seven country analyses prepared by proven experts on processes of 'transitional justice'. They deal with coming to terms with the past in Albania, Argentina, Ethiopia, Chile, Rwanda, South Africa and Uruguay, whereby all analyses are based on a uniform scheme. The countries were selected in such a way as to permit as many different constellations in dealing with mass crimes to be examined as possible – from the voluntary withdrawal of military rulers in Argentina and Uruguay, via the collapse of a decades-long dictatorship in Albania, to the violent overthrow of the regimes in Ethiopia and Rwanda by armed rebels.

The volume begins with analyses relating to Latin America, which has long been at the centre of research into the area of transitional justice. The political scientist and theologian Veit Strassner examines transitional justice with reference to the military dictatorships in Argentina and Uruguay, while the former Director of the Museum of Memory and Human Rights in Santiago de Chile, Ricardo Brodsky, looks at

1 Further information on the project can be found on the bilingual website www.after-dictatorship.org.

2 See the project description on the website of the Chair of Modern History at the University of Würzburg: https://www.geschichte.uni-wuerzburg.de/institut/neueste-geschichte/bmbf-projekt.

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how the Pinochet dictatorship in Chile was dealt with. On the African continent, too, 'transitional justice' is illuminated on the basis of three states. Peace and conflict researcher Julia Viebach investigates the topic as regards the genocide in Rwanda; the Research Director of the Centre for the Study of Violence and Reconciliation in Cape Town, Hugo van der Merwe, outlines efforts at reconciliation after the end of apartheid policies in South Africa; and criminal justice expert Tadesse Metekia describes dealing with the Marxist Dergue regime in Ethiopia. The seventh country study is dedicated to a country in Europe that usually receives little attention; namely, Albania, whose coming to terms with its 45 year communist dictatorship is analysed by Jonila Godole, Director of the Institute for Democracy, Media and Culture in Tirana. These country studies are preceded by fundamental reflections on dealing with dictatorships and politically motivated mass crimes from a historical perspective, written by co-editor and historian Peter Hoeres. The volume concludes with a comparative review by the second editor and previous director of the memorial museum located in the former Stasi prison of Berlin-Hohenschönhausen, Hubertus Knabe, in which he elaborates upon which instruments of transitional justice have proven effective under which conditions.

This volume and the research project from which it has emerged would not have been possible without the financial support of the German Federal Ministry for Economic Cooperation and Development (BMZ). The editors are extremely grateful for the generous support and consistently encouraging guidance provided by the Ministry's staff. They also thank the authors of the seven country studies for their committed and qualified participation. Last but not least, the translators of the German-language contributions, Kirsten Kearney and Nicholas Nedzynski, as well as Henning Saßenrath, who undertook the technical supervision of this volume, have made the book's appearance possible through their work.

The editors hope that the studies published here can give new impetus to the discussion on how to deal with dictatorships and serious human rights violations. Even if the world currently seems to be experiencing something of a renaissance of dictatorships following the triumph of democracy in the 1990s, the question as to which instruments of 'transitional justice' are the most effective remains relevant – not least because the legacies of these dictatorships will also have to be reappraised at some point.

Introduction

Peter Hoeres

Historical Perspectives on Transitional Justice

Numerous institutions, organizations and individuals are engaged in the political, cultural, social, and religious reappraisal of dictatorships. These include the successor governments that replace dictatorships, political parties, and civil society organizations such as human rights associations, victims' associations and churches or other religious communities. After the end of the National Socialist and fascist dictatorships in 1945, the collapse of the communist regimes at the end of the 1980s and the fall of numerous dictatorships in Africa, Latin America, and Asia between the mid-1970s and mid-1990s, the challenge was to ensure a peaceful transition to post-dictatorial societies on the one hand, and to come to terms with the overthrown dictatorships, punish the perpetrators and provide satisfaction for the victims on the other. The underlying international circumstances, the historical-cultural contexts, and the preconditions in terms of historical mentalities in this regard were very different. The *memory boom* from the 1970s onwards and the emergence of the paradigm of commemorative culture since the 1990s[1] have also intrinsically motivated academic research to devote more attention to this subject area. What often got lost in this development was the broad historical perspective, was diachronic localization, but also – and this is especially true of the German preoccupation with coming to terms with the Nazi past – the international comparative perspective. As it happens, the German example is surprisingly absent in many cases from recent research on transitional justice.

Forgetting and Remembering

Forgetting is both a curse and a blessing. We forget wedding anniversaries, appointments, and purses. Some people even forget their children on the aeroplane. Old friends, ancestors and our own experiences are also forgotten. In extreme cases, forgetting means the erasure of memory, the non-existence of persons – at least for us. The forgotten deceased and friends are no longer in our world and the world of our interactions. Those who forget themselves and their past in the whirlpool of time and its sensations are in Mephisto's hands, just like Goethe's Faust, who remains the great 'forgetter' to the end.[2]

However, forgetting is also a blessing. We end disputes by unconsciously and consciously not remembering. Reconciliation, indeed, coping with everyday life

1 Cf. Christoph Cornelißen, 'Erinnerungskulturen, Version: 2.0', in *Docupedia-Zeitgeschichte*, 22 October 2012, accessed 22 March 2022, http://docupedia.de/zg/cornelissen_erinnerungskulturen_v2_de_2012.

2 Quoted in Harald Weinrich, *Lethe. Kunst und Kritik des Vergessens* (Munich: C. H. Beck, 1997), 160.

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would be inconceivable otherwise. Forgetting is an anthropological constant and universal. There is not and has never been a people, nation or epoch that did not forget. According to Friedrich Nietzsche, without the 'art and power of being able to forget', life is attacked by the 'historical disease', identity is relativized, weakened, threatened.[3] Memory itself, which lifts us out of the pure fulfilment of the present, is also based on forgetting and presupposes a selection process that, out of the wealth of possible recollections, snatches a few from the jaws of oblivion. This applies to both individual and collective memory. According to the eminent historical theorist, Reinhart Koselleck, the latter is determined by the 'seven big Ps': professors, priests, pastors, PR specialists, press representatives, poets, and politicians.[4] However, those affected by history themselves also contribute to collective memory. In the same fashion, all these groups collaborate in forgetting, whether consciously or unconsciously.

Conscious forgetting can occur as punishment or mercy. Even in antiquity, forgetting was considered a precondition for peace. The decree to forget, following a phase of taking revenge on certain chief culprits, was seen as necessary, especially for internal pacification, after civil wars. An early example of this is the amnesty (ἀμνηστία/*amnēstia* = forgetting) after the so-called rule of the Thirty Tyrants in Athens in 404/403 BC. This amnesty pacified the warring parties following the punishment of the chief culprits responsible for the former reign of terror. Thereby, a successful and momentous pattern for establishing peace was tested, which consisted of forgetting the misdeeds of fellow travellers and accomplices.

In 356 BC, Herostratus set fire to the Temple of Artemis in Ephesus – one of the Seven Wonders of the World – in order to become famous forever. He paid for his thirst for glory not only with his death, but also with a *damnatio memoriae* (condemnation of memory), which the city of Ephesus imposed upon him. However, this did not result in his erasure from memory. Instead, his name and deed have been handed down to the present day. The later Roman *damnatio memoriae*, which was known as *abolitio nominis* at the time, and which e. g., condemned previous emperors to oblivion and decreed corresponding measures for art, likewise ultimately meant not an erasure but a stigmatizing remembrance. The modern form of this can be found in today's renaming of streets and the annulment of honorary citizenships.

In the Middle Ages, oblivion continued to play a role not only in peace treaties, but also in confession as the forgetting of guilt after its admission, following repentance and penance. In the High and Late Middle Ages, amnesty was a regular part of peace treaties. In the modern era, after confessional and civil wars, amnesties and oblivion were fixed both in France by Henry IV in 1594 and in England by Charles II with the 'Act of Free and General Pardon, Indempnity and Oblivion' [sic] passed

3 Friedrich Nietzsche, *Unzeitgemäße Betrachtungen. Zweites Stück: Vom Nutzen und Nachtheil der Historie für das Leben* (*Kritische Studienausgabe,* vol. 1), ed. Giorgio Colli and Mazzino Montinari (Munich: dtv, 1999), 330.

4 Reinhart Koselleck, 'Gibt es ein kollektives Gedächtnis?', *Divinatio* 19 (2004), 23–28, 27.

by Parliament in 1660. In each case, instigators or regicides were excepted from the amnesties. After the devastating Thirty Years' War, which had swept gruesomely across Europe, amnesty and 'perpetual oblivion' were also explicitly declared in writing. The Peace of Westphalia states: 'Both sides grant each other perpetual oblivion and amnesty [*perpetua oblivio et amnestia*] of all that has been committed with inimical intent since the beginning of hostilities in any place and in any manner by one or the other party, on either side [...and that everything] be consigned to perpetual oblivion'.[5] In the eighteenth century, many peace treaties included a so-called oblivion clause; that is, an assurance of forgetting the horrors of war and its consequences. For Kant, amnesty was part of the very concept of a peace settlement.[6]

At the Congress of Vienna, the French Foreign Minister Charles-Maurice de Talleyrand-Périgord, who had served all previous regimes, including Napoleon's, once again sat at the negotiating table on an equal footing. In spite of the bloody revolutionary period and the era of Napoleonic rule, article 11 of the 'Charte constitutionnelle' of 1814 explicitly commanded the following: 'All enquiries into opinions and votes given prior to the restoration of the present government are forbidden. The same oblivion is required from the tribunals and from citizens'.[7]

During the nineteenth century, the oblivion clause declined in importance in European international law. Nevertheless, the institution of amnesty continued to be explicitly or tacitly included in peace treaties up until the Germano-Russian peace settlement of Brest-Litovsk in early 1918. Even after the Second World War, Winston Churchill took up these traditions in his speech in Zurich on 19 September 1946, in which he called for a 'blessed act of oblivion'[8] after the massacres had been punished. Behind this lay the realization that permanent remembrance always leads to new conflicts, just as the after-effects of the Paris Peace Conference 1919 had shown.[9]

In addition, in the twentieth century, policies such as those under and after Stalin were established to erase the memory of disagreeable personalities. The erasure of Leon Trotsky and Lev Kamenev from the famous photographs of Vladimir Ilyich

5 Art. II IPO, 'Die Westfälischen Friedensverträge vom 24. Oktober 1648. Texte und Übersetzungen', in *Acta Pacis Westphalicae. Supplementa electronica, 1*, accessed 22 March 2022, http://www.pax-westphalica.de.

6 Immanuel Kant, *Die Metaphysik der Sitten*, §58, quoted according to the version in Immanuel Kant, *Werke in zwölf Bänden*, vol. 8 (Frankfurt am Main: Suhrkamp, 1977), 471.

7 Dieter Gosewinkel and Johannes Masing (ed.), *Die Verfassungen in Europa 1789–1949* (Munich: C. H. Beck, 2006), 283.

8 Robert Rhodes James (ed.), *Winston S. Churchill: His Complete Speeches 1897–1963, Volume VII. 1943–1949* (New York and London: Chelsea House, 1974), 7381.

9 On this paragraph, see Aleida Assmann, *Formen des Vergessens* (Göttingen: Wallstein, 2016); Christian Meier, *Das Gebot zu vergessen und die Unabweisbarkeit des Erinnerns: Vom öffentlichen Umgang mit schlimmer Vergangenheit* (Munich: Siedler, 2010); Wolfgang Reinhard, 'Geschichte als Delegitimation', *Jahrbuch des Historischen Kollegs* (2002), 27–37; David Rieff, *In Praise of Forgetting: Historical Memory and Its Ironies*, (New Haven and London: Yale University Press, 2017); Helmut Quaritsch, 'Über Bürgerkriegs- und Feind-Amnestien', *Der Staat* 31 (1992), 389–418.

Lenin orating in the square in front of the Bolshoi Theatre in 1920 taken by Grigory Goldstein offers an iconic example of this. The ostracized Trotsky and Kamenev were first erased from the photographs by cropping, then in the 1970s by retouching.[10] Similar methods were used in other communist states. However, those affected by memory can also demand a right to have their past lives forgotten. In the case of former Red Army Faction terrorist Susanne Albrecht, this led to the use of a court photograph of her in a history book being prohibited by court decision and now by law.[11] Following a ruling by the European Court of Justice in 2014, the newly proclaimed digital right to be forgotten was implemented. This gives individuals the ability to demand that Google not list links to time-barred websites and reports.[12]

If we take the victims' view, things look different: following the fall of a dictatorship, victims may demand recognition, satisfaction, compensation, and remembrance of their suffering. From this perspective, perpetrators should not go unpunished. They should be deprived of their privileges and ousted from influential positions (lustration). Furthermore, political lessons should be learned, and the victims rehabilitated and recognized. Only then can there be reconciliation and a subsidence of memory. Nonetheless, victims in particular may not necessarily want to be reminded on a daily basis of their suffering and the injustice they experienced.

These different needs and goals have determined the dialectical culture of remembrance since antiquity, which was characterized by the interplay of limited revenge and (restricted) amnesties, the commemoration of the dead and the prohibition of remembrance. The all-round ideologization of the enemy in the First World War broke with this tradition. Indeed, the ostracism of and discrimination against the enemy were made permanent by the peace treaties, which contained implicit attributions of guilt and thereby departed from traditional amnesty clauses: the Treaty of Versailles even provided for the extradition and punishment of the Kaiser and – unilaterally – of war criminals.[13] Today, the commemoration of the genocides of the twentieth century, of the Holocaust, the Holodomor or the mass murder of the Armenians during the First World War, acts as a collective imperative to prevent the repetition of such atrocities. This kind of command to remember is also applied to other issues, such as the colonial past. However, it does not necessarily follow that

10 Klaus Waschik, 'Wo ist Trotzki? Sowjetische Bildpolitik als Erinnerungskontrolle in den 1930er Jahren', in *Das Jahrhundert der Bilder. Band 1: 1900 bis 1949* ed. Gerhard Paul (Göttingen: Vandenhoeck & Ruprecht, 2009), 252–259.

11 Anonymous, 'Gericht: Kein Foto von Ex-Terroristin', *Der Tagesspiegel*, 27 March 2007, accessed 22 March 2022, https://www.tagesspiegel.de/gesellschaft/medien/gericht-kein-foto-von-ex-terroristin/827642.html.

12 Jan Weismantel, *Das 'Recht auf Vergessenwerden' im Internet nach dem 'Google-Urteil' des EuGH. Begleitung eines offenen Prozesses* (Berlin: Duncker & Humblot, 2017).

13 Peter Hoeres, *Krieg der Philosophen: Die deutsche und die britische Philosophie im Ersten Weltkrieg* (Paderborn: Ferdinand Schöningh, 2004); Peter Hoeres, 'Der Versailler Vertrag: Ein Frieden, der kein Frieden war', *Aus Politik und Zeitgeschichte* 15 (2019), 38–44, accessed 22 March 2022, https://www.bpb.de/apuz/288788/versailler-vertrag-ein-frieden-der-kein-frieden-war?p=all.

permanent remembrance will prevent a repetition of atrocities. The numerous wars of recent times, such as those in the Balkans or in the Ukraine, resulted in part from an excess of remembrance rather than a lack of it and make generalizations regarding the pedagogics of memory appear questionable.[14]

In most post-dictatorial societies, it is therefore rather an interplay and struggle between the poles of remembrance and reappraisal on the one hand and reconciliation (*reconciliación, riconciliazione*) and forgetting, silence, but also repression and the obscuring of memory on the other, which can still be observed today. The central importance of justice in coming to terms with dictatorships – not for nothing is the generic term 'transitional justice' used – appears dialectical with regard to remembering and forgetting. 'The demand on law has as much to do with forgetting as it has with remembering: paradoxically, if the past is too alive it will never be past, yet, the truth has to be remembered first in order that it can be forgotten.'[15] If the law is applied, the legal institution of amnesty, as with confession, is not about pushing away and suppressing injustice, but first about revealing and naming the injustice. Only then can forgiveness be granted, or punishment be restrained.[16] This is the idea behind the Truth and Reconciliation Commission (TRC) in South Africa, which promised amnesty in return for admissions of guilt.[17] In order to achieve a depoliticization of the past in the long term, and thus to pacify the present, transitional justice must take into account and balance the will to truth and the desire for pacification in equal measure.

Research Perspectives: The German Example in Context

A fixed point in the historiographical preoccupation with coming to terms with dictatorships and governmentally-sanctioned crimes, as well as with the protagonists active in that process of coming to terms with the past and shaping cultures of remembrance, is the German *Vergangenheitsbewältigung* (coming to terms with the past) in relation to the Nazi era. In Germany itself, this discourse was for a long time limited to a kind of navel-gazing directed at the country's own manifestations of coming to terms with that dictatorship. To this day, the debate remains predominantly stuck at this level.[18] Theodor Adorno's early critique of *Vergangenheitsbewäl-*

14 Rieff, *In Praise of Forgetting*, 96.

15 Emilios Christodoulidis and Scott Veitch, 'Introduction', in *Lethe's Law. Justice, Law and Ethics in Reconciliation,* ed. Emilios Christodoulidis and Scott Veitch, (Oxford: Hart Publishing, 2001), ix-xv, x.

16 See also Quaritsch, Bürgerkriegs Amnestien'.

17 Cf. the contribution by Hugo van der Merwe in this volume.

18 Even the new compendium by Magnus Brechtken (ed.), Aufarbeitung des Nationalsozialismus. Ein Kompendium, (Göttingen: Wallstein, 2021) confines itself to the history of the German reappraisal

tigung in 1959 triggered a terminological shift to the term *Aufarbeitung* (accounting for the past) and a critical assessment of the way in which Germany had initially dealt with the National Socialist period.[19] The view which came to prevail for a long time, that Nazi crimes had been suppressed in German post-war society as a result of the country being reduced to rubble, the war dead and the forced displacement of the East Germans, has proven to be too crude, bold and simple in the light of ongoing research. Hermann Lübbe's assessment of a 'communicative silence'[20] applies above all to the private sphere and the non-thematization of Nazi pasts in educational establishments and the workplace, and less to the public treatment of the topic. As early as 1946, the former concentration camp inmate Eugen Kogon published his bestseller *Der SS-Staat* (*The SS State*) about the concentration camp system, which has gone through no less than 47 editions to date.[21]

Following the Nuremberg Trials and the denazification proceedings, further developments brought the crimes of the National Socialist dictatorship to the attention of journalists and led to corresponding debates in the public arena. These included the Luxembourg Agreement of 1952, which was highly controversial at the time, and, one year later, the trial relating to the massacre perpetrated by the *Waffen-SS* at Oradour-sur-Glane. Even when applied to the 1950s, the assertion that 'silence reigned in West German public life regarding the "Third Reich"'[22] is too sweeping. Hartmut Berghoff correctly writes that this phase cannot be adequately described by either the 'thesis of [pyschological] repression or by that of coming to terms with the past'.[23] Berghoff identifies a process of change already present in 1955, which raises the question of how many years the assumed phase of silence lasted after the forced confrontation with Nazi crimes imposed by the Allies. Without question, however, 'Auschwitz' – as the cipher was at the time – i.e., the murder of the European Jews, was not the focal point of remembrance in the 1950s.

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of the National Socialist past, with the exception of a brief essay by Arnd Bauerkämper and Christopher Browning's American perspective.

19 Theodor W. Adorno, 'Was bedeutet: Aufarbeitung der Vergangenheit [1959]', in Theodor W. Adorno, *Gesammelte Schriften*, vol. 10.2 (Frankfurt am Main: Suhrkamp, 1977), 555–572.

20 Hermann Lübbe, *Vom Parteigenossen zum Bundesbürger – über beschwiegene und historisierte Vergangenheiten* (Munich: Wilhelm Fink, 2007), 7 f.

21 Eugen Kogon, *Der SS-Staat: Das System der deutschen Konzentrationslager* (Munich: dtv, 1946), 127.

22 Edgar Wolfrum, 'Nationalsozialismus und Zweiter Weltkrieg: Berichte zur Geschichte der Erinnerung', in *Verbrechen erinnern. Die Auseinandersetzung mit Holocaust und Völkermord*, ed. Volkhard Knigge and Norbert Frei, (Munich: C. H. Beck, 2002), 133–149, 136.

23 Hartmut Berghoff, 'Zwischen Verdrängung und Aufarbeitung: Die bundesdeutsche Gesellschaft und ihre nationalsozialistische Vergangenheit in den Fünfziger Jahren', *Geschichte in Wissenschaft und Unterricht* 49 (1998), 96–114, 114. The thesis of repression is also opposed by Manfred Kittel, *Die Legende von der 'Zweiten Schuld': Vergangenheitsbewältigung in der Ära Adenauer* (Frankfurt am Main and Berlin: Ullstein, 1993). On the legal and political beginnings of the 'politics of the past', albeit with a different assessment of the topic, see also Norbert Frei, *Vergangenheitspolitik: Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (Munich: Ullstein, 2012).

With the establishment of the 'Central Office of the Land Judicial Authorities for the Investigation of National Socialist Crimes' (*Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen*) in Ludwigsburg in 1958, the Ulm *Einsatzgruppen* trial in the same year, the anti-Semitic daubings and desecrations at the end of the 1950s, in which the Stasi was very probably also involved,[24] the Eichmann trial in Jerusalem and the Auschwitz trials at the beginning of the 1960s, the Holocaust, which was referred to as such from 1979 onwards, became increasingly discussed in many of its gruesome details.[25] The Institute of Contemporary History, founded in 1949 to research the Nazi period, published its expert reports in 1965 under the title *Anatomie des SS-Staates* (*Anatomy of the SS State*).[26] The 1970s represented a 'standstill' in the study of the Holocaust, despite or because of the omnipresence of the term 'fascism'. As Frank Bajohr notes: 'In no decade since 1945 has there been less research into and less published on the Holocaust in Germany than in the 1970s'.[27] The cipher '1968' does not, therefore, mark the beginning of the study of Nazi crimes, as is still often claimed, but is rather an interim pause therein.

It was not until the internationally extremely successful American television series *Holocaust*, which was broadcast in numerous countries in 1978/79, that interest in the subject was revived. At the same time, the series marked the beginning of a universalization of the memory of the Holocaust. This is strikingly expressed in the United States Holocaust Memorial Museum, which opened in 1993, and many comparable institutions, as well as in Holocaust memorial days – such as 27 January, the day of the liberation of the Auschwitz concentration camp, which was declared Holocaust Remembrance Day in 1996 in the Federal Republic of Germany and in 2005 by the EU Parliament and the UN General Assembly. At an international conference in Stockholm in the year 2000, the universal focus on the Holocaust was fixed in a declaration by 600 delegates from over 40 countries.[28] In Europe, however, just as in other spheres, a gulf is evident between the culture of remembrance represented by the politics of memory in Northern and Western European countries on the one hand and that of post-communist Eastern European states on the other. For the latter – to the irritation of Western Europeans – the experience of communist dictatorships

24 Hubertus Knabe, *Die unterwanderte Republik: Stasi im Westen* (Berlin: Propyläen, 1999), 126 – 132.
25 Peter Hoeres, *Zeitung für Deutschland: Die Geschichte der FAZ* (Munich and Salzburg: Benevento, 2019), 96 – 105.
26 Hans Buchheim, *Die SS – Das Herrschaftsinstrument: Befehl und Gehorsam* (*Anatomie des SS-Staates*, vol. 1) (Olten and Freiburg im Breisgau: dtv, 1965); Martin Broszat, Hans-Adolf Jacobsen and Helmut Krausnick, *Konzentrationslager, Kommissarbefehl, Judenverfolgung* (*Anatomie des SS-Staats*, vol. 2) (Olten and Freiburg im Breisgau: dtv, 1965).
27 Frank Bajohr, 'Holocaustforschung – Entwicklungslinien in Deutschland seit 1945', in Brechtken, *Aufarbeitung,* – 142, 132.
28 Jens Kroh, *Transnationale Erinnerung: Der Holocaust im Fokus geschichtspolitischer Initiativen* (Frankfurt am Main: Campus, 2008).

is of as central or at least equal importance to the experience of the German occupation during the Second World War.[29]

Recent years have witnessed the increasing development of comparative perspectives on transitional justice. The German example has been compared with that of Italy, Japan and other countries, or, at least – and more frequently – juxtaposed with them.[30] In addition, transnational influences on processes of coming to terms with the past have been elaborated upon, albeit hitherto far too rarely in historical studies.[31] At the *Historikertag* in Münster in 2018, a section was devoted to the topic of 'Divided Memory and Continuity of Elites: Post-totalitarian Societies in Comparison', which compared the developments in Germany with those in Italy, Russia and China.[32] The landscapes of memory in Eastern Europe, which differ greatly from those in Western societies and are always also orientated towards communism and its consequences, have recently attracted particular attention.[33] Transitional justice research, on the other hand, often deals with histories of transformation without explicit reference to Germany's dual dictatorial past.[34] However, an extensive project

29 Arnd Bauerkämper, 'Transnationale Dimensionen der "Vergangenheitsaufarbeitung"', in Brechtken, *Aufarbeitung*, 20 – 37, 31; Ulrike Jureit, 'Wem gehört der Holocaust?', in *Gefühlte Opfer: Illusionen der Vergangenheitsbewältigung*, ed. Ulrike Jureit and Carsten Schneider, *Vergangenheitsbewältigung* (Stuttgart: Klett-Cotta, 2010), 95 – 103.

30 Knigge and Frei (ed.), *Verbrechen erinnern*; Norbert Frei (ed.), *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg* (Göttingen: Wallstein, 2006). The intra-German examination of the Holocaust with a comparison between the Federal Republic and the GDR is described in Jeffrey Herf, *The Jewish Enemy: Nazi Propaganda during World War II and the Holocaust* (Cambridge: Harvard University Press, 2006).

31 Ian Buruma, *Erbschaft der Schuld: Vergangenheitsbewältigung in Deutschland und Japan* (translated by Klaus Binder and Jeremy Gaines. Munich and Vienna: Carl Hanser, 1994); Christoph Cornelißen, Lutz Klinkhammer and Wolfgang Schwentker (eds.), *Erinnerungskulturen: Deutschland, Italien und Japan seit 1945* (Frankfurt am Main: Fischer, 2003); Manfred Kittel: *Nach Nürnberg: 'Vergangenheitsbewältigung' in Japan und Westdeutschland 1945 bis 1968* (Munich: De Gruyter Oldenbourg, 2004); Gian Enrico Rusconi, *Deutschland – Italien, Italien – Deutschland: Geschichte einer schwierigen Beziehung von Bismarck bis zu Berlusconi* (translated by Antje Peter. Paderborn: Ferdinand Schöningh, 2006).

32 Maximilian Kutzner, 'Tagungsbericht: HT 2018: Gespaltene Erinnerung und Elitenkontinuitäten. Posttotalitäre Gesellschaften im Vergleich, 25. 09. 2018 – 28. 09. 2018 Münster', *H-Soz-Kult*, 2 November 2018, accessed 22 March 2022, www.hsozkult.de/conferencereport/id/tagungsberichte-7923.

33 Carola Lau, *Erinnerungsverwaltung, Vergangenheitspolitik und Erinnerungskultur nach 1989: Institute für nationales Gedenken im östlichen Europa im Vergleich* (Göttingen: Vandenhoeck & Ruprecht, 2017); Jörg Ganzenmüller (ed.), *Recht und Gerechtigkeit: Die strafrechtliche Aufarbeitung von Diktaturen in Europa* (Cologne: C. H. Beck, 2017).

34 Cf., for example, Kira Auer, *Vergangenheitsbewältigung in Ruanda, Kambodscha und Guatemala: Die Implementierung normativer Ansprüche* (Baden-Baden: Nomos, 2014); Veit Straßner, *Die offenen Wunden Lateinamerikas: Vergangenheitspolitik im postautoritären Argentinien, Uruguay und Chile* (Wiesbaden: Verlag für Sozialwissenschaften, 2007) or the articles in the *International Journal of Transitional Justice*, accessed 22 March 2022, https://academic.oup.com/ijtj/issue/14/3. However, see also Luc Huyse, *Transitional Justice after War and Dictatorship: Learning from European Experiences 1945 – 2010. Final Report January 2013* (Brussels: CEGES SOMA, 2013).

on international transitional criminal justice, initiated in 1996 by the Max Planck Institute for Foreign and International Criminal Law and completed in 2012, admittedly included the double dictatorship within Germany's past and the ways in which such things have been dealt with legally.[35]

From a comparative perspective, it becomes clear that the German approach to the Nazi dictatorship is an exception in terms of intensity and of the scope of public, political, legal, historical, and moral reappraisal that it involves. Here, a German *Sonderweg* is indeed palpable.[36] This holds least true in judicial terms, although here, too, there are only case-by-case analogies and comparative cases to permit such a conclusion. The comprehensive, albeit questionable, process of 'denazification' and the verdicts reached at the Nuremberg Trials, as well as in immediately subsequent trials, were followed by investigations and sentences passed by the occupying powers. Of 172,000 people investigated in West Germany/the Federal Republic, a total of 6,656 were sentenced.[37] In the GDR, almost 13,000 guilty verdicts were returned against Nazi perpetrators.[38]

To compare and contrast this with the punishment of another particularly extensive genocide – estimates put the death toll as high as a quarter of the population – in Cambodia, the Extraordinary Chambers in the Courts of Cambodia (ECCC) carried out a total of three sentences in relation the barbaric rule of the Khmer Rouge.[39] In China, a public show trial was organized against the so-called 'Gang of Four' for the terrible years of the Cultural Revolution from 1966 to 1976 with its millions of victims. In 1981, the Special Tribunal handed down two death sentences – later commuted to life imprisonment – and substantial prison sentences for the ten people considered to be part of the 'Gang of Four'. Further prosecutions for crimes committed during the Cultural Revolution occurred regionally only in the short period between the end of the Cultural Revolution and the early 1980s. In addition to judicial decisions, individuals were expelled from the party or forced to indulge in self-criticism, although

35 Albin Eser, Ulrich Sieber and [from sub-volume 8 onwards] Jörg Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht: Vergleichende Einblicke in Transitionsprozesse* (14 vols., Berlin: Duncker & Humblot, 2000 – 2012).

36 This is also the view taken in Christoph Cornelißen, '„Vergangenheitsbewältigung"– ein deutscher Sonderweg?', in *Aufarbeitung der Diktatur – Diktat der Aufarbeitung? Normierungsprozesse beim Umgang mit diktatorischer Vergangenhei*t, ed. Katrin Hammerstein et. al., (Göttingen: Steiner, 2009), 21 – 36.

37 Bajohr, 'Holocaustforschung', 128.

38 Andreas Eichmüller, 'Die Strafverfolgung von NS-Verbrechen durch westdeutsche Justizbehörden seit 1945: Eine Zahlenbilanz', *Vierteljahrshefte für Zeitgeschichte* 56 (2008), 621 – 640; Jörg Echternkamp, 'Die Verfolgung nationalsozialistischer Gewaltverbrechen', accessed 22 March 2022, https://www.bpb.de/geschichte/deutsche-geschichte/der-zweite-weltkrieg/199413/die-verfolgung-nationalsozialistischer-gewaltverbrechen.

39 On current developments, see Till Fähnders, 'Khieu Samphan gibt sich ahnungslos', *Frankfurter Allgemeine Zeitung*, 16 August 2021, 8. On transitional justice in Cambodia in general, compare David Chandler, 'Cambodia Deals with its Past: Collective Memory, Demonisation and Induced Amnesia', *Totalitarian Movements and Political Religions 9* (2008), 355 – 369.

prosecutions were not brought against large groups of members of the People's Liberation Army. Moreover, wholesale inquiries and administrative punishments were carried out. Between 1976 and 1986, extensive rehabilitation measures were implemented. It must be said, however, that there was no change in the system, but rather a change in political direction, and that criminal law was once again instrumentalized politically. This form of transitional justice can hardly be compared with procedures founded on the rule of law.[40]

In the case of Ethiopia, it is possible to speak of a fairly comprehensive process of transitional justice at the judicial level. Despite this, here, too, a conspicuous decrease can be observed if one looks at the sentences actually carried out. Out of more than 5,000 accused persons, 2,188 had to be tried in absentia. 3,600 people were sentenced, but the majority of the leadership clique centred around the dictator Mengistu had, like himself, absconded abroad. In Ethiopia, unlike Germany, it is striking that only a very rudimentary culture of remembrance has been established in the aftermath of judicial proceedings at authentic sites or via the founding of museums and the erection of monuments. The small 'Red Terror Martyrs Memorial Museum' in Addis Ababa, which opened in 2010, was set up on the initiative of a victims' group and is funded by donations.[41] Today, the African Union resides on the site of the former central prison in a new building financed by the Chinese state. Only a small memorial reminds visitors that thousands of inmates lost their lives here. In 1974, the Dergue regime had 60 members of the royal family and the imperial government murdered at this location.[42]

After the rather disappointing UN tribunal in neighbouring Tanzania and genocide trials in national courts, transitional justice in Rwanda following the genocide there was anchored in the traditional Lower case 'g' (gacaca) courts. However, these are scarcely compatible with Western ideas of legal procedures conducted in accordance with the rule of law, and they have been criticized by human rights organizations. Nevertheless, they have contributed to speaking the truth about the genocide and to participation at the local level.[43]

From a transnational perspective, it is furthermore clear that in the wake of the universalization of Holocaust remembrance, accounting for the past as practised in

40 Eser et al, *Strafrecht in Reaktion auf Systemunrecht*, vol. 9: Thomas Richter, *China* (Berlin: Duncker & Humblot, 2006); vol. 14: *Transitionsstrafrecht und Vergangenheitspolitik* (Berlin: Duncker & Humblot, 2012), 269–272 and 388 f.; Daniel Leese, *Maos langer Schatten: Chinas Umgang mit der Vergangenheit* (Munich: C. H. Beck, 2020), 411–481.

41 See the contribution by Tadesse Simie Metekia in this volume. Tellingly, the museum does not currently have a website.

42 Cf. accessed 22 March 2022, https://after-dictatorship.org/kontinente/afrika/aethiopien/erinnerungsorte.html.

43 See the article by Julia Viebach in this volume. On the relevant criticism, see, for instance, Human Rights Watch, *Justice Compromised –: The Legacy of Rwanda's Community-Based Gacaca Courts*, 31 May 2011, accessed 22 March 2022, https://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf.

Germany in relation to the Nazi era does not necessarily attract attention as a model, but more frequently as a specific example of transitional justice.[44] It is sometimes even seen as exemplary, for instance, in China with regard to the period of Japanese occupation, as well as amongst critics of the official commemorative culture in Japan itself.[45] As far as transitional justice in relation to the GDR is concerned, the Stasi Records Agency and Archive (BStU), founded in 1992, plays a pioneering role for comparable institutions in Eastern Europe.[46]

The historical Paradox of Memory

From a diachronic perspective, a paradox of the history of memory can be identified for the dictatorships of the twentieth century across all countries. To wit: the further back in time these existed, the stronger the desire for reappraisal, for banning the relics of the defunct regimes, for reparations and remembrance.[47] The intensified preoccupation with the dictatorial past is fostered by a generational change. The fact that those cohorts who supported or had been pillars of the dictatorship are dying off makes it possible for a new generation to raise its voice against the dictatorship without the danger of too much opposition or even a slide into civil war.[48] The course of coming to terms with the past is influenced and altered by changes in government between post-dictatorial parties and the opposition. This can be observed particularly in Albania, but also in Latin American countries.[49] The ideal-typical[50] (i. e., not obligatory) chronological course in many countries runs as follows: when a regime falls, the upper echelons of its leadership are replaced. On the one hand, there is an amnesty for the victims of the previous dictatorship, but on the other hand there is a far-reaching amnesty for the classes supporting the *ancien régime*. This is accompanied by an explicit or implicit *pacto de silencio* or a 'thick line',

44 Jan Eckel and Claudia Moisel (eds.), *Universalisierung des Holocaust? Erinnerungskultur und Geschichtspolitik in internationaler Perspektive* (Göttingen: Wallstein, 2008); Jureit/Schneider, *Gefühlte Opfer*; Daniel Levy and Natan Sznaider, *Erinnerung im globalen Zeitalter: Der Holocaust* (Frankfurt am Main: Suhrkamp, 2001); Peter Novick, *The Holocaust in American Life* (Boston: Houghton Mifflin Company, 1999).

45 Bauerkämper, *Transnationale Dimensionen der 'Vergangenheitsaufarbeitung'*, 33 – 35.

46 Lau, *Erinnerungsverwaltung, Vergangenheitspolitik und Erinnerungskultur nach 1989*, 20 f.

47 Similarly for German society, Hermann Lübbe, 'Der Nationalsozialismus im deutschen Nachkriegsbewusstsein', *Historische Zeitschrift* 236 (1983), 579 – 599.

48 In view of the millions of former soldiers, some of whom were still returning from Russian captivity, a critical examination of the Wehrmacht was, for instance, scarcely possible in the 1950s.

49 Compare the contributions by Jonila Godole, Ricardo Brodsky and Veit Strassner in the present volume.

50 On the concept of the ideal type, which aims at a unitary limiting concept whilst eliminating the accidental, cf. Max Weber, 'Die "Objektivität" sozialwissenschaftlicher und sozialpolitischer Erkenntnis', *Archiv für Sozialwissenschaft und Sozialpolitik* 19 (1904), 22 – 87.

as Polish Prime Minister Tadeusz Mazowiecki put it in his 1989 government declaration, drawn between a new government and the past.[51] The overriding goal is to avoid a civil war, or to stabilize the new democratic (or otherwise) rule and achieve national reconciliation. Consolidation is followed by a first major wave of transitional justice with truth commissions and tribunals, as well as compensation for a narrowly defined group, often formerly dismissed state officials or direct victims. In a second wave, a new generation revisits the issues. The dictatorship is judged even more critically and dealt with more decisively. The immunity and amnesty granted previously are partially revoked, remaining monuments are razed to the ground and, if necessary, the body of the former dictator is reburied, as in Spain. Compensation is then extended to other groups such as the relatives of victims, as can also be observed in Latin America.

With regard to the Nazi era, the last major group of victims to receive compensation from Germany were the former forced labourers, most of whom came from Eastern Europe. It was not until the year 2000 that a compensation fund of 10 billion DM was established for them, half of which was contributed by German companies.[52] In 2009, the German *Bundestag* passed a final bill of rehabilitation concerning convicted 'war traitors' – a measure that would have been unthinkable in the post-war period.

(Inter)disciplinary Approaches

The historical study of coming to terms with dictatorships takes a paradigm of commemorative culture as its starting point. Methodologically, it pursues an individualizing, inductive and archive-supported tack. In doing so, it cannot, on occasion, entirely avoid a teleology of worse-to-better,[53] which ignores the reductions in

51 Dominik Trutkowski compares both countries in their respective phases of transformation in his *Die ausgehandelten Revolutionen: Politische Kommunikation in Parlament und Öffentlichkeit beim Umbruch zur Demokratie in Spanien und Polen* (Düsseldorf: Droste, 2021).

52 Cord Pagenstecher, 'Der lange Weg zur Entschädigung', 2 June 2016, accessed 22 March 2022, https://www.bpb.de/geschichte/nationalsozialismus/ns-zwangsarbeit/227273/der-lange-weg-zur-entschaedigung.

53 The director of the Obersalzberg Documentation Centre, Sven Keller, provides an example of this, arguing without any trace of critical reflection on his own shock pedagogy, in his contribution 'Er bleibt – aber wie? Der Obersalzberg als Hitler-Ort', in Brechtken, *Aufarbeitung*, 284 – 316. By contrast, Peter Reichel, in his *Vergangenheitsbewältigung in Deutschland: Die Auseinandersetzung mit der NS-Diktatur von 1945 bis heute* (Munich: Beck'sche Reihe, 2001), rightly warned against describing the history of coming to terms with the past in Germany as a path 'that led from the darkness of questionable silence about the past and the suppression of guilt into the light of an exemplary illumination of the past and a flourishing culture of remembrance. That's just not how it was' (201).

complexity and ahistorical disambiguations of today's culture of remembrance.[54] By contrast, the political science approach to the topic operates in a typologically-systematizing and deductive fashion with the paradigm of transitional justice. This has come to be understood as encompassing much more than dealing with the experience of dictatorship at a legal level. Namely, the term further embraces extrajudicial punishment, the establishment of truth commissions (as they have been employed particularly in South Africa and the Latin American countries, in some cases several times),[55] the development of a material culture of remembrance in the form of authentic memorial sites, monuments and museums, the symbolic and material compensation of victims and the lustration of incriminated functionaries.[56]

These political science studies are often situated in current debates about the politics of memory and are critical of the results of official remembrance policy. In other words, they not only take stock in a systematizing and lexical manner,[57] but also intervene in ongoing political processes.[58] As is likewise the case in many historical studies, it is often unclear what ideal of successful transitional justice the researchers are working with.[59] Does it involve the complete prosecution of all perpetrators and an investigation into all details? Is it about a permanent presence in the political and cultural discourse? From a more distanced perspective, one can counter that establishing peace, preventing civil war, and stabilizing the rule of law are already major achievements of transitional societies. From this perspective, coming to terms with the past in a sustainable, lasting, and intensive fashion is essentially a phenomenon of affluence, the preconditions of which are a stable political culture and economic prosperity. To put it bluntly, neither a homeless, starving and traumatized refugee from the Eastern territories of Germany in 1945 nor an Albanian peasant family struggling for subsistence in the transitional period after the fall of the communist dictatorship would have possessed the economic, social and mental prerequisites to be able or willing to initiate a critical culture of remembrance.[60] A cer-

54 On this, see Peter Hoeres, 'Vom Paradox zur Eindeutigkeit: Der 8. Mai in der westdeutschen Erinnerungskultur', in *Der 8. Mai 1945 im Geschichtsbild der Deutschen und ihrer Nachbarn*, ed. Bernd Heidenreich, Evelyn Brockhoff and Andreas Rödder, (Wiesbaden: Hessische Landeszentrale für politische Bildung, 2016), 47–58.

55 Compare the contributions by Veit Strassner, Ricardo Brodsky and Hugo van der Merwe in the present volume.

56 Susanne Buckley-Zistel, 'Vergangenes Unrecht aufarbeiten: Eine globale Perspektive', *Aus Politik und Zeitgeschichte* 25–26 (2013), accessed 22 March 2022, https://www.bpb.de/apuz/162889/vergangenes-unrecht-aufarbeiten-eine-globale-perspektive?p=all.

57 Anja Mihr, Gert Pickel and Susanne Pickel (eds.), *Handbuch Transitional Justic: Aufarbeitung von Unrecht – hin zur Rechtsstaatlichkeit und Demokratie* (Wiesbaden: Springer VS, 2018); Gerhard Werle and Moritz Vormbaum, *Transitional Justice: Vergangenheitsbewältigung durch Recht* (Berlin: Springer Lehrbuch, 2018).

58 In this spirit, compare the mission statement of the *International Journal of Transitional Justice*, accessed 22 March 2022, https://academic.oup.com/ijtj/pages/About.

59 On this topic, compare the suggestions made by Hubertus Knabe at the end of this volume.

60 On Albania, compare the article by Jonila Godole in the present volume.

tain consensus in relation to remembrance policy, a shared rejection of the previous dictatorship by relevant parts of society and a simultaneous acceptance of the new system (ideally one founded on the rule of law and democratic principles) are further required in order to be able to deal with the past without endangering political stability.

Transitional justice and the academic study of this phenomenon have been encouraged by the rise of the victim paradigm. The suffering and experiences of the victims of dictatorships increasingly became the focus of attention – and research – towards the end of the twentieth century. Human rights organizations and the human rights discourse in general helped to foster this development.[61]

The globally observable boom in the political, journalistic and academic preoccupation with the dictatorships of the twentieth century and their legacies on the one hand, and the marked national focus of much transitional justice research on the other, also lie behind the idea for the project *After Dictatorship: Instruments of Transitional Justice in Former Authoritarian Systems – An International Comparison*, which aims to examine and compare different forms and instruments of coming to terms with the past. In doing so, the project integrates historical and political science-based methods in an interdisciplinary way. This is also evident in the professional provenance of the authors of the country studies on Albania, Argentina, Ethiopia, Chile, Rwanda, South Africa, and Uruguay that follow in this volume. The former separation of historical scholarship from political science along the lines of the thirty-year rule pertaining to the release of archival documents has recently been circumvented by numerous historical studies. This is due to a change in the types of media that constitute the sources and an understanding of contemporary history as a critical prehistory to our present, borrowed from Michel Foucault.[62] This volume also reaches into the present, for the process of coming to terms with the dictatorships of the twentieth century has not been brought to a close anywhere on the globe – and can hardly be expected to be so.

Coming to terms with dictatorships and state crimes takes time. As a rule, the demands are increasing, and the past is being viewed in an ever-more critical fashion. Seen from a historical perspective, the extensive, highly morally charged form of coming to terms with the past as it is often experienced today tends to constitute an

61 Cf. Thorsten Bonacker, 'Global Victimhood: On the Charisma of the Victim in Transitional Justice Processes', *World Political Science* 9 (2013), 97–129. This corresponds with the shift from researching the perpetrators to studying the victims in the commemorative culture of the Holocaust and Holocaust research. For a critical perspective on identifying with the victims of the Holocaust, see Jureit/Schneider, *Gefühlte Opfer*.

62 Compare the relevant subtitles of Andreas Rödder, *21.0: Eine kurze Geschichte der Gegenwart* (Munich: C. H. Beck, 2015); Philipp Sarasin, *1977. Eine kurze Geschichte der Gegenwart* (Berlin: Suhrkamp, 2021) and the name of the corresponding series of historical works published by Wallstein, accessed 22 March 2022, https://www.wallstein-verlag.de/reihen/geschichte-der-gegenwart.html, in addition to a Swiss blog at https://geschichtedergegenwart.ch. The connection to Foucault, however, is not always as clear as it is in Sarasin's case.

exception. Opposing tendencies are also currently making themselves felt, as can be observed in Russia or China. Perpetrators and groups of perpetrators are whitewashed by their alleged achievements, and the victims are then liable to appear as collateral damage caused by modernization or the requirements of war. The expectations placed on transitional justice should thus not be set too high, and the sensitive process of transforming dictatorships should not be made more difficult by exaggerated aspirations. Expectations must further be managed in a way that protects victims from disappointment and at the same time tries to meet realistic demands.

A diachronic and synchronic view of coming to terms with dictatorships is helpful in this respect. Which instruments of transitional justice have been and are being used, how do they function, what generalizations can be made, and where do the political, social, economic and – last but not least – religious contexts frame and influence coming to terms with dictatorships? For example, there are no counterparts to the *gacaca* courts in Rwanda in other countries, while truth commissions and international tribunals have become part of the standard repertoire of transitional justice. By contrast, amnesties and the exchange of functional elites have existed as means of coping with tyranny and changes of rulers since antiquity. In the following, the diversity, but also the constants of the processes involved in overcoming the past will become clear on the basis of seven case studies of transitional justice. At the end of the volume, these will be compared and combined under the guiding question of 'what is effective?'

Africa

Tadesse Simie Metekia

Ethiopia: The Post-Dergue Transitional Justice Process

Ethiopia, allegedly the oldest independent state in Africa, is back to civil war after almost three decades of relative peace. A war that broke out in northern Ethiopia in November 2020 has not yet ended at the time of writing. The main warring parties, the Tigray People's Liberation Front (TPLF) and the federal government, have not yet agreed to solve their differences amicably. In Ethiopia's west and southern parts, the government has engaged in a sporadic yet protracted armed conflict against the Oromo Liberation Front (OLF).

Armed conflicts, be they are internal or international in nature, are not new in Ethiopia.[1] Ethiopia's political history is marked by dictatorship after dictatorship, whereby new governments come to power by force and rule the country unconstitutionally.[2] However, the current conflicts have their roots in how Ethiopia handled the 1991 transition from the Dergue, a dictatorial regime that ruled Ethiopia from 1974 – 1991.[3] The TPLF, OLF and the Eritrean People's Liberation Front (EPLF) were the main warring groups that toppled Dergue after a long and bloody civil war – the longest in post-colonial Africa.[4] While the EPLF declared Eritrea's independence as a new state, the TPLF and OLF, together with other warring and non-warring groups, established a transitional government in Ethiopia in July 1991.[5]

The establishment of a Transitional Government of Ethiopia in 1991 was an unprecedented attempt to address the question of responding to the violence and atrocities perpetrated during the dictatorial regime. Following its establishment, the transitional government adopted various elements of transitional justice. This case study examines the successes and failures of the transitional justice measures adopted in Ethiopia for the first time, following the establishment of the 1991 Transitional Government of Ethiopia.

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1 For details on Ethiopia's history of war, see Tadesse S. Metekia, *Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis international standards* (Lieden: Brill, 2021), 308 – 310.

2 According to Tola, '...violence has almost always been the media of government-people relations in Ethiopia. The country's history is filled with numerous pages and chapters of repressions and massacres perpetrated by those in power against the people.'. See B. Tola, *To kill the Generation: The Red Terror in Ethiopia* [2](Washington DC: Free Ethiopian Press, 1989), 3. Professor Baharu Zewde, a historian, agrees that 'the history of the country is replete with wars and acts of violence". See B. Zewde, 'The history of the Red Terror: Contexts and Consequences,' in *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, ed. Kjetil Tronvoll et al. (Martlesham: James Currey, 2009), 17 – 32, 20.

3 For details on the Dergue, see section 1 below.

4 See Gebru Tareke, *The Ethiopian Revolution: War in the Horn of Africa* (New Haven: Yale University Press, 2009), 59.

5 See Transitional Period Charter of Ethiopia: Proclamation No.1/ 1991, entered into force 22 July 1991.

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Section 1 of this case study introduces Ethiopia's experience with the dictatorship regime. It provides the political context behind the establishment and structural operation of Dergue regime and the nature and scope of the violence perpetrated by it. Section 2 appraises the transitional justice measures adopted in post-Dergue Ethiopia. It examines details of the various mechanisms put in place by the Transitional Government of Ethiopia (TGE), 1991–1995, and afterwards by the Federal Government of Ethiopia. Section 3 evaluates whether the post-1991 transitional justice measures adopted in Ethiopia were successful. It identifies and discusses the successes and failures in Ethiopia's efforts to come to terms with its past.

1 The Experience of Dictatorship

In early 1974, armed forces, teachers, students, trade unions and civil servants had started a series of strikes and protests against the Haile Selassie regime.[6] Gradually, countless groups joined the uprising, demanding that the *ancien régime* put an end to political and economic problems.[7] Although the popular uprisings were organized by various coordinating committees representing different sections of the rebelling public, a more robust coordinating committee called the Coordinating Committee of the Armed Forces, the Police and the Territorial Army, also called Dergue, was established on 28 June 1974. Dergue, composed of 106 junior officers (majors, NCOs and privates), was founded mainly to arrest the officials of the *ancien regime*.

Although it had despised officials of the Haile Selassie regime and accused them of plundering public property and keeping the public in chains of poverty, Dergue emphasized its allegiance to Emperor and country in July 1974's *Ethiopia Tikdem* – a motto vowing to put Ethiopia first. The motto *Ethiopia Tikdem* (ኢትዮጵያ ትቅደም), which means 'Ethiopia First', was first used in the earliest stages of the 1974 revolution as a slogan, according to Shifaw, against the corruption and corrupt officials of the Haile Selassie regime.[8] Soon, *Ethiopia Tikdem* evolved into a motto that advocated putting the country's interests above and beyond anything or anyone else.[9]

Gradually, however, Dergue had started implementing a series of orchestrated measures aimed at undermining the government and the Emperor's role in the country's political administration, a process commonly referred to as the creeping *coup*

6 Teffera Haile-Selassie, *The Ethiopian Revolution 1974–1991: From a Monarchical Autocracy to a Military Oligarchy* (London: Kegan Paul International, 1997), 30–64; Tesfayde Dinka, *Ethiopia during the Derg Years: An Inside Account* (Los Angeles: Tsehai Publishers, 2016), 28–29.

7 Haile-Selassie, *The Ethiopian Revolution 1974–1991*; Dinka, *Ethiopia during the Derg Years*.

8 It became a caption to a more elaborate manifesto of Dergue issued on 1 November 1974. See Dawit Shifaw, *The Diary of Terror: Ethiopia 1974–1991* (Bloomington: Trafford Publishing, 2012) 16.

9 Shifaw, *The Diary of Terror*.

d'état.[10] The creeping coup achieved its ultimate goal on 12 September 1974. Dergue officially instituted itself as the Provisional Military Government (PMG) of Ethiopia by suspending the Revised Constitution, deposing the emperor and dissolving the Chamber of Deputies and the Senate (Parliament).[11]

Dergue's ascension to power was accompanied by the establishment of a military court on 12 September 1974 designed, to punish persons who violated a ban on strikes, demonstrations, assemblies, or any form of supposed conspiracy against the *Ethiopia Tikdem* principle.[12] Two months after its establishment, the PMG took a violent turn when it summarily executed 59 senior officials of the Haile Selassie regime on 23 November 1974. Arguably marking, the beginning of persecution that lasted the entire 17 years of Dergue rule, the summary executions were officially announced by Dergue on national television and radio. The following piece discusses the temporal scope of Dergue's persecution. It also examines the political background, ideological justification, structures, extent and forms of persecution, victim groups, perpetrators, and the mechanisms adopted by the Ethiopian people to overcome the persecution.

1.1 Relevant Period

Scholars of the political history of Ethiopia rarely agree on the start date of the violence perpetrated during the Dergue regime. While Bahru Zewde, a professor of Ethiopian history, alleges that the Red Terror started on the day Dergue summarily executed the officials of the Haile Selassie regime,[13] several others limit the Red Terror to the late 1970s. The main cause for this disagreement apparently lies in the fact that most of the literature on Dergue's violence is specific to the discussion of the Red Terror. The emphasis of the debate is on the question of who shot the first bullet – Dergue or the opposition.[14] Overly concerned with discussing this question, the existing scholarship has shown a near-complete disregard for the period before and after the Red Terror, thereby reducing the temporal scope of Dergue's violence to the late 1970s. Even then, the state of scholarship on the Red Terror is 'burdened

10 Haile-Selassie, *The Ethiopian Revolution 1974 – 1991,* supra note 9, 30 – 64; Dinka, *Ethiopia during the Derg Years,* supra note 9, 28 – 29.

11 See Provisional Military Government Establishment Proclamation No. 1 of 1974, entered into force 12 September 1974.

12 Provisional Military Government Establishment Proclamation No. 1 of 1974, Articles 8 and 9.

13 See Bahru Zewde, 'The history of the Red Terror: Contexts and Consequences', supra note 4.

14 See Melakou Tegegn, 'Mengistu's Red Terror' (2012) 10(3) *African Identities* 249 – 263; P. Toggia, 'The Revolutionary Endgame of Political Power: The Genealogy of "Red Terror" in Ethiopia', *African Identities* 10(3) (2012): 265 – 280; Tessema, *Prosecution of Politicide in Ethiopia,* supra note 18, 36 – 49. For relevant remarks in the case law, see FHC, *SPO* vs. *Hailu Burrayyu Sima et al.,* (Trial Judgment, 31 October 2005), File No. 03119, 86.

with bias, limited scope and a reproduction of the polemics, accusations and justifications of the time', as Jacob Wiebel noted in an essay written in 2012.[15]

In what seemed to be an effort to set the record straight, the Special Prosecution Office (the SPO), established pursuant to a law enacted in 1992 (the SPO Proclamation),[16] wrote in its final report to the House of Peoples' Representatives that:

> Indisputably, 'Red Terror' refers to 1977/78, where Dergue's atrocious acts reached their climax. Red Terror was a designation given by Dergue to its acts of encroachment. Nonetheless, it is a mistake to think that the *atrocities committed during Dergue occurred only during the Red Terror period* or that the EPRP was the only victim of the Red Terror.[17]

Indeed, court records show that Dergue stood trial for crimes committed as recently as 1989 and 1990, over a decade after the Red Terror period ended.[18] The whole Dergue trial, and even the *Mengistu et al.* case, which commentators commonly cite as the main Red Terror trial, was not only about the crimes committed during the Red Terror. In this case, the SPO prosecuted Dergue's top officials for acts of genocide that they allegedly planned and orchestrated between 1974 and 1983.[19] But limiting Dergue's violence to the Red Terror period risks excluding war crimes that occurred during the protracted armed conflicts, which was a situation unrelated to the Red Terror campaign. *Legesse Asfaw* et al. have dealt with war crimes perpetrated in Ethiopia between 1983 and 1988.[20]

Overall, the entire 17 years of Dergue's rule were marred by systemic and widespread persecution. Some writers have argued that Dergue was an entity established with no propensity for violence but was rather pushed and radicalized into a dicta-

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15 See Jacob Wiebel, 'The State of Scholarship on the Ethiopian Red Terror' in ERTDRC, *Documenting the Red Terror: Bearing Witness to Ethiopia's Lost Generations* (Ottawa: ERTDRC North America Inc, 2012) 89 – 96.

16 See Proclamation Establishing the Office of the Special Prosecutor: Proclamation No. 22/1991, entered into force 8 August 1992. [Hereinafter: the SPO Proclamation].

17 See Special Prosecutor's Office, *Dem Yazele Dossie: Begizeyawi Wotaderawi* Dergue *Weyem Mengist Abalat Benetsuhan Zegoch Laye Yetefetsem Wenjel Zegeba* (Addis Ababa: Far-East Trading P.L.C., 2010) [Hereinafter: *Dem YazeleDossie*], 122. Translation by the author. The original (Amharic) version reads:

ቀይሽብር 1970 የደርግ የጭፍጨፋ ተግበር ጣሪያ ላይ የደረሰበት ወቅት መገለጫ መሆኑ አይካድም። ቀይሽብር በአንድወቅት የጊዜያዊ ወታደራዊ አስተዳደር ደርግ ወይም መንግስት ለግፍ ተግባር በቀይሽብር ወቅት የተፈጸመው ብቻ ነበር ወይም የቀይሽብር ሥላባ ኢሕአፓ ብቻ ነው ብሎ ማሰብ ስህተት ነው።.

18 See ASC, *SPO* vs. *DagnenetAyalew et al.,* (Indictment), 23 December 1997. File No. 13/90, 6 – 9; FHC, *SPO* vs. *Getahun Zenebe Woldeselassie et al.,* (Revised Indictment), 16 June 1999, File No. 962/89, 3 – 7; FHC, *SPO* vs. *Teshome Kebede et al.,* (Indictment), 23 December 1997, File No. 931/89, 2; FHC, *SPO* vs. *Tesfaye Belayeneh et al.,* (Indictment), 23 December 1997, File No. 934/89, 2; FHC, *SPO* vs. *Colonel Tesfaye Woldeselassie Eshetie et al.,* (Indictment), 8 October 2000, File No. 206/93, 8 – 9.

19 See FSC, *SPO* vs. *Colonel Mengistu Hailemariam et al.,* (Revised Indictment of 28 November 1995), File No. 1/87, 11.

20 See FHC, *SPO* vs. *Legesse Asfaw et al.,* (Trial Judgment), 4 March 2008, File No. 03116.

torship by the civilian left.[21] However, the Federal High Court of Ethiopia averred that Dergue had prepared to become a dictatorial power even before September 1974. It had organized itself with institutions of repression, some of which were established for the sole purpose of destroying political groups, and some of which were reorganized to intensify the execution of a plan to destroy individuals and groups that would oppose its revolution. The first such institution was the Dergue Campaign and Security Department (DCSD), established at the beginning of July 1974 to prepare and coordinate the armed forces for combat activities.[22] The DCSD had a hitsquad[23] and a Daily Situations Follow-up Unit (DSFU).[24]

What is commonly referred to as Dergue regime comprised two significant administration periods: the Provisional Military Government (PMG), 1974–1987, and the People's Democratic Republic of Ethiopia (PDRE), 1987–1991. The PMG ruled the country by a series of decrees without a constitution. The PDRE was established following the adoption of the socialist constitution in 1987. Essentially, the same members of Dergue who ruled the country during the PMG remained in power after the PDRE was set up.

1.2 Political Background

The 1974 revolution resulted from a stark opposition to the imperial monarchy which, although it had started making efforts to modernize the country after the Second World War, was keeping the country in extreme poverty, with two-thirds of the land controlled by the aristocracy and the church. Nonetheless, Dergue did not have a clear political policy or ideology from its inception. Dergue carried along the *Ethiopia Tikdem* motto for about six months after its establishment, redefining it as a philosophy and then a political ideology. In that sense, the contents of the motto had to evolve with the creeping coup. In November 1974, *Ethiopia Tikdem* was redefined as a more comprehensive philosophy to reflect the beginning of a new era following the ousting of the Emperor and Dergue's assuming control of the entire state power. At that point, the philosophy comprised 11 principles, ranging

21 Messay Kebede, 'The Civilian left and the Radicalization of Dergue,' *Journal of Developing Societies* 24(2) (2008): 159–182.

22 See Kebede, 'The Civilian left and the Radicalization of Dergue,' 6. The department was composed of nine military members including lieutenant Colonel Fisseha Desta.

23 Kebede, 'The Civilian left and the Radicalization of Dergue,' 10. The hit squad was composed of soldiers handpicked from various divisions of the army by order of Colonel Mengistu Hailemariam. The court also noted that the hitsquad and the security unit of the DCSD were often sent on missions to attack anti-revolutionaries, which they carried out in collaboration with the *Kebeles* and the police. Besides, there was no evidence that the hitsquad was established on a short-term basis. In a document prepared in February 1978, it was stated that the hitsquad had been carrying out such an assignment since its establishment.

24 Kebede, 'The Civilian left and the Radicalization of Dergue,' 10.

from giving 'precedence to the interest of the many' to the establishment of a 'government of the people, by the people, for the people'.[25]

By the end of 1974, Dergue came up with a relatively clear political ideology, i. e. ሕብረተሰባዊነት (*Hibretesebawinet*) or *Ethiopian socialism*. According to Wog-deres, a Dergue official who served as Prime Minister of the PDRE, the initial decision to accept and follow socialism as an ideology did not develop with Dergue. It was promoted by the student body of Addis Ababa University, which recognized that the already declared '*Ethiopia Tikdem*' lacked tangible ideological, economic or political grounds. The students rigidly stated that they would not participate in Dergue's highly needed work campaign in rural Ethiopia[26] unless Dergue declared the specific political ideology it intended to follow.[27] In fact, by the end of the 1960s or at least by the beginning of the 1970s, 'Marxism-Leninism had come to be the dominant ideology of the student movements both at home and abroad'.[28]

Deliberations regarding whether Ethiopia should take Marxist, Leninist, and Maoist socialism as a prototype or come up with a different version of its own dominated the politics of the time. Colonel Mengistu, Major by then, persuaded the administration to establish a committee comprised of various intellectuals to dredge up a solution regarding whether or not to embrace socialism.[29]

The majority of the members of Dergue were not familiar with the rudiments of 'scientific' socialism.[30] It is difficult to imagine that the remaining few, including Colonel Mengistu, had an adequate understanding of the concept.[31] It appears that the majority of Dergue wanted to subscribe to a less confusing ideology that at least con-

25 Haile-Selassie, *The Ethiopian Revolution 1974 – 1991*, supra note 9, 135 – 136.

26 For a detailed structure and program regarding the Work Campaign, see Development through Cooperation, Enlighten and Work Campaign Proclamation No. 11/1974. See also Andargachew Tiruneh, *The Ethiopian Revolution, 1974 – 1987: A transformation from aristocratic to a totalitarian autocracy* (Cambridge: Cambridge University Press, 1993), 171, stating that the Campaign was intended to 'exorcise' (through education and enlightenment) the rural population of all backwardness such as lack of education, lack of morality and the existing unjust land-tenure system.

27 Fikre-Selassie Wogderes, *Egnana Abyotu* [*We and the Revolution*] (Los Angeles: Tsehai Publishers, 2014), 158.

28 See, for example, Bahru Zewede, *The Quest for Socialist Utopia: the Ethiopian Student Movement c. 1960 – 1974* (Addis Ababa: Addis Ababa University Press, 2014), 127 – 138, 128. See also Paul B. Henze, *Rebels and separatist in Ethiopia: regional resistance to a Marxist Regime* (RAND Corporation, 1985), v – vii.

29 Henze, *Rebels and separatist in Ethiopia*, 159. See also Taffara Deguefe, *Minutes of Ethiopian Century* (Addis Ababa: Shama Books, 2006), 428.

30 Henze, *Rebels and separatist in Ethiopia*, 159.

31 Henze, *Rebels and separatist in Ethiopia*, 159. See also, United States Department of State, *Ethiopia: Radicals Stave off New Challenges* (Bureau of Intelligence and Research, 1976), 4, accessed 27 April 2022, https://2001-2009.state.gov/documents/organization/67024.pdf. 'It is doubtful that he fully comprehends Marxist or Maoist ideology, but some Communist concepts – such as the class struggle, the national bourgeoise, and imperialism – provide him with a much-needed political formula for Ethiopia's current stage of development.'.

formed to the principles enshrined in the motto 'Ethiopia Tikdem'.[32] Cognizant of that, Colonel Mengistu explained to the members of Dergue that:

> Ethiopian Socialism means 'Ethiopia Tikdem'. Socialism changes the life of the poor; ensures equality; brings prosperity within a short time; frees our country from poverty and backwardness; exploitation and embezzlement of any sort will not exist; famine and dearth will be eradicated.[33]

After members of Dergue accepted Ethiopian socialism as 'an elaborated form of *Ethiopia Tikdem*',[34] Dergue engaged in simple propaganda to talk the Ethiopian public into supporting its political ideology. Accordingly, it announced Ethiopian socialism as a political ideology stemming from the religious traditions of Christianity and Islam in Ethiopia.[35]

Gradually, Dergue started clarifying what it actually meant by socialism. On 11 March 1975, Dergue promulgated Proclamation No. 26/1975, which put into place one of the key features of 'socialism' in Ethiopia, namely public ownership of the means of production. The law stipulated that those resources crucial for economic development and promoting an essential service to the community be transferred to the government.[36]

To implement the policies of *Ethiopia Tikdem*, Dergue established the Workers' Party of Ethiopia (WPE) with the help of party members from socialist countries such as East Germany. Dergue wanted to forge WPE into as the single socialist party that would lead the country.[37] Apparently, the regime's plan was to cultivate a single will for the broad masses and then establish the dictatorship to maintain

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32 Tiruneh, however, states that 'Ethiopian socialism' appears to have been envisaged by Dergue as a compromise between the demands of the radical left for a Marxist-Leninist programme and those of the interest groups and voices of moderation. See Tiruneh, *The Ethiopian Revolution, 1974 – 1987,* supra note 29, 88.

33 Wogderes, *Egnana Abiyotu,* supra note 30, 159 – 160. Translation by author. The original version reads,

> የኢትዮጵያ ሶሻሊዝም ማለት ኢትዮጵያ ትቅደም ማለት ነው። ሶሻሊዝም የድሃዉን ሕዝብ ሕይዎት ይቀይራል፣ እኩልነትን ያሰፍናል፣ ብልፅግናን በአጭር ጊዜ ያስገኛል፣ አገራችንን ከኋላ፡ ቀርነትናከድህነት ያላቃል፣ ማንናዉ. ምዓይነት ብዝበዛና ምዝበራ አይኖርም፣ ረሃብና እርዛት ይወገዳል።.

34 See, for instance, Haile-Selassie, *The Ethiopian Revolution 1974 – 1991,* supra note 9, 159. According to him, the basic principles were deliberately repeated in the declaration to show that the philosophy of Ethiopia Tikdem was identical in both content and form with Ethiopian Socialism.

35 Such an assertion could be no more than an attempt to win ideological support from the highly religious majority of the Ethiopian population at the time. See Haile-Selassie, *The Ethiopian Revolution 1974 – 1991,* supra note 9, 151.

36 Proclamation No. 26/1975, Government ownership and control of the Means of production, entered into force 11 March 1975. See idem, preamble para. 2.

37 The official establishment of the Worker's party took place in 1984 with Mengistu Haile-Mariam as secretary-general.

the status quo.[38] As it is natural for the broad masses to lack a single political will, as stated above, Dergue had to put in place a series of measures indispensable to forging a single political party. Nevertheless, the most significant step, which outlawed alternative political views and provided for the inviolability of Ethiopian socialism, was already publicized in November of the same year via the promulgation of the Special Penal Code (SPC). The SPC provided for the punishment of *offences against national progress and public safety and security* as well as o*ffences against the motto Ethiopia Tikdem.*[39] Accordingly, Article 35 indicates that whosoever commits an offence against Ethiopian socialism is punishable by rigorous imprisonment from five to ten years.[40] The death penalty was provided in more severe cases, where the matter goes beyond exercising a dissenting political view and involves endangering the institution of the PMAC by violence, threats, conspiracy, or other unlawful means.[41]

Other measures provided by law, perhaps to assist Dergue in forging a single-will of the broad masses, include: i) the establishment of a political school to politicize and organize the broad masses by providing for education that focuses on scientific socialism;[42] ii) dissemination of the ideology of Marxism-Leninism in the mass organizations and professional associations established pursuant to proclamation 119/77;[43] and iii) imposing upon higher education institutions a mandate to teach, expound and publicize socialism.[44]

1.3 Ideological Justification

The violence during the Dergue regime was arguably based on ideological differences between perpetrators and victims. Dergue labelled its victims as anti-people, anti-revolutionary, anti-socialist imperialist or reactionary forces. However, not all

38 For details on formation of WPE, see R. Warner, 'The Workers' Party of Ethiopia' (A Report Prepared by the Federal Research Division of the Library of Congress under an Interagency Agreement, Washington DC, 12 October 1984) 1–17, accessed 7 June 2022, https://apps.dtic.mil/sti/pdfs/ADA303418.pdf.

39 See the SPCP, Article 35, offences Against the Motto Ethiopia Tikdem, which reads: 'Whosoever fails to comply with Proclamations, Decrees, Orders or Regulations promulgated to implement the popular Motto "Ethiopia Tikdem" or hinders compliance therewith by publicly inciting or instigating by word of mouth, in writing or by any other means...'.

40 SPCP, Article 35.

41 See the SPCP, Article 9 regarding outrages against the institution of the PMAC. See also SPCP, Articles 7, 8, 10, and 11.

42 Political School Establishment Proclamation No.120/1977, entered into force 14 July 1977.

43 Provisional Office for Mass Organizational Affairs Organization and Operation Improvement Proclamation No.119/1977, entered into force 14 July 1977, Article 8 (11).

44 Higher Education Institutions Administration Proclamation No.109/1977, entered into force 13 January 1977, Article 3(1).

victims were members and affiliates of opposition political groups. For instance, 'the Emperor was assassinated owing to Dergue's phoney belief that his continued existence might have left the innocent public with a hope that he might reign again' and thus not because of a specific political ideology.[45]

Most importantly, the major opposition forces targeted by Dergue had carried socialism as a political ideology. The EPRP was a pro-communist organization opposed to Dergue, mainly because the latter was a military force. An organization widely known by its Amharic name MEISON, a socialist party that dubbed itself the All-Ethiopian Socialist Movement, had made a short-term alliance with Dergue with a view to strengthening socialism from inside. These and other opposition groups were believed to have been organized and led by groups of radical intellectuals who had espoused 'Marxism in the 1960s and devoted themselves to the study of its application in Ethiopia'.[46] The socialist ideals did not emerge with Dergue, but with student movements of the 1960s.

As far as organizations engaged in an armed conflict with Dergue were concerned, the TPLF was a pro-communist organization that expressly stated its espousal of Albanian style communism. One of the main concerns for the US in 1991 was to make sure that the new forces dropped socialism as an ideology, to which the TPLF agreed at the London Conference of May 1991. In its *no democracy, no cooperation* principle, the US communicated that its support for the TPLF would depend on the latter's willingness to adhere to democratic principles instead of the socialist ideals it had carried with itself during the armed conflict.

Overall, the urban conflicts portrayed as White Terror vs Red Terror and the armed conflict in more rural areas of the northern, eastern and western parts of the country were carried out between groups that claimed to be standing for socialist principles. As such, there was no fundamental ideological or philosophical difference among the conflicting parties during Dergue regime. Dergue targeted members and affiliates of opposition forces not due to their opposition to its socialist ideals but because they opposed the means and methods by which Dergue tried to implement socialism. As Stefan Brüne, a West-German political analyst who worked in Ethiopia during Dergue, put it, it was Dergue's

> military implementation [of socialism] which provoked the criticism and resistance, not the nationalization of industry but the absence of civil participation in the decision-making process, not the ideas but the dictatorial means with which the regime put them into practice.[47]

Exceptionally, however, there was an ideological difference between Dergue and the groups it referred to as reactionary forces. The reactionaries included those who sup-

45 *Colonel Mengistu Hailemariam et al.* (Appeals Judgment), 71.

46 John Markakis, 'Garrison Socialism: the Case of Ethiopia,' MERIP Reports, No. 79, 1979.

47 Stefan Brüne, 'Ideology, Government and Development: The People's Democratic Republic of Ethiopia,' *Northeast African Studies* 12(2) (1990).

ported the Haile Selassie regime and feudal lords, against whom the students, peasants, and workers began protesting in the 1960s. The reactionaries were believed to be imperialists and indigenous aristocrats who left the country under poverty, despite the fact of industrialization and commercialization was dominated by foreign capital. Nonetheless, as far as the killing of the Emperor was concerned, the label 'reactionary' may not be relevant. It appears the Emperor had ultimately agreed to accept the change. He was known to have said, 'If the revolution is good for the people, then I too support it'.

Notwithstanding the absence of significant ideological differences among the conflicting parties – the perpetrators and the victims – it should be noted that the violence during Dergue was political violence. As summarized by the SPO in its completion report to the House of Peoples, Representatives in 2010,

> Dergue did not kill a single boy based on which [ethnic, racial, national or religious] group the boy belonged to or based on the kind of school the boy went to, but only because of the boy's alleged affiliation to certain political groups such as the EDU [Ethiopian Democratic Union] and the EPRP.[48]

1.4 Structures of Persecution

1.4.1 Structure of Violence: Involving the Entire State Apparatus

On 15 September 1974, Dergue declared itself 'head of state' (ርዕሰ ብሔር), using a singular marker to indicate that all Dergue officials held such a status collectively and indivisibly.[49] Most of the decisions to eliminate members of opposition political groups were considered to have been taken by all members acting as one. Dergue, which had already organized itself into a general assembly, standing committee and sub-committees, established new institutions of violence and restructured the existing ones.

As early as 7 July 1974, Dergue had started giving military directives to destroy unidentified individuals and groups who were countering activities that Dergue was carrying out. This was done under the auspices of the Dergue Campaign and Security Department (DCSD), established at the beginning of July 1974 to prepare and

48 Translation by the author. See Ethiopian Television, Documentary: findings of human rights abuse during Red Terror era – Part 1 (ETV Documentary part 2, 2010), accessed 27 April 2022, https://www.youtube.com/watch?v=EsLflpn4xBg&ab_channel=EthiopianTV. See also, for instance, FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al.*, (Revised Indictment), 28 November 1995, File No. 1/87. There was no single charge of genocide on racial, religious, ethnic and national groups. See *Dem Yazele Dossie*, 137.

49 See Definitions of Power of Provisional Military Administration Council and of its Chairman, Proclamation No.2 /1974, entered into force 15 September 1974, Articles 2 and 3.

coordinate the armed forces for combat activities.[50] The DCSD had a hit squad and a Daily Situations Follow-up Unit (DSFU).[51] The Department was later reorganized under Dergue Military Committee (DMC) in February 1975 with a mission to destroy individuals and groups with anti-revolutionary agendas.[52]

In October 1974, Dergue established the Central Investigation Centre (*Maekalawi*), the administration of which was carried out by high-ranking government officials in collaboration with the Dergue Investigation Team (DIT).[53] The latter was established initially to carry out investigations into the already arrested and suspected officials of the *ancien régime*.[54] Later on, the DIT's investigative power was extended to include members of the defence forces who did not accept Dergue's *Ethiopia Tikdem* motto, as well as persons engaged in activities disruptive to Dergue's policies.[55]

In August 1976, four organizations were added to Dergue's institutions of violence. These were: i) the Information Evaluation and Dissemination Unit (IEDU);[56]ii) the Public Security Protection Committee (PSPC);[57]iii) the Revolutionary Information Unit (RIU);[58] and iv) the Police Force Special Investigation Unit (PFSIU).[59] These institutions were structured to carry out a coordinated attack against those identified by Dergue as anti-revolution and anti-unity.[60] The establishment of these institutions of violence meant that Dergue had a whole system set up to destroy opposition political groups.

In the late 1970s, Dergue started reorganizing the institutions of violence to coordinate and intensify the measures it had been taking against anti-revolutionaries. In May 1977, Higher Urban Dwellers Associations (HUDAs) were established by the decision of the Urban Development and Housing Minister.[61] To coordinate its attack

50 See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., (Trial Ruling), 23 January 2003, File No.1/87, 6. The department was composed of nine military members, including lieutenant Colonel Fisseha Desta.

51 FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 10.

52 FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 10.

53 FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 11.

54 FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 10.

55 See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 10.

56 The IEDU was established by order of Colonel Mengistu Hailemariam and had a mandate to track and report persons who could attempt to destabilize Dergue's position of control, its work programs, and its *Ethiopia Tikdem* ideology. FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 11.

57 FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 11. The PSPC was established to work in collaboration with the DIT and the IEDU and to report the investigation results to Dergue or its chairman.

58 The RIU was empowered to render opinions regarding whether anti-revolutionaries were to be detained, released or subjected to revolutionary measures. See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 11.

59 The PFSIU was created within the police force with a power similar to that of the RIU. See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 11.

60 FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 11.

61 The reason for the establishment of the HUDAs was, according to the court, to push forward the revolution's offensive. See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al*., 11.

against anti-revolutionaries and to ensure the involvement of public and professional organizations in the violence, Dergue established a Revolution Protection Units Coordination Committee (RPUCC).[62] Efforts were also made to arm the *Kebeles* (the lowest level administrative units) as a part of coordinating ongoing measures against the anti-revolutionaries.[63] A counter-anti-revolutionary force was established to remove the enemies of the revolution from schools.[64] In January and May 1978, orders were issued to ensure that the *Kebeles* and HUDAs carried out interrogations jointly with Dergue investigation units.[65]

In August 1978, the most advanced institution of violence, namely, the Central Revolutionary Investigation Department (CRID), was formed from a merger of the DIT and the PFSIU.[66] CRID was equipped with modern communication systems, security clearance and a separate hit squad for oblitering anti-revolutionary groups.[67] It established direct communication with *Kebeles* and HUDAs to carry out its investigations into anti-revolutionaries, thereby strengthening an already centralized investigation system. The intelligence system was further strengthened and organized, particularly after 1978, with the help of the Soviet KGB and the East German State Security Service (Stasi).[68] Widening this system further, the CRID operated both in Addis Ababa and in the provinces, notably by sending special investigators to the provinces and having detainees transferred from the provinces to its Addis Ababa centre.[69] As such, this well-thought-through and centralized system of violence was meant to destroy opposition political groups throughout the country.

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62 Captain Legesse Asfaw worked in the committee and carried out activities such as submitting requests to Dergue for the purpose of arming the coordinating committee. See FHC, *SPO vs. Colonel Mengistu Hailemariam et al.*, 15.

63 Dergue supplied weapons, gave training to the *Kebeles* and helped them organize themselves. According to the court, this was done as part of an initial promise made by Dergue to arm the *Kebeles* and HUDAs with the weapons necessary to take revolutionary measures against the anti-revolutionaries. However, the Court did not mention when the promises were made and by whom. In the 1970s, it was discussed in several meetings held by Dergue that *Kebeles* in Addis Ababa had begun killing detainees in local prisons and that dead bodies were seen left on different places and on the streets. The meetings also noted that there was a widespread practice of interrogation accompanied by flogging and beatings, as recorded in the diary of Colonel Tesfaye Woldeselessie (who served as the Chairman of the Information Evaluation and Dissemination Committee). See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al.*, 12–15.

64 This was carried out under the leadership of Lieutenant Colonel Endale Tessema. See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al.*, 14.

65 The order was given by Lieutenant Colonel Debela Dinsa. See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al.*, 16.

66 See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al.*, 11.

67 See FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al.*, 11.

68 See B. Mesfin, 'The Architecture and Conduct of Intelligence in Ethiopia (1974–1991),' *International Journal of Ethiopian Studies* 5(1) (2010): 39–70.

69 The CRID had investigation centers in Addis Ababa city administration, Addis Ababa Police Sprinter Division, Eritrea, and Tigray (Mekelle). See Mesfin, 'The Architecture and Conduct of Intel-

1.4.2 Forms of Violence: Every Measure Necessary

The minutes of 19 November 1976 from Dergue's National Assembly sessions revealed that Dergue reached a decision to destroy groups that had opposing political views to the revolution.[70] Following this decision, a memo written by the then Chairman of Dergue, Brigadier General Teferi Benti, was dispatched to the provinces and the various offices, including the Special Supreme Court Martial, with orders to take *every measure necessary* to implement Dergue's plan to destroy the enemies of the revolution and reactionaries (አድሃሪያን).[71] The taking of 'every measure necessary' was reinforced by announcements, orders and campaigns to eliminate the enemies of the revolution.

It was following the assassination of Colonel Atenafu Abate that Colonel Mengistu Hailemariam made a speech known as *Key Shiber Yefafame* ('Let the Red Terror intensify').[72] In the speech, aired on Ethiopian Radio, Dergue called upon the public to blazon Red Terror in reactionary neighbourhoods, to consider the blocking of anti-revolutionary intrigues its primary job, and to intensify the Red Terror. Dergue also promised to stand with the public in carrying out these activities. At the same time, what Dergue had put in place in September 1977 was the *Netsa Ermija* (free measures). That was a codename denoting the permission given to the local actors (*Kebeles*) to take revolutionary measures (killing anti-revolutionaries) without seeking approval from higher-level government officials[73]. Later on, an announcement was made by Captain Legesse Asfaw on behalf of Dergue at the Addis Ababa City Council on the occasion of the municipal councillors' oath-taking ceremony in which he pledged on behalf of Dergue to continue the *Netsa Ermija*. He also reassured the *Kebeles* that they would not be held accountable for doing so.[74]

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ligence in Ethiopia (1974 – 1991),' 12. For the SPO case dealing with the CRID special investigators, see FHC, *SPO vs. Teshome Bayyu et al.* (Trial Judgment), 15 January 2009, File No. 07415, 4 – 5.

70 FHC, *SPO vs. Teshome Bayyu et al.* In the Assembly Sessions, a determination was made as to which government organ was responsible for carrying out the decision.

71 FHC, *SPO vs. Teshome Bayyu et al.*, 8.

72 The speech was made following the assassination of Colonel Atenafu Abate. In the speech aired on Ethiopian Radio, Dergue called upon the public to blazon Red Terror in the reactionary neighborhoods, to consider the impeding and halting of anti-revolutionary intrigues its primary job, and to intensify the Red Terror. Dergue also promised that it would stand with the public in carrying out these activities. *Colonel Mengistu Hailemariam et al.*, (Trial Ruling), 8.

73 See Babile Tola, *To Kill the Generation: The Red Terror in Ethiopia* [2](Washington, D.C.: Free Ethiopia Press, 1997), 146.

74 *Colonel Mengistu Hailemariam et al.*, (Trial Ruling), supra note 9, 8. Based on evidence obtained from the Ethiopian Radio Organization, an announcement was made by Captain Legesse Asfaw on behalf of Dergue at the Addis Ababa City Council at the municipal councilors' oath-taking ceremony. During the event, the Captain asserted that *Netsa Ermija* had been carried out with cooperation between Dergue *and* the city administration and promised that the cooperation in this regard would continue. The evidence did not indicate when Dergue's *Netsa Ermija* began; it simply talked of the decision to continue it. According to Tola, however, *Netsa Ermija* was launched in September 1977.

Dergue had planned and carried out anti-revolutionary elimination campaigns on several occasions.[75] Following a study conducted by the Revolutionary Information Unit (RUI) on the identity of anti-revolutionary groups,[76] a campaign dubbed 'Hit the Anti-Revolutionaries' and spearheaded by the Dergue Campaign and Security Department (DCSD) was launched in April 1977. This campaign, which involved the collaboration of civilian and military units, was designed to operate intensively day and night until anti-revolutionaries were entirely destroyed.[77] A recurrent campaign called *ZemechaMentir* (Identify and Eliminate) was carried out frequently by Dergue at different levels to identify and eliminate members of opposition factions.[78]

As to the specific forms of persecutions, it was established in evidence at the court of law that Dergue killed 9,546 people in pursuance of its plan to destroy enemies of the revolution.[79] This figure includes the Emperor, whom Dergue assassinated on the grounds that his existence might place false hope in the minds and hearts of the general public that he would reign again. Besides, about 10,000 people were massacred during the aerial bombardments in northern Ethiopia, which were considered war crimes against the civilian population.

In addition to unlawful mass incarcerations, the infliction of bodily injuries in the form of acts of torture were not only rampant but took unimaginable forms. Torture techniques such as the *wofelala* were commonly used to obtain confessions or to impose extrajudicial punishment. These caused the victims such severe suffering that some referred to it as 'hell on earth'. This was a method in which a person was placed in an upside-down suspended harness and subjected to a lengthy flogging on the inner part of the foot.

Members of opposition political groups were placed in black sites, dungeons, interrogation rooms and torture chambers under living conditions calculated to result in death. The victims were kept in rooms without sufficient food and air, in a manner

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See Babile Tola, *To Kill the Generation: The Red Terror in Ethiopia* ²(Washington, D.C.: Free Ethiopia Press, 1997), 146.

75 See also FHC, *SPO* vs. *Colonel Mengistu Hailemariam et al.*, (Trial Judgment), 11 December 2007, File No. 1/87, 4.

76 At this time, those considered enemies of the revolution included EPRP, EDU, Tesfa Le Zewede and its affiliates, members of the ELF, ECOP, youth associations. It was stated in the order document that the campaign was carried out by decision of the Provisional Military Government.

77 Colonel Mengistu Hailemariam gave an order to launch a 'Hit the Anti-Revolutionaries' campaign, which was carried out through the collaboration of the armed forces, the police and other civilian bodies such as the *Kebele* revolutionary guards and workers' revolutionary guards. See *Colonel Mengistu Hailemariam et al.* (Trial Ruling), 10.

78 On October 1977, lieutenant colonel Debela Dinsa gave the order to the *Kebeles* in Addis Ababa. Similarly, on 1 July 1978, Colonel Tesfaye Gebrekidane prepared a procedural guideline based on which the armed forces would be able to identify and eliminate anti-revolutionary forces in the army. *Colonel Mengistu Hailemariam et al.* (Trial Ruling), 10, 14.

79 *Dem Yazele Dossie*, Annex, Table II.

that deprived them of proper sleep, and with no access to medical care, and then were left to die in those places after being tortured.[80]

Enforced disappearance was also common. In the post-Dergue investigations, locating the whereabouts of several victims proved challenging. However, there was evidence showing that several individuals were arrested and tortured by the regime at a certain point or that inmates were released from prison but never returned home. Only very few mass graves were exhumed, with even fewer identifications made with the help of forensic teams from Argentina.

What appeared to be a horrifyingly unique way of terrorizing of the public was Dergue's extensive use of the dead (corpses) as a means for perpetrating further violence. Corpses were hauled across and dumped on the streets as families were prohibited from collecting the deceased for burial. Dead bodies were displayed on national television and could be seen hanging in a butcher's shop alongside raw beef on a feast day. Mourning the dead was prohibited all over the country. In some places, market-goers were coerced into walking on the dead bodies left on the streets and market places. Fathers and mothers were forced to step on the dead bodies of their children. Dergue adopted this horrific technique of terrorzsing the public and instilling fear and powerlessness in order to suppress, if not altogether eliminate, political dissent. Although common during the Red Terror period, such things were practised as recently as 1989 and 1990.[81]

Another form of violence that did not appear during the SPO's court proceedings against Dergue were the so-called 'resettlement' programs, which Dergue adopted under the pretext of a famine relief measure to diffuse perceived and ongoing political opposition. In the words of Dawit Woldegiorgis, a historian,

> From the very beginning, resettlement for Mengistu was not a development program but a solution to his social and national security problems. Any dissidents, anyone who created problems or was seen as a security risk, was packed off to a resettlement site. In the minds of the people, resettlement programs were equated with concentration camps.[82]

1.4.3 The Extent of Persecution: Destroy all Kinds of Opposition

In the 1992 law that established the Special Prosecutor's Office (SPO) to investigate and prosecute Dergue-era crimes, it was stated that the socialist government had perpetrated '*heinous and horrendous criminal acts* which occupy a special chapter in the

80 See *Colonel Mengistu Hailemariam et al.* (Revised Indictment), 106 – 122.

81 For details, see Tadesse S. Metekia, 'Violence Against and Using the Dead: Ethiopian Dergue Cases,' *Human Remains and Violence* 4(1) (2018): 76 – 92.

82 Dawit Woldegiorgis, *Red Tears: War, Famine and Revolution in Ethiopia* (Trenton: The Red Sea Press, 1989), 285. See also Edmond J. Keller, 'Drought, War, and the Politics of Famine in Ethiopia and Eritrea,' *The Journal of Modern African Studies* 30(4) (1992), 609 – 624.

history of the people of Ethiopia'[83] The regime not only 'deprived the people of Ethiopia of its human and political rights and subjected it to gross oppression', but also 'impoverished the economy of the country by illegally confiscating and destroying the property of the people as well as by misappropriating public and state property.'[84] In terms of their temporal scope, the acts of persecution lasted for the entire 17 years, as discussed above.

As to the scope of the persecution, it should be noted that the crimes mentioned above were not perpetrated in a protracted manner. They were part of a series of crimes committed over a long period in a widespread and systematic manner, accompanied by a plan to destroy the entire body of opposition political groups. After examining numerous pieces of evidence, Ethiopian courts have concluded that Dergue was established *from the outset* with a plan and intent to destroy opposition political groups, which it carried within itself all along. Such a conclusion resulted from an extensive analysis of factors such as official commands, pronouncements, and campaigns of violence, the establishment and reinforcement of institutions of violence, and direct involvement of state officials in orchestrating and implementing the system of violence.[85] As such, Dergue's violence has been considered genocide against political groups (politicide).

From a territorial perspective, Dergue did not limit its acts of violence to opposition groups that resided in today's Ethiopia. In addition to extensive measures in what is now known as the State of Eritrea, the violence reached Ethiopian groups in European cities. Dergue's Colonel Tesfaye Woldeselassie, the Chairman of the Information Evaluation and Dissemination Committee, sponsored assassination missions in Italy (Rome) and Germany (Berlin) targeting members and leaders of the opposition political groups in the diaspora.[86]

1.5 Victim Groups

During Dergue regime, tens of thousands of Ethiopia's best-educated were selectively killed; thousands were systematically tortured, injured, jailed or forcefully disappeared. Peasants were starved and forcefully relocated, and hundreds of thousands died because of malnutrition and disease.[87]Although there is no official statement re-

83 SPO Proclamation, Preamble, para 2. [Emphasis added].

84 SPO Proclamation, Preamble, para 2.

85 For details, see Tadesse S. Metekia, *Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis international standards* (Lieden: Brill, 2021), 272–282.

86 See FHC, *SPO* vs. *Colonel Tesfaye Woldeselassie Eshete,* (Revised Indictment), 09 November 2000, File No. 268/85, 10–11, 28–30.

87 See Remy Prouveze and Nadia Brenaz, 'International and domestic prosecutions,' in Cherif Bassiouni (ed.), *The Pursuit of International Criminal Justice, Vol. I: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Antwerp: Intersentia, 2010), 386–387; See Human Rights Watch, 'Evil

garding the number of victims, some have estimated that Dergue regime took the lives of as many as 725,000 Ethiopians.[88] Others put the estimate close to 2,000,000.[89]

As for the Red Terror, from 10,000 to 20,000 Ethiopians were killed in Addis Ababa alone.[90] It is believed that the rest of the provinces saw comparable numbers of fatalities, if not more. The estimate by the EPRDF government put the number of deaths in Addis Ababa at 55,000.[91] According to Tola, the Red Terror took the lives of as many as 150,000 Ethiopians. According to Amnesty International, in just two months between December 1977 and February 1978, about 30,000 people were detained in Addis Ababa alone.[92] Yet, as noted above, the Red Terror was not the only campaign of violence orchestrated and implemented by Dergue. The Red Terror was itself commonly misperceived as a violence that targeted only the Ethiopian People's Revolutionary Party (EPRP). As such, any hasty reference might amount to furthering the mockery of the other victims, as also cautioned by the SPO.

One may divide victims of Dergue into two broad categories based on political ideology or form of opposition. Based on the former, Dergue victims were referred to by their perpetrators as reactionaries and anti-revolutionaries. Reactionaries were feudal landlords, officials and individuals who supported the Haile Selassie regime for either political, religious or social status. 'Anti-revolutionaries' was a term used by Dergue to refer to all kinds of groups that were opposed to the military revolution and how Dergue was implementing socialism in Ethiopia.

Based on their forms of opposition, Dergue's victims could be categorized as either warring or non-warring groups. With the OLF and the TPLF being the pioneers in taking up arms against Dergue, the civil war that took 17 years involved several warring groups. The groups referred to themselves as liberation fronts or people's democratic organizations and most of them were established to fight against injustices on

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Days: 30 Years of War and Famine in Ethiopia' (Report of African Watch, September 1991) 1, accessed 20 September 2020, https://www.hrw.org/sites/default/files/reports/Ethiopia919.pdf. [Hereinafter: Thirty Years of Evil Days]; Yves Santamaria, 'Afro communism: Ethiopia, Angola, and Mozambique,' in Mark Kramer et al. (ed.), *The Black Book of Communism: Crimes, Terror, Repression* (Cambridge: Harvard University Press, 1999) 683–704.

88 According to African Watch Report, 500,000 'famine deaths' occurred between just 1982 and 1986, while the regime caused between 225,000 and 317,000 deaths through human rights violations. See Human Rights Watch, 'Evil Days: 30 Years of War and Famine in Ethiopia' (Report of African Watch, September 1991), accessed September 30, 2020, https://www.hrw.org/sites/default/files/reports/Ethiopia919.pdf, 172.

89 See Paulo Milkias, 'Mengistu Haile Mariam: Profile of a Dictator,' *Ethiopian Review* 4(1) (1994): 57–59, 57.

90 Human Rights Watch, 'Evil Days: 30 Years of War and Famine in Ethiopia,' supra note 88.

91 See Bahru Zewde, 'The history of the Red Terror: Contexts and Consequences,' in Kjetil Tronvoll et al. (eds.), *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (Martlesham: James Currey, 2009), 17–32, 30.

92 Amnesty International (AI). 1978. 'Human Rights Violations in Ethiopia', accessed 30 September 2020,https://www.amnesty.org/download/Documents/204000/afr250101978en.pdf, 8.

behalf of their respective ethnic groups. Non-warring groups included mainly the EPRP and MEISON. The EPRP, known for its White Terror, a violent campaign aimed at assassinating Dergue and MEISON officials, had a short-lived armed wing that used to be known as the Ethiopian People's Revolutionary Army (EPLA).

It is noteworthy that Dergue was indiscriminate in terms of identifying opposition groups it targeted for persecution. As Ethiopian courts have unanimously concluded in Dergue trials, the persecution during Dergue regime targeted *all* (ሁሉንም) political opposition groups, that is, each one of the numerous political opposition groups.[93] The violence was more indiscriminate in the sense that it did not spare those who were less active and had no direct involvement in the opposition, such as religious dignitaries. For example, Abune Tewoflos Woldemariam, the patriarch of the Ethiopian Orthodox Church, and Gudina Tumsa, a priest and general secretary of the Ethiopian Evangelical Church Mekane Yesus, were executed on the allegation that the former was a 'reactionary' (pro-Haile Selassie regime) and the latter 'anti-revolutionary' (as an alleged member of the OLF).

1.6 Those Responsible

Over 5,000 officials, members and affiliates of Dergue regime were identified as responsible for crimes committed between 1974 and 1991. Not all of these individuals had held a position of authority in Dergue administration (the government, the party, or mass organizations). In addition to policymakers and field commanders, private individuals were responsible for atrocities. The violence reached its height by involving a large number of people referred to as personal informants, associates, chauffeurs,[94] 'cooperating individuals',[95] or 'progressive individuals'.[96]

Colonel Mengistu Hailemariam, the chairman of the PMG, the president of the PDRE and the commander-in-chief of the armed forces, was by all standards the most responsible person. He announced the Red Terror and called for its intensification – not to mention that he oversaw the whole system of persecution through the country both in- and outside of the context of armed conflict. In one of the examples

93 See *Colonel Mengistu Hailemariam et al.* (Trial Ruling), 5; *Colonel Mengistu Hailemariam et al.* (Appeals Judgment), 70.

94 See *Dem Yazele Dossie*, 137. See also FHC, *SPO* vs. *Teshome Ashenie* (Indictment, 29 June 2000), File No. 1937/1992, 1; FHC, *SPO* vs. *Ademasu Amare et al.* (Revised Indictment), 7 July 1998, File No. 654/1989, 3:, see in particular defendant number 16.

95 See e. g. defendants number 28, 54, 117, 140, 141, and 142 in FHC, *SPO* vs. *Gesegesse Gebremeskel Aterega et al.*, (Indictment), 23 December 1996, File No. 03099/1989, 4 – 5, 12, 14. Several defendants were prosecuted as cooperating individuals in SNNPRS SC, *SPO vs. Mekonnen Gelan et al.*, (Revised Indictment, 22 May 2001), File No. 1338/97, 1 – 20. See the details of defendants number 132, 138, and 152 in OSC, *SPO vs. Brigadier General Tedela Desta et al.* (Revised Indictment, 10 October 1999), File No. OSC 1/1989, 13 – 14.

96 See defendants number 41 and 46 in *Gesegesse Gebremeskel Aterega et al.* (Indictment), 5.

that depict his mercilessness, Mengistu had his presidential palace built over the Emperor's grave, on top of which he literally sat and ruled the country for 17 years.

On top of giving orders, initiating and organizing campaigns, and making public announcements concerning the elimination of members and affiliates of political opposition groups, Dergue higher officials were responsible for arming *Kebele* administrations,[97] supervising prisons,[98] and running the CRID.[99] Even more, they directly and regularly participated in deciding measures to be taken against anti-revolutionaries. In particular, officials at National and Public Security Affairs (NSPA) /ሀገርናሕዝብደህንትጉዳይሃላፊው/ were responsible for rendering the final decision on the fate of anti-revolutionaries.[100]

The usual procedure was well-oiled and followed pre-determined steps. After receiving investigation results from the Director of the DIT, the NPSA officials (such as Lieutenant Colonels Kassahun Tafesse and Teka Tulu) had the power to send their final decisions to the DIT or directly to the DCSD.[101] Their decisions often contained death sentences, usually coded in phrases such as "take a revolutionary measure, move them to the district, take them across, join them with Jesus, and send them with any transport available".[102]

An alternative procedure was also available: NPSA officials could pass on their decisions to the general secretary of Dergue, Captain Fikreselassie Wogederesse, or the deputy general secretary, Lieutenant Colonel Fisseha Desta.[103] The two could either change or approve the decisions and send them back to NPSA officials with instructions to notify the DCSD.[104] In 1971, when the CRID replaced the DIT and the PFSIU, both the usual and the alternative procedures were maintained.[105]

Regional governors, most of whom were permanent members of Dergue, were the key players in intensifying the persecution during the regime. They had either their own special forces to take counter-revolutionary measures or had the liberty to invite special investigators from the CRID's central office to undertake torture and execu-

97 The list of officials included: Captain Fikreselassie Wegderess, Colonel Tesfaye Gebrekidane, Colonel Demessie Duressa, Letenal Colonel Fesseha Desta. See *Colonel Mengistu Hailemariam et al.* (Trial Ruling), 13.

98 According to documentary evidence produced by the SPO in this regard, the prison administration committee included Major KassayeAragaw, *meto-aleqa* Petros Gebre, *mikitelmeto-aleqa* AragawYimer, Major Dejene Wolde Agegnehu, *miktelmeto-aleqa* FessehaAndeto and others. See *Dem Yazele Dossie*.

99 The CRID used as its office an off-site location, Prince AsaratKassa's villa, and was run by Lieutenant-Colonel Fisseha Desta. See *Colonel Mengistu Hailemariam et al.* (Trial Ruling), 11.

100 See *Colonel Mengistu Hailemariam et al.* (Trial Ruling), 12.

101 See *Colonel Mengistu Hailemariam et al.* (Trial Ruling), 13.

102 Tadesse S. Metekia, *Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis international standards* (Lieden: Brill, 2021), 281.

103 Tadesse S. Metekia, *Prosecution of Core Crimes in Ethiopia*, 281.

104 Tadesse S. Metekia, *Prosecution of Core Crimes in Ethiopia*, 281.

105 Tadesse S. Metekia, *Prosecution of Core Crimes in Ethiopia*, 281.

tions. The most monstrous of all was Melaku Teferra, governor of the Gonder province, followed, arguably, by Gesges Gebremeskel Ateraga, the governor of the then Cheha district in west-central Ethiopia. The two had, in the words of the Federal Supreme and High Courts of Ethiopia, an 'addiction to killing' (የመግደልሱስ). Melaku Teferra, responsible for killing 971 people, left behind a uniquely horrifying memory. In a poignant depiction of the scale of his mercilessness in detaining, killing, and forcefully conscripting their sons into the army, mothers in the Gonder province of northern Ethiopia had poetized him as:

> MelakuTeferra, God's younger brother;
> pardon my son, and I would not bear another.[106]

Concerning the armed conflict, 23 military officers ranging from major to brigadier general, most of whom were air force pilots trained to conduct airstrikes, were held responsible. This included Captain Legesse Asfaw, a permanent member of Dergue and a decorated military captain in charge of military operations in the northern part of the country, the then Tigray region. He had special powers that made him even superior to the Ministry of Defense as far as military operations in Tigray were concerned.[107]

1.7 Places of Persecution

As is commonly the case with repressive regimes, the greatest commonplace of repression during Dergue were the prisons. In Addis Ababa, the most notorious ones were the central prison, Kerchele, and the central investigation centre, Meakelawi. Kerchale had a separate wing that was known as Alem-Bekagn, an infamous incarceration and torture chamber. During the Red Terror, Dergue converted *Kebeles* and Higher Urban Dwellers Associations into investigation and detention centres. It was the establishment of the National Revolutionary Operations Command pursuant to Proclamation No.129 of 1977 that had in effect transformed all government offices into detention centres by empowering government offices at all levels to identify and detain anti-revolutionary and anti-unity forces for up to six months just on the ground of suspicion of involvement in anti-revolutionary, anti-unit, or anti-operations acts.[108]

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106 Translation by the author. The original (Amharic) lyrics read:
መላኩ ተፈራ የግዜር ታናሽ ወንድም
ያዛሬን ማርልኝ የነገን አልወልድም

107 For details, see Metekia, *Prosecution of Core Crimes in Ethiopia*.

108 National Revolutionary Operation Command Proclamation, Proclamation No. 129 of 1977, entered into force 27 August 1977.

The provision of *Netsa Ermija*, free measures, created numerous killing squads across the country where *Kebeles*, factories, and schoolyards became places of persecution by revolutionary guards. Military camps and command were also notorious places of persecution where civilians were arrested, detained and tortured. Several military compounds were later on found to be mass graveyards. Similarly, Dergue used compounds of security and intelligence departments not as just places of detention and torture but also of killing and mass burial.

Offline locations of persecution were common too. In Addis Ababa, private mansions and villas became torture chambers. Victims arrived at the locations blindfolded. Some of these locations were known by Dergue security forces by code names such as the *Setan Bet* (Satan House) and Bermuda.[109]

It was also common for executions to take place in strictly official sites. Between 1976 and 1978, about 70 dead bodies were collected from the *Arat-Kilo* Palace (presidential Palace) on a daily basis and dumped into mass graves.[110] The Emperor was murdered in the presidential palace, and, as discovered in the early 1990s and mentioned above, Colonel Mengistu Hailemariam had his office built literally over the grave of the Emperor.[111]

Also, streets and marketplaces were places of persecution. Victims were beaten and killed on the streets and in marketplaces. Such was especially the case in the context of Dergue's violence against the Ethiopian public. As recorded in the cases of *Mengistu et al.* and in *Debela Dinsa Wege et al.* alone, the SPO recorded that Dergue dumped and dragged over 1,416 dead bodies on and across the streets of Addis Ababa.[112] Bodies were left on the streets and watched by government agents and informants so that friends and family members would not collect them. Spread throughout every town in the country, this practice was meant to terrorize the public. Linked to this form of violence was the use of national television as a means to terrorize even the wider public. Dead bodies were purposely displayed on TV so that Ethiopians would be terrified and refrain from engaging in activities opposed to Dergue.

1.8 The Form in which the Regime was Overcome

Ethiopians and Eritreans struggled against Dergue's military regime by violent means that involved armed and non-armed activities. The situation during the period of the Red Terror has been commonly understood as a violent struggle among the ruling and opposition groups, notably through its colloquial Amharic reference *Tenenqe* (ትንንቅ). The most notable non-armed struggle against Dergue came from the

109 See *Dem YazeleDossie*, 69 – 71.

110 See *Dem YazeleDossie*, 13.

111 Mengistu et al. (Appeals Judgment of 26 May 2008), Federal Supreme Court, File No. 30181, 95.

112 For details, see Tadesse S. Metekia, "Violence Against and Using the Dead: Ethiopian Dergue Cases", *Remains and Violence* 4(1) (2018): 76 – 92.

EPRP, which after a brief period of relatively peaceful protest, launched the so-called White Terror – a sporadic campaign of assassination that targeted members and allies of Dergue. As known by its other labels, such as 'urban guerrilla warfare', the assassinations and terrorizations were carried out in the cities, mainly in Addis Ababa.[113]

For the armed struggle which lasted the entire 17 years of Dergue, various armed groups engaged in a protracted and lengthy civil war which brought about Dergue's complete defeat in 1991.[114] Of the liberation fronts, the Eritrean Peoples' Liberation Front (successor to the Eritrean Liberation Front (ELF)) was the first to embark on the long journey of what could be characterized as a war of liberation, which ended in 1991 with the creation of the independent State of Eritrea. The Tigray Liberation Front (TPLF), which started an armed struggle in 1975 from the northern part of the country, was later joined by other groups and formed the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), which succeeded in overthrowing Dergue in May 1991.[115] In the East, the Oromo Liberation Front (OLF) had fought Dergue mainly in eastern Ethiopia until it was forced to re-establish itself in the western part of the country.[116] Other groups, such as the Ethiopian Democratic Union (EDU) and the Ethiopian Peoples' Revolutionary Army (EPRA), the armed wing of the Ethiopian Peoples' Revolutionary Party (EPRP), were involved in relatively less significant armed conflicts in the 1970s.[117]

2 Transitional Justice

2.1 Political and Institutional Changes

Unlike conflicts in many other places, the Ethiopian civil war ended in 1991 with a total defeat of Dergue, leaving the incoming powers with unfettered discretion to es-

113 As opposed to the armed struggle of the peasants simultaneously carried out in the rural parts of the country, the White Terror was not an armed struggle and, as it is generally understood, had no connection to the armed conflicts and thus to actions that could potentially constitute war crimes.
114 See Tareke, *The Ethiopian Revolution,* supra note 7, 59.
115 See Aregawi Berhe, *A Political History of the Tigray People's Liberation Front (1975–1991): Revolt, Ideology and Mobilisation in Ethiopia* (PhD Dissertation, Vrijie Universiteit Amsterdam, 2009), 313–345.
116 Martin Plaut, 'Ethiopia's Oromo Liberation Front,' *Review of African Political Economy* 33(109) (2006): 587–593; Andargachew Tiruneh, *The Ethiopian Revolution 1974–1987: A Transformation from an Aristocratic to a Totalitarian Autocracy* (Cambridge: Cambridge University Press, 1992), 366–367.
117 These groups were more active in what was referred to as the White Terror than in the armed struggle. Their less intense armed struggle did not last long, as both groups were defeated by the TPLF by the end of the 1970s. See Tareke, *The Ethiopian Revolution,* supra note 7, 86–88; Tiruneh, *The Ethiopian Revolution 1974–1987,* 213–214.

tablish a new political order. Dergue's defeat was announced in May 1991 in the middle of the US-brokered London Peace Talks, where representatives of the government and rebel forces (EPLF, OLF and TPLF) convened to discuss the Ethiopian transition. The London Peace Talks were the only multi-party peace talks during the lengthy civil war and ones that were possible only following the end of the Cold War and the withdrawal of Soviet military advisers from Ethiopia. However, it was concluded without significant agreement, except that the EPRDF would convene a follow-up conference in Addis Ababa no later than 1 July 1991 to discuss the details of the transitional period.

Within a month after defeating and ousting Dergue and detaining thousands of its members and affiliates in June 1991, the EPRDF (a group headed by the TPLF) dissolved the entire military and security apparatus of the past regime. Within a very short time, the EPRDF, together with the EPLF and the OLF, demobilized the whole army of Dergue. Dergue officials were told to surrender within 48 Hours on 30 May 1991. By the end of June 1991, TGE issued directives to abolish the Ministry of Defence, the Ministry of Interior, and the WPE and associations formed by it.

Consequently, a Peace and Democracy Transitional conference of Ethiopia was convened in Addis Ababa from 1 to 5 July 1991. The conference adopted the Transitional Period Charter as drafted,[118] and a Transitional Period Council of Representatives was formed, allocating the majority of its seats to the EPRDF. Most important was that the conference approved the establishment of the Transitional Government of Ethiopia (TGE), which was given a legal force by the Transitional Period Charter for the initial period of no more than two and half years.

The charter, which became the supreme law of the land (an interim constitution) for the duration of the transitional period,[119] marked a significant departure from the Dergue regime in various respects. It provided that freedom, equal rights and self-determination of all peoples be the guiding principles of political, economic and social life as Ethiopia was starting a new chapter of restructuring itself democratically. It was indeed a clean slate where the previous regime was removed altogether, as the establishment of the TGE meant the dissolution of the WPE, the suspension of the PDRE Constitution of 1987 and, most importantly, the end of socialism as a political ideology.

Upon the promises of the Transitional Period Charter, a Constitutional Commission was set up in 1993 to prepare a draft constitution. Accordingly, four years after the establishment of the TGE, the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), the most comprehensive in the country's constitutional history, came into force on 21 August 1995 by significantly improving the promises of

118 Transitional Period Charter of Ethiopia: Proclamation No. 1/1991, entered into force 22 July 1991, Article 6, accessed 20 March 2021, http://www.ethcriminalawnetwork.com/system/files/The%20Transitional%20Period%20Charter%20of%20Ethiopia.pdf.

119 Transitional Period Charter of Ethiopia: Proclamation No. 1/1991, Article 18.

the Transitional Period Charter.[120] The constitution, together with Proclamation No. 2 of 1995, officially established a Federal Democratic Republic of Ethiopia (FDRE) as opposed to Dergue's unitary state structure. The constitution adopted multinational federalism and structured the country into nine autonomous regional governments with guarantees of self-determination. It also included a most controversial opt-out clause, i. e. the right to secession from the federation (Article 39 of the constitution).

With the coming into force of the 1995 constitution, the FDRE became, at least theoretically, the exact opposite of the PDRE in the sense that it was, unlike its predecessor, founded upon a multi-party system, equal state recognition of all Ethiopian languages, a parliamentary system of government, a comprehensive list of human and democratic rights, and an independent National Election Board to conduct in an impartial manner free and fair elections in federal and state constituencies.

The constitution also provided for the establishment of several institutions vital for building democratic culture by disconnecting the system from its repressive past. The most significant development was a Human Rights Commission, a move believed to be a result of policy influence from the US, which had emerged as the important economic and political ally of the post-Dergue government in Ethiopia. The Ethiopian Human Rights Commission (EHRC) was formally established five years later by the House of Peoples' Representatives with objectives ranging from creating public awareness about human rights to ensuring corrective measures when human rights violations occurred.[121] In the same year, the Institution of the Ombudsman was established by Proclamation No. 211/2000 to protect citizens from problems arising from executive maladministration.

After undertaking a lengthy Civil Service Reform Programme (started in 1994) that identified, among other things, a lack of coherent strategy and laws for ensuring ethical standards, and after conducting a corruption survey, the Federal Ethics and Anti-Corruption Commission was established in 2001 by law number 235/2001 with a mandate to prevent and prosecute acts of corruption and impropriety. The establishment of these human rights institutions was meant to complement the underdeveloped judicial sector in promoting respect for human rights and good governance. In that respect, the country has adopted several reforms to ensure the effectiveness and independence of the judiciary. The creation of an independent judiciary was already envisaged by the Transitional Period Charter (Article 9), and elaborate provisions were included in the FDRE Constitution (Articles 78 – 81).

As for the actual elections, the TGE held local elections in May 1992 following some 'snapelections' in April 1992, a process that installed EPRDF representatives

120 The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, entered into force 21 August 1995.

121 Proclamation No 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, Article 5.

at all levels.[122] Election disputes deepened the misgivings between the EPRDF-TPLF and the OLF and ultimately resulted in the latter withdrawing from the TGE on 23 June 1992. A more competitive nationwide election was held in May 2000, in which the EPRDF emerged victorious, despite allegations of widespread election fraud. In May 2005, Ethiopia held elections which, although reportedly marred by irregularities, were considered relatively peaceful and were arguably the closest to genuine elections the country has ever experienced.[123] Nonetheless, a post-election crisis was triggered in early June 2005 when the Coalition for Unity and Democracy (CUD), the second largest opposition coalition at that time,[124] refused to accept the results that declared a narrow victory for the ruling party, the EPRDF, alleging electoral manipulation. In turn, the EPRDF accused the CUD of conspiring to overthrow the government by force and rejected reports of international observers, which largely confirmed the CUD's claims. Violence ensued and both sides contributed in varying degrees to the loss of life and property that accrued from the beginning of June until the end of November 2005. Since then, the EPRDF has persistently declared itself the landslide winner in elections, held in 2010 and 2015.

2.2 Prosecution

In the beginning, the TGE did not take any significant steps aimed at responding to past crimes. In particular, an independent investigation into Dergue-era violence, which could have been carried out by setting up specialized bodies such as a commission of inquiry, never occurred. The silence was unexpectedly broken on 8 August 1992, when the TGE established the Office of the Special Prosecutor (SPO) to prosecute crimes committed during the Dergue regime. The relevant part of the proclamation announced the decision to prosecute in the following terms:

> [I]n view of the fact that the historical mission of the Ethiopian People's Revolutionary Democratic Front [EPRDF] has been accomplished, it is essential that higher officials of the WPE [Workers Party of Ethiopia] and members of the security and armed forces who have been detained at the time of the EPRDF assumed control of the country and thereafter and who are suspected of having committed offences, as well as representatives of urban dwellers associations

122 Lovise Aalen et al., *Ethiopian since Dergue: A decade of democratic pretension and performance* (Zed Books: London, 2002), 30 – 32.

123 See for example, Anders Wijkman, *European Parliament Delegation to Observe Federal and Regional Parliamentary Elections in Ethiopia: A Report, 12 – 17 May 2005* (June 2005), Annex C, 1, accessed 28 March 2019, http://www.europarl.europa.eu/intcoop/election_observation/missions/2004 – 2009/20051505_ethiopia.pdf. See also Human Rights Watch, 'World Report 2006: Ethiopia, Events of 2005', 1, accessed 29 September 2019, https://www.hrw.org/world-report/2006/country-chapters/ethiopia.

124 The CUD (ቅንጅት (Kinjit) in Amharic) was a coalition of four parties: The All Ethiopia Unity Party (AEUP), the Ethiopian Democratic League (EDL), the United Ethiopian Democratic Party-Medhin (UEDP-Medhin), and the Rainbow Party (Movement for Democracy and Social Justice).

> and peasant associations, and other persons who have associated with the commission of said offenses, must be brought to trial.[125]

It was not immediately clear why the TGE decided to prosecute Dergue. In a manner that mirrored the TGE's decision to prosecute, the FDRE Constitution prohibited the possibility of granting amnesty for gross human rights violations. Article 28 of the constitution reads:

> Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as *genocide*, summary executions, forcible disappearances or torture shall not be barred by statute of limitations. Such offences *may not be commuted by amnesty* or pardon of the legislature or any other state organ.[126]

By prosecuting Dergue and outlawing amnesty for gross human rights violations in its constitution, Ethiopia wanted to establish a new political order that disassociated it from its past and the experiences of some countries in Africa and Latin America. As highlighted in the *travaux préparatoires* of the constitution, the Constitutional Commission discussed in 1993 and 1994 that:

> [I]n some countries in Africa and Latin America a culture of impunity has developed in which dictator governments remain unaccountable for the atrocities they perpetrated against their own people, which encourages a recurrence of similar atrocities. It was also stated during the transitional period that amnesty should not be granted in relation to offences involving violations of human rights.[127]

The SPO's prosecution of Dergue-era crimes took almost two decades, from 1992 to 2010. Including the Federal Supreme Court, which had served as the court of appeal, Dergue trials were conducted by seven courts all over Ethiopia. The Federal High Court was the one that oversaw the most critical cases, such as the cases of *Colonel Mengistu et al.* and *Captain Legesse Asfaw et al.* Five other regional supreme courts (in Oromia, Amhara, Tigray, Harari, and SNNPRs) have adjudicated various crimes committed during Dergue regime.

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125 Wijkman, *European Parliament Delegation to Observe Federal and Regional Parliamentary Elections in Ethiopia*, Preamble, para. 4.

126 The Constitution of FDRE, Article 28(1) [Emphasis added].

127 The discussion did not mention the specific countries to which it was referring. See 'The Minutes of the 84th Ordinary Session of the Constitutional Committee (24 February 1994)' in The Constitutional Commission, 'Minutes, Vol. II: Ordinary Sessions No. 51 – No. 88 held from 2 November 1993 to 3 April 1994' (Addis Ababa: FDRE House of Federations, Unpublished), 199. Translation by the author. The original (Amharic) version reads:

የሚለውበኢትዮጵያሁኔታእንዲሁምበአፍሪካበላቲንአሜሪካሀገሮችአምባገነንግዛቸውበህዝብላይግፍከፈጸሙበኋላበሰሩትወንጀልተጠያቂሳይሆኑየሚቀሩበትሁኔታአየተለመደናለተመሳሳይድርጊትየሚጋብዝመሆኑንበሽግግርሩወቅትምሱብአዋሙበትንከተመለከተለተሰሩወንጀሎችምህረትየማይሰጥመሆኑተገልጿል።.

The SPO prosecuted both international and domestic crimes. As for *international crimes,* the SPO identified: i) the crime of genocide under Article 281 of the Penal Code,[128] ii) war crimes against the civilian population pursuant to Article 282 of the Penal Code,[129] and iii) provocation and preparation to commit, permit or support acts that constitute genocide and war crimes in violation of Article 286 of the Penal Code.[130] By genocide, the SPO referred to genocide against political groups, something often coined by social scientists as *politicide*.[131]

The *domestic crimes,* on the other hand, included: murder (Article 522 of the Penal Code),[132] grave wilful injury (Article 538 of the Penal Code),[133] unlawful arrest or detention (Article 416 of the Penal Code),[134] abuse of power (Article 414 of the Penal Code),[135] aggravated property damage (Article 654 of the Penal Code),[136] and rape (Article 589 of the Penal Code).[137] In the large majority of its cases, the SPO prosecuted domestic crimes mainly as alternative charges to genocide. There were also instances in which it prosecuted domestic crimes as independent and additional charges.[138] Yet some SPO cases have dealt exclusively with purely domestic crimes committed with no apparent political motivation and without any connection to genocide or war crimes.

By the time Dergue trials were completed in 2010, 5,119 individuals had been indicted, out of which 3,583 were convicted and punished (Tab. 1). Nonetheless, it should be noted here that many officials and affiliates of the Dergue regime were not punished, because they had already managed to leave the country. Given that extradition efforts were unsuccessful for several reasons, Ethiopian courts had to proceed with a huge number of in absentia trials. 2,188 of 5,119 defendants were tried in their absence.[139] Out of the 73 high-ranking Dergue officials prosecuted in *Mengistu et al.*, 20 were prosecuted in absentia, including Colonel Mengistu Hailemariam, who

128 *Colonel Mengistu Hailemariam et al.* (Revised Indictment), supra note 87, 7–8.

129 See FHC, *SPO vs. Legesse Asfaw et al.* (Indictment), 3 May 2001, File No. 03116.

130 Provocation and preparation to commit, permit or support acts of genocide was the first ever charge brought by the SPO against Dergue officials (106 individuals). See *Colonel Mengistu Hailemariam et al.,* (Revised Indictment), Count 1.

131 See B. Harff and T. R. Gurr, 'Victims of the State: Genocides, Politicides and Group Repression since 1945,' *International Review of Victimology* 1(1) (1989): 23–41.

132 See FHC, *SPO vs. Colonel Mengistu Hailemariam et al.* (Revised Indictment), 87.

133 See FHC, *SPO vs. Colonel Mengistu Hailemariam et al.* (Revised Indictment), 87.

134 See FHC, *SPO vs. Colonel Mengistu Hailemariam et al.* (Revised Indictment), 87.

135 See FHC, *SPO vs. Colonel Mengistu Hailemariam et al.* (Revised Indictment), 87.

136 See, for instance, OSC, *SPO vs. Brigadier General Tedela Desta et al.* (Initial Indictment), 20 September 1999, File No. 28/85.

137 See the Special Prosecution Office, 'Annual Report to the House of Peoples' Representatives of Ethiopia" (Addis Ababa, 04 February 2010), 10. [Hereinafter: SPO's Annual Report to the HPR (2010)].

138 See SPO's Annual Report to the HPR (2010). For example, counts 210 (unlawful arrest and detention) and 211 (abuse of power) were independent charges as ordinary crimes.

139 See *Dem Yazele Dossie*, 444.

fled to Zimbabwe a week before the total downfall of his regime.[140] Of the 23 defendants in war crimes trials (*Capitaine Legesse Asfaw et al.*), only five were present in court.

Tab. 1: Summary of number of persons indicted, convicted, and acquitted in Dergue trials

Persons indicted	convicted	acquitted	convicted in absentia	acquitted in absentia	Overall conviction rate
	3,583	1,536	1,308	880	69.9 %
	Sentences imposed				
	Death	**Life**	**15 to 25 years**	**≤ 15 years**	**Minimum Sentence**
5,119	52	182	921	2,028	2 years

According to the FDRE Constitution and the criminal code, the death penalty is reserved for serious/grave criminal offences, and its pronouncement depends on the individual circumstances of the offender. Of the death sentences, 18 were pronounced by the Federal Supreme Court against members of Dergue's Standing Committee, the regime's highest executive organ, and Colonel Mengistu Hailemariam.[141] Also, Legesse Asfaw was sentenced to death for ordering the indiscriminate bombing of undefended localities and towns in 1983 and 1988, resulting in the death of more than 10,000 civilians in Chila, Wukro, and Hawzien. Nonetheless, none of the 52 convicts in Dergue trials was executed. Although Ethiopia is not an abolitionist state, it seems to have limited the enforcement of death sentences to offences in which the perpetrators were top-ranking military or government (Ethiopian or foreign) officials.[142]

In connection to criminal prosecutions, it is worth noting that the TGE felt compelled to establish the SPO as the only transitional justice institution and ensure a process that chose prosecution as the only official means of responding to past abuses. The reason for this was not so clear. Various factors were mentioned on different occasions to explain the TGE's motivations in bringing all Dergue officials to justice. As discussed further below, some of the alleged factors included the TGE's conviction to uphold an international obligation to prosecute atrocity crimes, the TGE's desire to drive political legitimacy, and Dergue's total defeat.

140 See FHC, *SPO vs. Colonel Mengistu Hailemariam et al.* (Trial Judgment), 77.
141 See *Colonel Mengistu Hailemariam et al.* (Appeals Judgment), 95.
142 See Tadesse S. Metekia, 'Punishing Core Crimes in Ethiopia', 160 – 190.

2.2.1 The Alleged Commitment to Implement the Obligation to Prosecute

Following the downfall of Dergue, international organizations communicated to the EPRDF that there was an international duty to prosecute the crimes committed in Ethiopia.[143] Nonetheless, the TGE did not explain its decision to prosecute Dergue from the perspective of a duty to prosecute until some years later. But in 1994, the SPO stated that 'implicit in the decision to prosecute was the acceptance of the TGE of its international and national legal obligations to investigate and bring to justice those responsible for Dergue-era crimes'.[144]

2.2.2 The Absence of an Actual or Perceived Adversary

Unlike several other countries where the outgoing and incoming governments had their own bargaining powers for negotiating terms of the transition, the 1991 revolution in Ethiopia resulted in a total defeat of Dergue. As a result, the country had the chance to begin the new era on the terms of the incoming powers alone. Ethiopia in 1991 differed from how countries such as Chile or Argentina dealt with their sea-changes around the same time. In Chile, General Augusto Pinochet Ugarte, under whose control the military power remained until 1990, explicitly warned the new government not to ignore the 1978 amnesty[145] and 'not to touch a single hair of a single soldier'.[146] Likewise, in Argentina, where the shift in power balances played a significant role in shaping the country's search for justice, the military actively resisted accountability by enacting a blanket self-amnesty law for crimes committed between 1973 – 1982.[147] Dergue was totally defeated by the EPRDF forces and it was already noted in 1991 that Dergue was nothing more than a harmless shell which had no bargaining leverage of any kind in the Ethiopian transition.

Ethiopia was not in a similar position to South Africa in its changes either, where the introduction of amnesty in the truth and reconciliation process was partly needed so as not to endanger the economic interests of the country as the 'overwhelming economic power resided in a few major business groupings with huge bargaining

143 Amnesty International and Human Rights Watch both called upon the EPRDF and the TGE to comply with their international obligation and to bring to trial those responsible for brutal offenses during Dergue era. See Human Rights Watch 'Evil Days,' 374; See Amnesty International, 'Ethiopia: End of an Era of Brutal Repression – A New Chance for Human Rights' (Amnesty International, 18 June 1991), 46 – 48, accessed 20 December 2019, https://www.amnesty.org/en/documents/afr25/005/1991/en/.

144 SPO Report (1994), 559.

145 Decree Law 2.191 of April 1978 (Chile).

146 See SPO Report (1994), 454.

147 For a detailed discussion, see Par Engstrom and Gabriel Pereira, 'From Amnesty to Accountability: Ebb and Flow in the Search for Justice in Argentina', in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Fancesca Lessa and Leigh A. Payne (Cambridge: Cambridge University Press, 2012) 97 – 122.

power vis-à-vis the state'.[148] Dergue's adoption of socialism, the political and economic ideology implemented by the regime as a groundwork to transform the country into communism, resulted in its control of the entire state economy. In effect, both military and economic power were in the hands of Dergue. As such, as soon as Dergue officials were defeated on the military front, the regime lost every sort of control it had over the country's economy.

2.2.3 The TGE's Search for Political Legitimacy

Tronvoll, a Norwegian scholar on peace and security in the horn of Africa, noted that Dergue trials were designed to serve as rituals to disconnect the current regime from the past and 'to define a new starting point – a year zero – for democracy'.[149] Allo and Tesfaye argued that Dergue trials represented the beginning of a series of 'juridico-political' engagements aimed at 'legitimizing and rationalizing politics of repression and elimination' that had been ongoing in Ethiopia.[150] Indeed, it is possible that the decision to prosecute Dergue was reached by the EPRDF to acquire political legitimacy. At the time, there were clear indicators regarding the EPRDF's credibility deficit both internationally and internally.

Internationally, the new forces were being perceived as pro-Soviet, which, at that time, could entail a legitimacy crisis with serious repercussions for the international recognition of governments. Internally, the EPRDF was hardly considered a legitimate government, and the TGE lacked a peaceful start. The transitional period, by and large full of political unrest, was made legitimate by means of conflict with the OLF, the second major group in the TGE.[151] Accordingly, the decision to hold Dergue officials accountable for the crimes of the old regime might have been adopted to ease the legitimacy challenges of the new government.

Although the above factors may explain why the TGE had to reach a policy decision to bring Dergue to justice, it should be noted that they do not explain why the SPO appeared as the only transitional justice institution in post-1991 Ethiopia. As discussed further below, there were no officially established institutions that could complement the works of the SPO by providing reparation to the victims or engaging in efforts aimed at healing the country through reconciliation.

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148 See for instance, *Report of Truth and Reconciliation Commission of South Africa, V. IV* (1998), para. 48, accessed 20 December 2020, http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf 20.12.2020). See also B. Hamber and S. Kibble, *From Truth to Transformation: The Truth and Reconciliation Commission in South Africa,* Catholic Institute for International Relations, February 1999, accessed 20 December 2020, https://www.csvr.org.za/from-truth-to-transformation-the-truth-and-reconciliation-commission-in-south-africa/.

149 See Tronvoll, 'The Quest for Justice or the Construction of Political Legitimacy,' supra note 3, 13.

150 See Aawol Allo and Beza Tesfaye, 'Spectacles of illegality: mapping Ethiopia's show trials,' *African Identities* 13 (2015): 279–296.

151 For a full account of the political unrest during the TGE, see Theodore M. Vestal, *Ethiopia: A Post-Cold War African State* (Westport: Preager Publishers, 1999), 1–57.

2.3 The Replacement of the Elites

Ethiopia's transition from Dergue's PDRE to the EPRDF's FDRE was a case of forced transition. Therefore, as opposed to the case of negotiated transition, the incoming powers had the discretion to lay the groundwork for the new political order unilaterally. Dergue was a vanquished force and as such had no say in the intricacies of elite exchange in post-1991 Ethiopia. Nevertheless, at the end of the London Conference, the TPLF mentioned the possibility of involving some members of the outgoing government who were not tainted with crimes of the past in the new provisional government.[152]

From the outset of the transition, it was unequivocal that members and affiliates of the Dergue regime would not have a place in the new political administration. Measures taken by the EPRDF were directed towards ensuring absolute control over the entire state apparatus by the new forces. As envisioned in the Transitional Period Charter, elite exchange in the post-1991 political order was based predominantly on furthering two interests: removing Dergue and its affinities from political corridors and ensuring the sharing of political power among ethnic groups.

The EPRDF's determination to exclude members and affiliates of Dergue was signified, firstly, by its move to arrest more than 2,000 individuals in June 1991. Secondly, the July 1991 Addis Ababa Conference allowed participation of non-Dergue organizations only. It was attended by Workers' representatives, University Teachers' representatives, and 27 mostly ethnic-based liberation fronts, most of which were 'created by the EPRDF for the occasion'. The conference excluded long-standing groups such as the Ethiopian People's Revolutionary Party (EPRP), All Ethiopian Socialist Movement (AESM), and the Coalition of Democratic Ethiopian Forces (CODEF), because they had ideological differences with the EPRDF and also because they – and the AESM and CODEF in particular – were suspected of having collaborated with Dergue regime.[153] At the conference, a Transitional Period Council of Representatives of 87 members was established. The EPRDF took 32 out of the 87 seats of the Transitional Period Council of Representatives, while the OLF was given 12. The remaining 43 seats were allotted to the other 25 ethnic-based political organizations.

In a similar vein, the TGE was established in a manner that ensured that only non-Dergue members and organizations could assume political power. Following an agreement that some of the highest official positions should be shared among the ethnic-based political parties, Melese Zenawi of the TPLF became the president of the TGE. At the same time, individuals from other ethnic groups took other cabinet posts. Overall, the TGE was composed of eighteen cabinets of nine ethnic groups. The criticism at this time was not per se of the appointment of officials based on ethnic

152 See 'Ethiopian rebels pledge democratic rule,' *The Stanford Daily* (London, 29 May 1991), accessed 14 July 2022, https://archives.stanforddaily.com/1991/05/29?page=3&section=MODSMD_ARTICLE17#article.

153 Aaron Tesfaye, *Political Power and Ethnic Federalism*, 74.

identity but that several representatives of those ethnic-based organizations were urban intellectuals from Addis Ababa, lacking solid connections with the people they claimed to have represented.[154]

The TGE took specific measures to ensure that persons involved in the security and intelligence apparatus of Dergue would not be part of the administrative functions of the new government. In addition to demobilizing the former army and disbanding the security forces, it detained and interned more than 10,000 of them. The TGE released about 8,000 of them after reviewing their records.[155] The remaining were brought to justice together with thousands of other members and officials of Dergue regime. In a significant policy decision, the TGE suspended the entire police force that was operational during Dergue. They were made to go through screening and rehabilitation to re-join the police force together with newly trained officers.[156]

In July 1991, the EPRDF installed Grievance Hearing Committees (GHCs) in every workplace to identify and expose individuals involved in the crimes and corruption of Dergue regime. The committees had the power to investigate and dismiss individuals from work. They could also recommend detention. As for civil servants, however, the purging affected only those who were political appointees.[157]

As to the judiciary, the TGE adopted a measure in which many judges were debarred due to prior affiliation with the ousted regime.[158] This affected about half of the judges in the Supreme and High courts who were members of the WPE. In a similar approach, affiliation with the WPE was included in the SPO Proclamation as a ground for excluding an individual from becoming a special prosecutor.[159]

2.4 Reparations

Within the context of the transitional mechanism adopted in 1991, Ethiopia did not implement official schemes for reparation of victims or families and relatives of persons persecuted by Dergue. Although one of the mandates of the TGE was to provide relief and rehabilitation to mitigate the impacts of Dergue-era violence, the Transitional Period charter stated that the rehabilitation was to be provided for areas that were 'severely affected by the war, prisoners of war, ex-prisoners of war, as

154 Kinfe Abraham, *Ethiopia From Bullets to the Ballot Box: the Bumpy Road to Democracy and the Political Economy of Transition* (Lawrenceville: the Red Sea Press Inc., 1994), 25.

155 See Human Rights Watch, 'Ethiopia: Waiting for Justice: Shortcomings in Establishing the Rule of Law,' 8 May 1992, 18, accessed 28 September 2020, https://www.refworld.org/docid/45cc5f472.html.

156 Human Rights Watch, 'Ethiopia: Waiting for Justice,' 18.

157 Human Rights Watch, 'Ethiopia: Waiting for Justice,' 18.

158 Human Rights Watch, 'Ethiopia: Waiting for Justice,' 18.

159 For instance, Article 5 (3) of the SPO Proclamation states that a member of the SPO must be an Ethiopian citizen who was not a member of the Workers Party of Ethiopia (Dergue) and its security forces.

well as those sections of the population that have been forcibly uprooted by the previous regime's policy of villagization and resettlement'.[160] Accordingly, the charter did not envisage any form of reparation for the victims of political violence during the Red Terror and other Dergue campaigns.

The SPO Proclamation acknowledged that Dergue had impoverished the country's economy by plundering, illegally confiscating and destroying the property of the people as well as by misappropriating public and state property. Nonetheless, there was no mechanism put in place by the charter or any other laws to compensate the victims for the economic and moral damages they sustained. The absence of a reparation scheme might have put Ethiopia in stark contrast with the experiences of several Latin American countries where moral and material reparation was adopted to acknowledge the suffering of the victims and wrongdoing on the part of the state.

Perhaps one reason for the absence of a reparation scheme was the partisan nature of the transition in Ethiopia, where the TGE was established and ruled by a few forces engaged in armed resistance against Dergue. As a result, several non-military groups persecuted by Dergue, such as the EPRP and AESM, were not recognized or allowed by the EPRDF to attend the Addis Ababa Conference in July 1991, as noted above. Even after ascending to political power, the EPRDF acted as a party representing a specific section of the country instead of a government for the entire Ethiopian population. Yet the reality was that the State of Ethiopia failed to protect all of its citizens from gross human rights violations, which the TGE was unwilling to acknowledge fully.

The selectivity in the transitional process implied the existence of disagreement among the victims of violence in recognizing each other. The absence of a national reconciliation process, as discussed further below, that could have involved all parties and victim groups could also be a reason why the charter did not consider reparation for all kinds of victims. No meaningful development involving reparation has occurred in the post-transitional period. The 1995 constitution, which was adopted on the promise of 'rectifying historically unjust relationships', failed to guarantee the provision of reparation for victims of persecution.[161]

The absence of a relevant reparation provision in the proclamation poised the SPO to bring Dergue to justice. Victims of gross human rights violations were not significantly involved in Dergue trials except for where they served as SPO winesses. Neither the state nor the convicted Dergue officials were required by Ethiopian courts to pay even symbolic restitution to the victims of the regime's violence.

160 Transitional Period Charter, Article 14.

161 FDRE Constitution, Preamble, para. 4.

2.5 Reconciliation

At the London Conference of May 1991, Dergue attempted to discuss issues of reconciliation and amnesty with the rebel groups (OLF and TPLF). The TPLF lacked a clear policy direction concerning whether to prosecute or grant amnesty for past crimes, as was further displayed in interviews its leaders gave to journalists in London. In one interview, the TPLF hinted that Dergue officials 'might be brought to justice'.[162] In another, it was stated that the TPLF had not ruled out a blanket amnesty in case the general public wanted one to be granted.[163]

It was, therefore, with an undecided aim that the EPRDF detained Dergue officials in June 1991. The question of reconciliation was not raised and discussed at the Addis Ababa Conference of July 1991. However, the 1991 Transitional Period Charter included a provision implying, arguably, the need to adopt a reconciliation process. In its preamble, the charter highlighted the following:

> peace and stability as essential conditions of development require the end of all hostilities, the *healing of wounds caused by conflicts* and the establishment and maintenance of good neighborliness and co-operation.[164]

As there is no settled theoretical or practical approach in this regard, the charter's call on the TGE to heal Ethiopia's wounds was open to interpretation. The question is whether the nation's wounds would heal through efforts to depolarize political conflicts or prosecute alleged perpetrators. Some scholars advocate the view that prosecution, and only prosecution, can bring true healing to the wounds of a nation.[165] The experiences of countries that have dealt with atrocities of a similar nature indicate a firm belief that a nation's wounds may heal through adopting a transitional justice approach that also introduces amnesty, or a process that combines both amnesty and prosecution.

Nonetheless, the TGE took a path in which it chose prosecution over reconciliation – it established the SPO, but not a TRC. Its decision was fundamentally different from the choices made earlier by Argentina[166] and Chile[167] and later by Sierra Leone

162 See G. A. Lewthwaite, 'Rebels pledge democracy in Ethiopia: U.S.-brokered talks end in agreement after fall of capital,' *The Baltimore Sun*, 29 May 1991, accessed 27 September 2020, http://Articles.baltimoresun.com/1991-05-29/news/1991149072_1_addis-ababa-ethiopians-eprdf.

163 See B. Harden, 'Rebel leaders Pledges Coalition Government, then Free Elections,' *The Washington Post*, 29 May 1991, accessed 20 October 2020, https://www.washingtonpost.com/archive/politics/1991/05/29/rebel-leader-pledges-coalition-government-then-free-elections/a5818143-9397-470d-a1b2-b44e28e9e98d/.

164 FDRE Constitution, Preamble, para. 3. [Emphasis added].

165 See Jon Van Dyke, 'The Fundamental Human Right to Prosecution and Compensation,' *Denver Journal of International Law and Policy* 29 (2000 – 2001): 77 – 100.

166 For a detailed discussion on the choices made in Argentina regarding the crimes committed between 1976 and 1982, see Per Engstrom and Gabriel Pereira, 'From Amnesty to Accountability: Ebb

and South Africa, which included a provision on amnesty and on the establishment of TRCs to establish the whole truth and heal the wounds. The TGE did not explain why prosecution – and only prosecution – was considered an 'essential' course of action in restoring peace and stability in Ethiopia.

It is important to note that the TGE's decision to reject reconciliation altogether was reached against recommendations by international organizations such as Human Rights Watch that Ethiopia should focus on prosecuting only those most responsible.[168] Rejecting non-judicial approaches and focusing only on bringing thousands of people to justice was also a miscalculated path in terms of resources. The country had an almost unsustainable judicial infrastructure, which could not adequately address day-to-day disputes during the transitional period. Many experienced judges had fled the country during the Mengistu regime due to fear of persecution.[169]

Most importantly, there was no public participation and support behind the TGE's decision to choose prosecution over reconciliation; it was the EPRDF that formulated the choice without properly seeking the public's or victims' opinion on the matter.[170] As opposed to the TGE's initial statement that it would consider provision for amnesty if the Ethiopian public wanted that, there was no direct or indirect communication of such an opinion from the public addressed to the TGE (either in the form of a referendum or of a political debate).[171] If there was victim participation at all, Ethiopia's transitional period politics was limited to the scattered gatherings of mourners, which aimed more at finding the whereabouts of the dead or disap-

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and Flow in the Search for Justice in Argentina" in Francesca Lessa and Leigh A. Payne *Amnesty in the Age of Human Rights Accountability: Ccomparative and International Perspectives*, ed. (Cambridge: Cambridge University Press, 2012), 97–122.

167 See Supreme Decree No.355 (Chile): Creation of the Commission on Truth and Reconciliation (Santiago, 25 April 1990), accessed 28 September 2020, http://www.usip.org/sites/default/files/file/resources/collections/commissions/Chile90-Charter.pdf. According to the first paragraph of the Decree's preamble, the TRC was established considering 'that the moral conscience of the nation demands that the truth about grave violations of human rights committed in [Chile] between September 11, 1973 and March 11, 1990 be brought to trial'.

168 See Human Rights Watch, 'Evil Days: 30 Years of War and Famine in Ethiopia" (Report of African Watch, September 1991), 376, accessed 20 September 2020, https://www.hrw.org/sites/default/files/reports/Ethiopia919.pdf.

169 See Human Rights Watch, 'Ethiopia: Reckoning under the Law' (Human Rights Watch, 1 December), 19, accessed 28 September 2019, https://www.hrw.org/report/1994/12/01/ethiopia-reckoning-under-law [Hereinafter: Human Rights Watch, 'Ethiopia: Reckoning under the Law'].

170 See Demelash Shiferaw Reta, *National Prosecution and Transitional Justice: The Case of Ethiopia* (PhD Dissertation, University of Warwick School of Law, 2014), 186–7. It is, however, stated that there were demands by some of the victims and their families who organized anti-Red Terror campaigns to ask the government to bring the perpetrators to justice. See also, Dadimons Haile, *Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia* (Leuven: Leuven University Press, 2000), 59–60.

171 Haile, *Accountability for Crimes of the Past and the Challenges of Criminal Prosecution*, 59–60.

peared victims.[172] Therefore, no relevant discussions were held between victims and perpetrators, between victims and victors, or still between victors and vanquished.

On the contrary, members of Dergue expressed willingness to apologize, although this was mostly done after charges were already brought against them. It was reported that some of the Dergue officials interned by the TGE requested the government of Ethiopia adopt an approach of national reconciliation that would have offered amnesty instead of prosecution.[173] According to the request, Dergue officials stated that

> there is and will be nothing one can do to bring back the dead to life; there should be a national reconciliation. A magnanimous decision by the government is a better choice so that wounds heal and resentments fade away.[174]

As the government did not attend to their request, Dergue officials raised the same argument in court in the form of a preliminary objection to their indictment.[175] Back then, the Federal High Court rejected the claim, stating that it was not in the court's mandate to allow for amnesty or reconciliation and that the defendants' offer to apologize to the public could not discontinue an ongoing trial.[176]

Ironically, the perpetrators' request to apologize resurfaced before the Ethiopian courts even after they were convicted. In their joint response to a sentencing opinion, the convicts in *Mengistu et al.* requested the Federal High Court take into account the fact that they had asked the government to create a forum for them so that they could officially apologize to the Ethiopian public for the crimes committed during their time in power.[177] At the sentencing phase, the SPO reiterated its earlier stance on the matter and stated that the defendants were never truly remorseful.[178] The Federal High Court, however, accepted the defendants' readiness to apologize as a mitigating factor, although it was sceptical as to their sincerity.[179] It still found that the request

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172 See Bridget Conley, *Memory from the Margins: Ethiopia's Red Terror Martyrs Memorial Museum* (London: Palgrave Macmillan, 2019), 85.

173 Conley, *Memory from the Margins*, 167.

174 See Conley, *Memory from the Margins*. Translation by the Author. The original (Amharic) version reads:

ምንምበናደርግየሞቱትንመልሰንስለማናገኛቸው·በሒደ·ዊእርቅመደረግአለበት።ደምእንዲደርቅምእንዲፋቅልበሰፊነትያካተተየመንግስትወሳ-ኔየተሻለአማራጭነው·

The context and exact time of this request were not mentioned in the records of the SPO. It is possible that this was done after the decision to prosecute was already announced, as there appears no evidence of similar communication while the defendants were in detention.

175 FHC, *SPO vs. Colonel Mengistu Hailemariam et al.* (Ruling on Preliminary Objections), 10 October 1995, File No. 1/87, 94.

176 FHC, *SPO vs. Colonel Mengistu Hailemariam*, 94.

177 FHC, *SPO vs. Colonel Mengistu Hailemariam et al.* (Sentencing Judgment), 10.

178 FHC, *SPO vs. Colonel Mengistu Hailemariam*, 4.

179 FHC, *SPO vs. Colonel Mengistu Hailemariam*, 14.

for an 'apology forum' could be seen 'as a good thing for the future; meaning, as a request aimed at bringing reconciliation'.[180]

It was only three decades after Dergue's downfall that Ethiopia started to consider the importance of national reconciliation in addressing complex political problems that had kept the country under repression and violence. In that respect, a reconciliation commission was established in 2019 to 'maintain peace, justice, national unity and consensus as well as reconciliation among Ethiopian Peoples'.[181] The establishment of the commission is symptomatic of the fact that Ethiopians have been denied an opportunity to discuss and resolve their national problems amicably.

2.6 Laws Relating to Transitional Justice

Two significant laws could be seen as foundational to creating and administering transitional justice institutions/systems in post-Dergue Ethiopia: the 1991 Transitional Period Charter and the 1994 FDRE Constitution. The Transitional Period Charter is significant because it established a new beginning in Ethiopia's legal and political landscape through the establishment of the TGE. In particular, it incorporated the Universal Declaration of Human Rights and avowed respect for and the promotion of individual human rights in Ethiopia. In responding to the most critical questions that had served as a basis for the struggle against Dergue, the charter affirmed the rights of the nation's peoples to self-determination. Besides laying down the fundamentals of a new chapter in Ethiopian political order and espousing the establishment of an electoral and constitutional commission, the charter repealed all laws of Dergue that would contradict its contents and promises.

The following legislations were among the important laws enacted to enforce the Transitional Period Charter by allowing rights and activities banned during the Dergue regime. These are:

- **Ethiopian Privatization Agency Establishment Proclamation** (No. 87 of 1994)[182] as amended by the Ethiopian Privatization Agency Establishment (Amendment) Proclamation (No. 52 of 1996). Established a privatization agency with authority to select, evaluate and prepare public enterprises for privatization, a move that repealed Dergue's proclamation on nationalization or public ownership of the means of production.

180 FHC, *SPO vs. Colonel Mengistu Hailemariam*, 15.

181 Reconciliation Commission Establishment Proclamation, Proclamation No. 1102/2018, entered into force 5 February 2019.

182 Ethiopian Privatization Agency Establishment Proclamation, Proclamation No. 87/1994, entered into force 17 February 1994 accessed 20 March 2021, https://chilot.me/wp-content/uploads/2011/01/proc-no-52-1996-ethiopian-privatization-agency-establishme.pdf.

- **Political Parties Registration Proclamation** (No. 46/1993)[183] as amended by Political Parties Registration Amendment Proclamation (No. 82 of 1994).[184] Effectively ended Dergue's one-party system. Its significance is unparalleled, as it was the absence of a law providing for a multi-party system that intensified the political violence during the Dergue regime.
- **Electoral Law of Ethiopia Proclamation** (No. 64 of 1993)[185] as repealed by the Proclamation to make the Electoral Law of Ethiopia conform with the FDE Constitution.
- **Constitutional Commission Establishment Proclamation** (No. 24 of 1992).[186] This law not only solidified the suspension of the PDRE Constitution of 1987, but also guaranteed that a negotiated constitution would become a reality in Ethiopia.

By the end of 1994, elected representatives of the Nations, Nationalities and Peoples of Ethiopia ratified the FDRE Constitution.[187] The constitution is, to date, the most significant legal and political development in Ethiopia after Dergue. On the top of providing a constitutional basis for the establishment of various institutions discussed elsewhere in this study, the constitution contained two features that marked a complete departure from the legal and political aspects of the Dergue regime. These are:

- **Human and Democratic Rights:** The constitution devoted its entire chapter 3 to incorporating fundamental human rights on an unprecedented level. Besides, it provided under Articles 9 and 13 that international human rights treaties ratified by Ethiopia were above and beyond the constitution itself. In terms of ratification, which could also be considered an important development in post-1991 Ethiopia, it was in 1993 that Ethiopia acceded to the human rights covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The following year, it ratified

183 Political Parties Registration Proclamation, Proclamation No. 46/1993, entered into force 15 April 1993, accessed 20 March 2021, https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=52400.

184 Political Parties Registration Amendment Proclamation, Proclamation No. 82/1994, entered into force 28 January 1994, accessed 20 March 2021, https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=fr&p_isn=71633&p_country=ETH&p_count=171.

185 Electoral Law of Ethiopia Proclamation, Proclamation No. 64/1993, entered into force 23 August 1993, accessed 20 March 2021, https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=35190&p_country=ETH&p_classification=01.

186 Constitutional Commission Establishment Proclamation, Proclamation No. 24/1992, entered into force 18 August 1992, accessed 20 March 2021, https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=34098.

187 For details, see the Constitutional History of Ethiopia, accessed 20 March 2021, https://constitutionnet.org/country/ethiopia.

the Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment.

– **Obligation to Prosecute:** as noted in section 3.2. above, the constitution included a provision (Article 28) that gross human rights violations would not be subjected to amnesty or pardon by the government. This development was a pledge to abolish impunity as a guarantee of non-repetition of crimes like those perpetrated by Dergue.

2.7 Access to Files

As noted above, Dergue carried out its violence by employing a well-structured system of repression, in which orders to persecute members and affiliates of opposition political groups had to pass through a well-established and strict chain of command. This involved highest-ranking officials as well as local actors at the *Kebele* level. The usual procedure was well-oiled, followed clearly determined steps and was often accompanied by minutes of meetings of members of the revolutionary campaign coordinating committees. The process is deemed to have been meticulously recorded and kept – perpetrators took audio-visual records of torture sessions before they murdered their victims. Prison authorities meticulously maintained records of incarceration and executions, perhaps as proof of adherence to superior orders and campaigns to eliminate anti-revolutionaries.

Dergue's departure was so abrupt that the regime did not have the time to destroy the evidence of its well-documented violence. The incoming powers were left with unfettered access to the entire archives of Dergue. Perhaps this was one of the reasons why the TGE decided to prosecute Dergue. In a 1994 report entitled 'The Special Prosecution Process of War Criminals and Human Rights Violators in Ethiopia', the SPO announced that it 'has ten times more evidence than needed to prosecute several of the detained successfully and many of the exiles for serious criminal offences'.[188] As Engelschiøn, a Norwegian expert who assisted the SPO in the 1990s, wrote, it is doubtful if there were 'any other cases relevant to war crimes and violations of International Humanitarian Customary Law where you have such an amount of written materials as evidence'.[189] An exception to this is that the SPO lacked reliable and sufficient evidence for its war crimes cases due to Eritrea's secession and the irretrievability of military communiqués from Dergue's military base in Asmara, the capital city of Eritrea.[190]

188 SPO, 'Report of the Office of the Special Prosecutor 1994: The Special Prosecution Process of War Criminals and Human Rights Violators in Ethiopia' in *Transitional Justice: How emerging democracies reckon with former regimes; Laws, Rulings and Reports*, ed. Neil J. Kritz (Washington DC: United States Institute of Peace Press, 1995), 559 – 574.

189 SPO, 'Report of the Office of the Special Prosecutor 1994,' 26.

190 SPO, 'Report of the Office of the Special Prosecutor 1994,' 432.

However, accessing files could be a strenuous exercise for researchers, academicians, and journalists. After the SPO completed its prosecution in 2010, its records were transferred to an unknown location on the grounds of national security – and became inaccessible to the public. In Addis Ababa, although the library of the House of Peoples' Representatives maintains a collection of the old laws and documents not destroyed during the military transition in May 1991, the library grants only minimal permissions to photocopy or scan its collections. No specific library provides complete access to the files of Dergue.

Similarly, documents relating to the trials of Dergue are not easily accessible. The cases are not readily available because Ethiopia lacks official gazettes that publicize court judgments,[191] as already noted by commentators who have attempted to include a more elaborated discussion on Ethiopian trials.[192] Where access is granted through official channels and institutional support, locating some of the documents in court archives requires even more time, as files were often misplaced or moved from their alleged original locations, and no one would be there to assist. In addition, a language barrier, in particular with respect to international commentators, may have isolated the historical, political, and legal aspects of the transitional justice in Ethiopia from being exposed to a comprehensive critique.[193]

Concerning records and archives, it should be pointed out here that Ethiopia has a National Archives and Library Agency established as an autonomous organ under Proclamation No. 179/1999.[194] The National Archives and Library are located in Addis Ababa and are open to researchers and historians. The objective of the establishment of the National Archives and the Library Agency is to collect, systematically organize, preserve, and make the information resources of the country available for study and research purposes. One of the mandates of the National Archives was to acquire and preserve records of defunct government offices or institutions as well as archives without owners.[195] Nonetheless, whether the SPO has transferred the thousands of pieces of documentary evidence it has collected to support its case against Dergue officials is not clear.

191 It was only in 2005 that a law was enacted to impose on the Federal Supreme Court an obligation to publish binding decisions of its cassation bench. See Federal Courts Proclamation Re-Amendment Proclamation, Proclamation No. 454/2005, Article 2 (1), para. 2.

192 See Cherif Bassiouni, *International Criminal Law: International Enforcement* ³(Leiden: Martinus Nijhoff Publishers, 2008), 311.

193 Firew Tiba, 'Mass Trials and Modes of Criminal Responsibility for International Crimes: The Case of Ethiopia' in *The hidden histories of war crimes trials*, ed. Kevin John Heller and Gerry Simpson (Oxford: Oxford University Press, 2013), 310 – 311.

194 Ethiopian National Archives and Library Proclamation, Proclamation No. 179/199, entered into force 29 June 1999.

195 Ethiopian National Archives and Library Proclamation, Proclamation No. 179/199, Article 8 (4).

2.8 Memorial Sites

Memorial sites commemorating the violence of Dergue regime took two categories – i) memorial sites for victims and ii) armed struggle memorials. A closer look at the nature of installed commemorative symbols indicates that the country paid far better attention to commemorating the armed struggle than the victims. Memorial sites for victims of Dergue are relatively very few and have resulted from efforts made by families of victims.

2.8.1 Memorial Sites for Victims

(i) The Holy Trinity Memorial for Early Martyrs

Immediately after the downfall of Dergue, families of victims had engaged in various efforts to locate and exhume the bodies of their loved ones for reburial. Most of the notable exhumations were conducted before the TGE made any significant policy decision regarding the victims or crimes of Dergue. In Addis Ababa, victims' families exhumed the bodies of the 59 officials buried in mass graves at Karchale prison. The families also exhumed other officials and dignitaries whom Dergue executed in July 1978. Bodies of 68 martyrs were reburied at the Holy Trinity Cathedral in Addis Ababa, where a memorial cemetery was built by the victims' families on 26 July 1992. The monument contains profiles of the victims and is open to visitors. Occasionally, families of the victims gather to commemorate the martyrs. The most recent commemoration visit took place on 24 November 2020, on the 46th anniversary of the 1974 summary execution.

(ii) The Memorial Stone

The first effort to honour victims of the violence during (mainly) Dergue's Red Terror campaign was announced on the third anniversary of the TGE on 28 May 1994, when a memorial stone was laid at Meskel Square in Addis Ababa. In highlighting its importance, the late Melese Zenawi, president of the TGE, stated that 'we lay this memorial stone in memory of those who were massacred while fighting for democracy and justice.'[196] The memorial stone was evidently not meant to serve as a permanent monument but as a foundation for a future memorial site. It was just a small rectangular stone placed in front of the Addis Ababa Museum.

Nonetheless, nothing has been added to the memorial stone to make it a visible reminder of the past. It has become a stone forgotten in the dust by the side of the street. By contrast, monuments previously erected in Addis Ababa have maintained a conspicuous appearance, with ample open space designated to each. Examples include the 28-metre high *Yekatit 12* Monument commemorating a massacre committed

196 Conley, *Memory from the Margins*, 85.

by Italian forces and a 50-meter-high obelisk memorial to Dergue's 1977 war to quell Somalia's invasion.

(iii) The Red Terror Martyrs' Memorial Museum (RTMMM)

The second and most significant memorial site in Addis Ababa is the Red Terror Martyrs' Memorial Museum (RTMMM), built next to the memorial stone in 2010. The RTMMM resulted from a non-governmental initiative by the Association of Red Terror Survivors, Families, and Friends, a civic society established on 15 September 2003. Its construction was funded by private donations collected through fundraising events organized by members of the association. Half of the contribution, 7,000,000 Ethiopian Birr, came from Sheik Mohammed Hussein Al Amoudi, the wealthiest resident in Ethiopia.[197]

The RTMMM serves as a memorial to the victims who died and were tortured during the Red Terror. Despite its relatively small size, torture instruments, skulls and bones, coffins, bloody clothes and photographs of victims are displayed in the museum. One of the shortcomings of the museum is that it was not established with a clear definition of who would count as a victim. The vast majority of those considered victims by the RTMM are members of the EPRP, a phenomenon that might raise concerns of representation regarding other victim groups.

(iv) African Union Human Rights Memorial (AUHRM): Alem Bekagn

In 2008, Chinese-funded headquarters expansion was begun for the African Union (AU) on a site that used to host Alem Bekagn, the most notorious wing of the central prison, Kerchele, built by Haile Selassie in the early 1920s. Alem Bekagn (literally, 'farewell to the world') was used by Dergue as an incarceration centre for members of opposition political groups and as a torture chamber. It was also where the 59 officials of the Haile Selassie regime were summarily executed on 24 November 1974. The AU Commission was criticized for expanding its headquarters into a place where many had been killed and tortured.

Prompted by such criticism, and also with a view to establishing a broader memorial for atrocities committed in various places in Africa, the AU Commission started implementing a plan already included in its resolution of 7 April 2004. The resolution promised on the occasion of the tenth anniversary of the genocide in Rwanda to establish a human rights memorial for the victims of the Rwandan genocide and the Red Terror in Ethiopia.[198] AU's Human Rights Memorial Project (AUHRM) is meant to manifest the duty to remember, provide recognition for the victims, and

197 Conley, *Memory from the Margins*, 142.

198 For details see Alex de Waal, 'AlemBekagn: the African Union's accidental human rights memorial,' *African Affairs* 112/447 (2013): 191–215.

constitute a place of mourning and public education. In addition to the Red Terror memorial, it comprises memorials on the Rwandan genocide, apartheid and slavery. Nonetheless, the AU Commission's Red Terror memorial is, in reality, limited to publishing brief notes and stories of survivors of the Red Terror on its web page.[199] Only a small monument is placed inside the AU Commission to remember Alem Bekagn.

2.8.2 Armed Struggle Memorials: Victims or Victors?

Two somehow interrelated forms of violence could characterize the persecution during Dergue era. The first took the form of violence perpetrated by both civilian and military officials against the civilian population in the absence of armed conflict. This included the Red Terror and other campaigns of violence that Dergue undertook to eliminate members of opposition political groups in cities and towns across the country. The second form of violence was the one that had a direct nexus to the several protracted armed conflicts between Dergue and the rebel forces. The most formidable rebel group was the EPRDF, which overthrew Dergue in collaboration with the OLF and EPLF. The EPRDF, which has ruled Ethiopia for the past three decades after the downfall of Dergue, was a coalition of three organizations: the TPLF, the Amhara National Democratic Movement (ANDM) and the Oromo People's Democratic Organizations (OPDO). To commemorate their armed struggle and victory against Dergue, the three groups have created armed struggle memorials in the respective regions they represented.

(i) Tigray Martyrs' Memorial Museum and Monument

The Tigray Martyrs' Memorial Museum and Monument (TMMMM), built to commemorate the TPLF's struggle against Dergue, was the first to open in 1995. TMMMM, which loomed large at the centre of Mekelle, the Capital of the Tigray region, was claimed to have been funded through private donations. Each TPLF soldier has donated four months' salary to make the memorial a reality. In addition to the museum and a towering monument, a memorial flame was placed on the ground at the centre of the monument to commemorate the 22 June 1988 massacre of Hawzien.

(ii) Amhara Region People's Martyrs' Memorial Monument and Museum

A decade after the TMMMM was built and opened to the public, the Amhara Regional Government decided in 2006 to finance a similar memorial site in honour of the ANDM soldiers and the peoples of the Amhara Region who fought against the brutal Dergue regime. The Amhara Region People's Martyrs' Memorial Monument and Museum was opened in 2009 in Bahir Dar, the capital of the Amhara regional state. The

199 Accessed 20 March 2021, http://alembekagn.org/au-memorials/106-the-Red Terror-memorial.

memorial site was built on the banks of the river Nile and hosted an amphitheatre, museum, library, art gallery, monument, meeting halls, and cafeteria.

A statue at the memorial site was demolished in December 2020 by the decision of the Amhara regional government in Bahirdar.[200] The statue of a warrior on horse with head bowed was regarded as a TPLF-installed memorial that does not reflect the history and psychology of the Amhara people.

(iii) Oromo Martyrs' Memorial Museum and Monument: Unfinished

In 2004, the Oromia regional state opened a memorial site in Adama, a city near the regional capital Finfinne (Addis Ababa). The site has a similar plan to the memorial sites in Bahir Dar and Mekelle. The Adama memorial, intended to honour all Oromo who participated in the struggle against Dergue, was funded by the OPDO. Except for the monument, which was designed to depict the people's struggle for freedom and to preserve their culture for the future, most of the memorial site is not ready for use. A planned museum has not been finished. Some of the rooms have been left for use as a dormitory by regional security forces.[201] Given that the OPDO is considered a latecomer to the struggle against Dergue and that its participation in the EPRDF coalition led to the exclusion of the OLF (by far the oldest organization in the struggle of the Oromo) from the political space during the transitional period, it is doubtful whether the Oromo people have seen the Adama memorial site as something that represents their struggle against Dergue.

2.9 Commemorative Events

No officially recognized regular commemoration days or events are established in Ethiopia for remembering the victims of the Dergue regime. There are no dates designated for commemorating the beginning or the end of the Red Terror campaign, the Huwzien massacre of 22 June 1988, the May Day massacre of 1977, or the summary executions of 4 November 1974. Overall, public holidays in Ethiopia do not emphasize the campaigns of persecution and the victims of Dergue.

Even the Ethiopian Orthodox Church (EOC) has not designated a commemorative day to remember the misery and death of its patriarch Abune Tewoflos at the hands of Dergue. This silence of the Church is paradoxical given its previous tradition of commemorating massacred patriarchs. For instance, the EOC has imputed sainthood to Abune Petros, a patriarch murdered by the Italian army in Addis Ababa on 29 July 1936, and built a church in his name.

200 Accessed 20 March 2021, https://www.ethio-telecom.net/watch.php?vid=be8b392e1.
201 Conley, *Memory from the Margins*, 85.

Nonetheless, two major commemorative dates have links to the transition from Dergue to the FDRE. The first is the *Downfall of Dergue*, which is celebrated on 28 May every year. Government officials make speeches and hold other events to highlight the EPRDF's victory over Dergue forces. Ironically, the 28 May commemoration emphasizes the lengthy and bloody civil war in a manner that appears to afford less significance to the victims of the Red Terror and other campaigns of violence with no direct nexus to the armed conflict between Dergue and the rebel forces.

The second memorial day is *Nations, Nationalities and People's Day*, which has been celebrated every year on 8 December, the date on which the FDRE Constitution of 1994 came into force, guaranteeing the rights and equality of Ethiopia's nationalities and peoples. On this day every year, a different regional state or autonomous-city administration hosts a festival in which ethnic groups share their culture through live performances to display the diversity and unity of Ethiopia's peoples and groups. This celebration is believed to reflect the FDRE's marked departure from the political activities carried out during the Dergue regime, where the diversity of ethnic groups and the self-administration of regions were not recognized.

2.10 Transitional Justice Institutions

As noted above, Ethiopia's transition from the Dergue regime was spearheaded by the TGE, which was in turn controlled by the TPLF-EPRDF. The TPLF was preoccupied with consolidating its grip on power. It was clear from the circumstances of the time that it did not make establishing transitional institutions its priority. For instance, no international or national commission of inquiry, be it ad hoc or permanent, was established by the TGE to examine the abuses of the Dergue regime. The need to establish a commission of inquiry was brought to the attention of the TGE in September 1991 by African Watch and Amnesty International, an alert which the TGE ignored.[202]

As also discussed above, under sections 3.4. and 3.5, the TGE was unwilling to establish a reparation or reconciliation commission. The most significant transitional justice institution established by the TGE was the SPO. Established with a primary responsibility of prosecuting Dergue for crimes committed from 1974 to 1991, the SPO had, in reality, to act as both police and prosecution department in carrying out investigations into and prosecutions of Dergue-era crimes.

In addition, the SPO had the secondary responsibility of establishing the historical truth regarding the atrocities committed during the Dergue regime. According to paragraph 5 of the preamble of the SPO Proclamation, the SPO was responsible for 'recording for posterity the brutal offenses and the embezzlement of property perpe-

202 See Thirty Years of Evil Days, supra note 15, 377–379; Amnesty International, 'Ethiopia: End of an Era of Brutal Repression,' 47.

trated against the people of Ethiopia'.[203] This secondary mandate was, as the proclamation added, demanded by the 'interest of just historical obligation'.[204]

In the absence of any guidance in the proclamation, the SPO seems to have understood its second mandate as limited to documenting and reporting a 'judicial truth,' i.e. a truth uncovered through judicial proceedings. Given that promising non-prosecution in the form of an amnesty was off the table, the TGE must have aimed to reach the truth through judicial proceedings. Nevertheless, the SPO later on dropped the truth-reporting task itself, as it focused on prosecution alone.[205] *Dem Yazele Dossie* (literally, 'blood-soaked dossier') is the only report that the SPO published for public access just before its closure in 2010.[206] Even then, the report offered a highly selective presentation of crimes committed only by the highest-ranking Dergue officials.

In addition to the SPO, Ethiopian courts have played a vital role in the effort to bring perpetrators to justice. The TGE did not establish a specialized tribunal. The trials had to be conducted using regular courts. Initially, it was the Federal High Court (FHC) that was given the jurisdictional mandate to see Dergue-era cases. Later on, and as the prosecution expanded to cover crimes all over the country, the FHC had to delegate its mandate to regional supreme courts. As a result, five regional supreme courts were involved in Dergue trials. These were:

1. the Supreme Court of the Amhara Regional State (in Bahirdar and Dessie),
2. the Supreme Court of Harari Regional State (in Harar),
3. the Supreme Court of Oromia Regional State (in Assela and Jimma),
4. the Supreme Court of the Regional State of Southern Nations, Nationalities and People (in Hawassa), and
5. the Supreme Court of Tigray Regional State (in Mekelle).

The Federal Supreme Court served as a court of appeal for cases seen by the five regional supreme courts and the FHC. Several decisions were also rendered by the Cassation Bench of the Supreme Court on questions of interpretation of the laws applied in Dergue cases.

203 See Proclamation Establishing the Office of the Special Prosecutor: Proclamation No. 22/1991, entered into force 8 August 1992, Preamble, para. 5, accessed 20 March 2021, https://www.usip.org/sites/default/files/Ethiopia-Charter.pdf.

204 See Proclamation Establishing the Office of the Special Prosecutor: Proclamation No. 22/1991.

205 Pricsilla Hayner, 'Past Truths, Present Dangers: The Role of Official Truth Seeking in Conflict Resolution and Prevention,' in *International Conflict Resolution after the Cold War*, ed. Paul Stern and Daniel Druckman (Washington DC.: National Academy Press, 2000), 338–382, 349.

206 See *Dem Yazele Dossie*.

2.11 Victims' Associations

The downfall of Dergue saw several informal gatherings of families of victims. In the early 1990s, victims' families held informal discussions in what was then referred to as Red Terror victims' committees. The committees did not form formal associations and focused primarily on locating the disappeared and exhuming the bodies of their loved ones. They were mostly gatherings of mourners and they did not attempt to advocate on behalf of the victims in terms of justice or truth and memory. As noted above, however, some families of victims managed to establish a permanent memorial site. Notably, the above-mentioned Holy Trinity Memorial for 68 victims executed by Dergue between 1974 and 1978 resulted from efforts made by families of the victims.

On 15 September 2003, a more formal victims' association was officially established in Ethiopia: the Association of Red Terror Survivors, Families, and Friends, registered as a civil society organization in Ethiopia. Its members include victims of those who survived the violence, families of victims (parents, siblings, and children of those who suffered and died) and friends (those who support the association's goals and programs). The association has managed to take visible steps to honour the victims of Dergue and support post-Dergue efforts in building democratic governance in the country.

As for memory and remembrance, the RTMMM is a result of the association's efforts. The association has not just planned and funded the RTMMM but has also been in charge of running and maintaining it. The association has also attempted to collaborate with individuals to establish access to documents from Dergue regime, although this has not been successful.

To develop a political culture that entertains a diversity of ideas, as opposed to what was the case during Dergue regime, the Association of Red Terror Survivors, Families, and Friends was involved in pre-election activities. It managed to host a discussion between the ruling party, the EPRDF, and opposition groups in 2005. The association tried to influence political parties into making official pledges to accept election results and avoid resorting to violence. Unfortunately, the effort was not successful, as the aftermath of the 2005 election exhibited bloody violence perpetrated by government forces and supporters of opposition groups.

2.12 Measures in the Educational System

Influenced by education advisors from sister states such as the Soviet Union and East Germany, education under Dergue was highly politicized and used for ideological indoctrination, instilling socialist ideals in all students. Undeniably though, the Dergue regime managed to decrease the national illiteracy rate despite its policy of persecution and the protracted nature of the armed conflict. The downfall of Dergue has brought about notable changes in Ethiopia's education system.

In 1994, the TGE enacted Ethiopia's first post-Dergue education sector reform, the Education and Training Policy (ETP). The policy reflected the shortcomings of the education system during Dergue and comprised specific objectives that were believed to direct the country towards achieving the goals of the 1991 revolution. As noted in the ETP, the education reform was required to chart the right direction to overcome 'the complex problems into which the country has been plunged by the previous dictatorial, self-centred and vain regimes'.[207] Accordingly, the ETP emphasized that the specific objectives of education in the new Ethiopia are, among others,

- to provide education that promotes democratic culture, tolerance and peaceful resolutions of differences and that raises the sense of discharging societal responsibility.
- to provide education that can produce citizens who stand for democratic unity, liberty, equality, dignity and justice and who are endowed with moral values.
- to recognize the rights of nations/nationalities to learn in their own language.

In terms of expanding school projects, the first thing Ethiopia did was repeal Dergue's proclamation prohibiting private schools. In all the regions, a system has been put in place whereby private investors are offered land for free or at a nominal price to build schools. In major towns and cities, private investors have opened several kindergartens, primary, secondary, technical and vocational schools, as well as institutions of higher education.[208]

One of the major curriculum developments in post-Dergue Ethiopia is the introduction of Civic and Ethical Education courses at all schools (primary, secondary, preparatory, and tertiary). The course was designed to enable students to know their rights and duties in society and live in equality, mutual respect and trust with their fellow citizens.[209] Efforts were made to make civic and ethical education different from political education during Dergue regime. From secondary school onwards, the course focuses on teaching the principles of the Ethiopian constitution and the human and democratic rights of Ethiopia's nations, nationalities, and peoples. In effect, the course was meant to create civic awareness regarding the country's political transformation from the brutal Dergue regime to the FDRE government with guarantees of democracy.

Teaching human rights more comprehensively, in addition to a brief introduction on human rights in civic and ethical education courses, is at least in theory meant to be accomplished through the work of the Ethiopian Human Rights Commission and the law schools. The former was, in fact, established with the objective of educating

207 See The Education and Training Policy and Its Implementation, Ethiopian Ministry of Education, Feb. 2002, 68.

208 See The Education and Training Policy and Its Implementation, Ethiopian Ministry of Education, Feb. 2002, 68.

209 The Education and Training Policy and Its Implementation, Ethiopian Ministry of Education, Feb. 2002, 33 – 34.

the public to raise their awareness of human rights, which it would undertake in addition to its two other purposes: ensuring that human rights are protected, respected and fully enforced and ensuring that necessary measures are taken where they are found to have been violated.[210]

Ethiopian law schools have a nationally harmonized curriculum for their undergraduate programme in law, of which human rights law comprises one of the core courses.[211] Nonetheless, the focus is predominantly on foundations and principles of international human rights law, with a discretionary reference to human rights abuses that occurred during Dergue regime. No specific course on Dergue-era crimes has been designed or included in the curriculum of the law school, although Ethiopian courts have adjudicated Dergue-era crimes in a process that took almost two decades, 1992 – 2010. Neither the human rights law course nor the criminal law course discusses the scope and nature of crimes committed by Dergue.

2.13 Coming to Terms with the Past through the Media

The very first article of the Transitional Charter that established the TGE in 1991 guaranteed that every individual shall have freedom of expression – a fundamental shift from the situation in Dergue era. Dergue violently suppressed opposition and independent opinions and publications, and newspapers and mass media were turned into official propaganda organs, often with the help of Soviet media trainers. The TGE liberalized the press like never before in Ethiopian history. It issued Press Proclamation No. 341/1992 on the ground that a free and independent press is a fundamental precondition of democracy. Within the five years following the establishment of the TGE, over 200 newspapers and 87 magazines became operational in Ethiopia.

Nonetheless, the promises of the transitional period have not been kept. The EPRDF kept state media under party control and did not transform them into public media. It also failed to allow the state-owned media to become independent. Although the country issued a Broadcasting Proclamation in 1999 to allow for the establishment and running of commercial stations, it was only in 2006 that the first two private radios were issued licenses on the grounds that the companies were seen as sympathetic or aligned to the ruling party. The EPRDF put community radio stations under close watch, let alone private ones. The Ethiopian Press Agency (EPA), an organization run by party affiliates, runs government newspapers.

Regarding the crimes committed during Dergue era, reports were often aired on Ethiopian radio and television. As part of the legitimacy building effort, the EPRDF regularly reported on Dergue atrocities in the state media during the first years of

210 Proclamation No. 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, Article 5.

211 See National Modularized Curriculum of the LL. B Program in Laws, April 2013.

transition. The stories of the armed struggle have often been broadcast by Ethiopian Television (ETv) to depict the heroism of the EPRDF forces. Regarding the trial process, significant media coverage was given only after the whole process was completed. In a two-part documentary entitled *Findings of Human Rights Abuses in the Red Terror Era*, ETv presented to the public several episodes of torture and a brief summary of the trial's outcome concerning top-ranking Dergue officials.

State-owned media were not allowed to air diverse opinions until 2005, where in connection to the election campaign the opposition parties were granted unprecedented access to air their views using state-owned media such as Ethiopian television and radio. The press freedom honeymoon, however, ended with the 2005 post-election conflict. The Ethiopian government accused various media organizations of incitement to commit genocide and treason.[212] The situation resulted in the jailing of journalists and the shutting down of media outlets, following which the government's censorship and control became even tighter.

With access to independent media becoming limited, if not unavailable altogether, Ethiopians have started seeking and exchanging information through two alternative mechanisms: international broadcasters and social media. The international hosts with widespread acceptance in Ethiopia are the Voice of America (VOA) from Washington DC, the United States, and Deutsche Welle from Bonn, Germany. The two broadcasters have reached the larger Ethiopian public by broadcasting relatively independent information in Ethiopian languages. Al Jazeera has become the most popular international television channel among Ethiopian elites with the ability to understand English.

Social media has proved to be an indispensable means of communication for Ethiopians who would otherwise not have accessed relevant information. The recent series of protests held mainly in the Oromia region primarily resulted from social media use. As Jawar Mohammed, arguably the most prominent figure in the Oromo protests, noted in a 2018 interview with Al Jazeera, no change could have been possible in Ethiopia without social media.[213] Indeed, for the first time in Ethiopian history, protests and changes were mainly discussed and reported by the public via social media outlets such as Facebook, Twitter, and YouTube. Similar statements, albeit in a different context, were made by another opposition leader, Andergachew Tsige, who warned that he and his supporters would return to social media if the government of Abiy Ahmed would not respect the promises of the transition.

In addition to the absence of a free and independent press, the reliance on social media results from technological advancements related to smartphones and the internet. According to some reports, out of a hundred million people, the number of Ethiopians on Facebook in Afan Oromo, Amharic, English and other languages is

212 For details, see Metekia, T. S. *Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis international standards* (Leiden: Brill, 2021) 161–169.

213 The Listening Post, 'Social Media Shaping Calls for Ethiopia Political Change', *Aljazeera*, 12 Aug. 2018, accessed 4 June 2022, https://www.youtube.com/watch?v=MkNuDr4Tbxk.

more than twenty million, of which the majority access the internet from a mobile device. Recent instances show that social media has become the primary source of information in Ethiopia.

In Ethiopia, both before and after the 2018 transition, the government has aimed to control and regulate social media use. On several occasions and in different parts of the country, the internet has been shut down for as long as a month or more. In a major step taken recently, the Ethiopian parliament has issued a Hate Speech and Disinformation Proclamation,[214] which criminalizes the use of social media to incite violence and disseminate false information. The proclamation has been criticized by rights groups and the UN on the grounds that it broadly and vaguely defines social media platforms and activities, thereby threatening freedom of speech and opinion.

2.14 Coming to Terms with the Past through Art

One of the significant lexical changes that occurred in post-Dergue Ethiopian literature and everyday language relates to the use of the word ደርግ (dergue). Derived from the Geez language, 'dergue' referred in Amharic to committee or council. In 1974 'dergue' became a shortened form of the lengthy official name የጦር ሐይሎች የፖሊስ ሰራዊትና የብሔራዊ ጦር ደርግ (armed forces, police and territorial army council). The name Dergue became the most common unofficial reference to the regime until its downfall, irrespective of whether said council had changed itself into a Provisional Military Government on 12 September 1974 and established the PDRE in 1987. Dergue has become a reference used in almost all Ethiopian languages to denote the socialist government that ruled the country from 1974 to 1991. With the regime's downfall, the word 'dergue' has vanished from Ethiopian vocabulary in the sense that no written or verbal language uses the word to refer to its original meaning, council or committee. It has become a taboo and an expression used only if one needs to mock an undemocratic person/system or despise and condemn a despicable action that is dictatorial or violent.

After coming to power in 1991, the EPRDF used national television to depict the heinous nature of Dergue and the democratic promises of the new government. After Dergue trials were completed in 2010, a two-part documentary film entitled *Findings of human Rights Abuse During the Red Terror Era* was produced by the government and aired on national television. It covered briefly the trial process, the historical injustice and the efforts made by the current government to bring perpetrators to justice.

The most prominent and accessible form of reappraisal of the Ethiopian past has been carried out through works of film. Having witnessed its first film in 1917 and

214 Hate Speech and Disinformation Prevention and. Suppression Proclamation, Proclamation No. 185 /2020, entered into force 23 March 2020.

cinema house in 1927, Ethiopia is believed to be a pioneer in sub-Saharan Africa in introducing film. This development was put on hold from 1974 to 1991. The downfall of Dergue brought the revival of the film industry. Several movies (mainly in the comedy genre) were produced thereafter, although their reach was limited until recently to the major cities.

Ethiopian films that have attempted to portray the political situation during Dergue regime have revealed the ironic reality that Ethiopians harbour divergent interpretations of the violence and the struggle. In movies such as the 18-minute film *Red Terror,* ቀይስሕተት (*Red Mistake*), አባትየው (*The Father*), የሎሚሽታ (*Scent of Lemon*), ቱዛ (*Morning Dew*) and a documentary entitled የወንዝ መዕበል (*Deluge*), one could conclude that Ethiopian movies on the Dergue regime try to communicate two different messages regarding the past and the present.

These movies have managed to present the nature and extent of Dergue's violence in both implicit and overt ways. The films show scenes of torture, death and forced conscription into the armed forces. They contain scenes set in prison cells and underground torture chambers.

Nonetheless, Ethiopian films appear to have rejected post-Dergue political developments. At a closer look, the movies do implicitly disapprove of the current federal-state structure and the recognition of diverse ethnic identities as a development that has eroded Ethiopian nationalism. As a result, the films deplore the brutal nature of Dergue but do not celebrate post-Dergue developments. Instead, they attempt to summon a nostalgia of nationalism in pre-Dergue Ethiopia, which they present to the viewer as what an Ethiopian unity should resemble.

This artistic characterization of post-Dergue Ethiopia could be explained by the fact that the 1991 Ethiopian transition has not been representative. It was an imposed transition that has not entertained diverse views through a national reconciliation scheme. As a result, Ethiopians disagree as to whether the post-Dergue federal structure is the best fit for the country. Therefore, one can infer from the artistic rejection of the current state structure which segment of Ethiopian society dominates the local film industry.

3 Stocktaking: Successes and Failures of Transitional Justice in Ethiopia

3.1 Successes in Coming to Terms with the Past

Measuring the successes of the transitional justice mechanism adopted in post-1991 Ethiopia is a tricky question. Nonetheless, the following points might be considered positive developments compared to the country's realities during the Dergue regime.

– **Justice:** Given that neither reconciliation nor reparations were put in place, whether victims were satisfied with how Ethiopia attempted to come to terms

with its violent past depends on the analysis of other mechanisms such as criminal prosecution. In that respect, the fact that Ethiopia put all Dergue officials and affiliates on trial could be considered a success story from the perspective of retributive justice, save the gaps discussed in section 2.2. below.

- **Elections and Multi-Party System:** It was only after the downfall of Dergue that elections involving the participation of several political parties became possible in Ethiopia. Since 1991, Ethiopia has established a multi-party system, although it has always been the EPRDF coalition that has remained in power through contested elections.
- **Human Rights Laws and Institutions:** Compared to the Dergue regime, Ethiopia now has made significant improvements in guaranteeing individual human rights. The incorporation of human rights provisions from the UDHR and the International Covenants on Human Rights into the DRE constitution, which also stipulated that international human rights treaties have precedence over domestic laws and the constitution itself, is a significant positive development. The fact that the country established national human rights institutions such as the Ethiopian Human Rights Commission to educate the public and promote respect for human rights could be considered a success story.
- **Laws on Impunity:** With the view to fighting impunity, the adoption of the FDRE Constitution in 1994 Ethiopia has put an end to prosecutorial discretion to prosecute gross human rights violations. As per Article 28, the government could reach no executive decision regarding amnesty for perpetrators of what the Ethiopian law refers to as crimes against humanity (such as genocide, summary executions, forcible disappearances or torture). Interestingly, the constitution has stipulated that even the legislator does not have the power to enact laws to set aside the stipulation of Article 28.
- **Federalism:** The federal state structure that Ethiopia adopted after the downfall of Dergue as a response to the centuries-old unitary state structure comes out as a significant success story in contemporary political debates in Ethiopia. The federalism, which took into account the multinational nature of the country's composition in terms of linguistic and ethnic identities, is central to answering concerns that led to the creation of various liberation fronts that engaged in the civil war against Dergue. Nonetheless, critics often accused federalism of widening ethnic polarization in the country.

3.2 Failures: 'Come, Come Mengistu'

Except for some of the points raised in 2.1. above, the transitional justice mechanisms adopted in Ethiopia did not bear good fruit. Even the above-mentioned success stories have been overshadowed by the EPRDF's deteriorating human rights record. A 2017 report by *The Economist* revealed that Dergue's Colonel Mengistu Hailemariam, who lives in exile in Zimbabwe, 'seems to be growing in popularity

back home, especially in towns and among those too young to remember the misery of his rule'.[215] In recent protests, the youth were heard chanting 'come, come Mengistu'.[216] The following points may explain this massive failure in Ethiopia's effort to confront its past.

- **Unrepresentative Transition:** The 1991 transition from Dergue to a new political order was driven by the interest of those who had the upper hand in the armed conflict, particularly the EPRDF coalition. The two conferences in London and Addis Ababa were not concerned with forming a widely representative transitional government. Instead, they focused on handing governmental power over to the TPLF led EPRDF. Victim groups such as the EPRP and MEISON were excluded from the conferences and the resultant transitional government because of their alleged political differences with the EPRDF.
- **Victors' Justice:** Like in the cases of the Red and the White Terrors, crimes perpetrated during the armed conflicts were admittedly not one-sided. Several reports alleged that the rebel forces had committed acts that could constitute violations of common Article 3 to the 1949 Geneva Conventions or the war crimes provisions of the Penal Code of 1957 of Ethiopia. Nonetheless, only officials, members, and affiliates of Dergue (the vanquished) were implicated in the SPO Proclamation. The SPO prosecuted only Dergue. No other investigative or prosecutorial mechanism was established to deal with crimes allegedly perpetrated by other groups, including those who ascended to power in 1991.
- **Delayed Justice:** The process of prosecuting Dergue through the SPO scheme took about two decades. The SPO was established in 1992 and presented its completion report to the House of Peoples' Representatives in 2010. Some of the trials, such as the main trial involving the highest-ranking Dergue officials, took more than 12 years to complete. The process was criticized by the African Commission on Human and Peoples' Rights (ACHPR) as involving a violation of the accused's right to be tried within a reasonable time.[217] Admittedly, in remarks made a decade after the decision to prosecute was reached, the late Prime Minister Melese Zenawi, who was also the President of the TGE at the time of the decision, stated, 'I think we sort of swallowed more than we could chew'.[218]
- **Absentees' Justice:** Ethiopian trials are, as noted above, trials for absentee defendants. There is no other criminal trial in history that has prosecuted some 2,188 defendants in absentia. This is a result of the government's inability or unwillingness to secure the extradition of fugitives. The fact that several top-rank-

215 *The Economist*, 'Why Ethiopians are nostalgic for a murderous Marxist regime,' 7 December 2017.
216 *The Economist*, 'Why Ethiopians are nostalgic for a murderous Marxist regime,' 7 December 2017.
217 See ACHPR, *Haregewoin Gabre-Selassie and IHRDA (on behalf of former* Dergue *officials) vs. Ethiopia* (Decision), 12 October 2013, Comm. No. 301/2005, para. 240.
218 See Kjetil Tronvoll, 'The Quest for Justice or the Construction of Political Legitimacy: The Political Anatomy for the Red Terror Trials' in *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, ed. Kjetil Tronvoll et al. (Martlesham: James Currey, 2009) 84–95, 92.

ing militaries and civilian officials of the Dergue regime are living in Zimbabwe and several developed countries, often in luxury, has sent the message that the prosecution process has failed to serve its intended goals.

- **Memory and Memoirs:** Ethiopia has not made a meaningful official effort to create memorial sites and commemorative events so that the victims and successive generations would remember the violence and develop a culture that prevents such atrocities from recurring. Although victims' associations made commendable efforts, the absence of a more representative and national effort to establish and maintain non-partisan memorial sites and commemorative events has kept the public in the dark about what happened during Dergue. The impact of such a failure is even more prominent given that Dergue officials have continuously produced memoirs that are unrepentant and aimed at justifying the violence that was perpetrated.[219]
- **From aborted reconciliation to a national dialogue:** The decision of the TGE in 1992 to establish the SPO was reached by rejecting calls for national reconciliation or an approach that would combine prosecution with reconciliation. It is the case that the current Ethiopian political landscape is a manifestation of several missed opportunities to bring the country to discuss its disagreements in the process of national reconciliation. A positive development in this regard was the establishment of the above-mentioned reconciliation commission in 2019.
  However, the parliament dissolved the reconciliation commission in March 2022. The reconciliation commission could not undertake meaningful work due to its defective formulation in terms of temporal and subject matter jurisdiction in March 2022. This is yet another missed opportunity to reconcile victims and perpetrators and resolve historical injustice in Ethiopia.
  In January 2022, Ethiopia started experimenting with a new transitional justice institution referred to as National Dialogue Commission, established under Proclamation No. 1265/2021.[220] The dialogue commission has replaced the reconciliation commission to ultimately bolster a national consensus and a culture of trust by mending degraded social values.[221] The replacement of the reconciliation commission by the dialogue commission appears to lack strong justification, as the former could have accomplished what is envisaged by the latter. The effec-

219 The memoirs include: F. Desta, *Abiyotuna Tizitaye [my Reminiscences of the Revolution]* (Los Angeles: Tsehai Publishers, 2015); Fikre-Selassie Wogderes, *Egnana Abiyotu [We and the Revolution]* (Los Angeles: Tsehai Publishers, 2014). For memoirs written by members of opposing political parties, such as the Ethiopian People's Revolutionary Party (EPRP), see Hiwot Teffera, *Tower in the Sky* (Addis Ababa: Addis Ababa University Press, 2012).

220 The Ethiopian National Dialogue Commission Establishment Proclamation, Proclamation No. 1265/2021, entered into force 13 January 2022.

221 The Ethiopian National Dialogue Commission Establishment Proclamation, Proclamation No. 1265/2021, Preamble Para 3.

tiveness of the dialogue commission in achieving the much-needed peaceful and consensual new beginning is yet to be seen.

- **Gross Human Rights Violations:** Although Ethiopia has made significant improvements in terms of adopting human rights law and establishing institutions, a further assessment of Ethiopian practice reveals the existence of substantial deviations from the promises of the law. Firstly, there have been several allegations that core crimes other than those already prosecuted have been perpetrated in various regions of Ethiopia.[222] The government has often dismissed the allegations as political propaganda of the opposition political parties or as enemy campaigns aimed at infiltrating and disintegrating the country. It was only in 2018 that, for the first time in Ethiopian history, an incumbent government publicly admitted that widespread and systematic acts of torture and terror had been perpetrated against the Ethiopian people by its own police and security forces.[223] Yet, this admission and acknowledgement of state criminality did not put an end to the violence in Ethiopia. As also noted by the time of writing of this case study, violence in Ethiopia has continued unabated. In connection to political unrest in the Oromia region, attacks have been carried out against the civilian population on the grounds of religion, ethnicity or politics.
- **Another Devastating Civil War:** In what could be seen as a failure of the transitional justice mechanisms adopted since 1991, Ethiopia is now in a civil war. In the war that broke out on 4 November 2020, the TPLF, the architect of the transitional process in 1991, is fighting the National Defense Force in what the latter initially referred to as an operation to restore the rule of law. Although the specific causes and consequences of the war remain contested, it is evident that this civil war is a result of a three-decades-old repressive and unrepresentative goverance. This civil war could indeed be traced back to the undemocratic beginnings of 1991.

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222 Notable allegations include: 1) the Anuak Situation, which represents the continued commission of international crimes against the Anuak communities in Southwest Ethiopia, allegedly by Ethiopian National Defence Force (ENDF) since 2003; see Human Rights Watch, 'Targeting the Anuak', accessed 24 September 2019, http://www.hrw.org /reports /2005/03/23/targeting-anuak; 2) the Ogaden conflict, in which alleged commissions of war crimes and crimes against humanity by the ENDF have been reported; see Human Rights Watch, 'Collective Punishment: War Crimes and Crimes against Humanity in the Ogaden area of Ethiopia's Somali Region,' 13 June 2008, accessed 24 Septemer 2020, http://www.hrw.org/node/62176; 3) The eviction and deportation of members of the Amhara ethnic group from the Benishangul-Gumuz regional states have been widely portrayed as acts of ethnic-cleansing; accessed 24 September 2020, http://www.ethiomedia.com/addis/5775.html; 4) A widespread and systematic attack against the members of ethnic Oromos as reported by different organizations such as Amnesty International; see e. g. Amnesty International, 'Because I am Oromo: Sweeping repression in the Oromia region of Ethiopia' (Amnesty International Report, 27 October 2014), accessed 24 September 2020, https://www.amnesty.org/en/documents/afr25/006/2014/en.

223 See Prime Minister Abiy Ahmed Speech to the Parliament, 1 July 2018, accessed 22 September 2020 https://www.youtube.com/watch?v=wJnC2aX4jP8&t=8079s.

Overall, the transitional justice process adopted in Ethiopia following the downfall of Dergue was incomplete because it did not consider the need to establish important institutions that could have brought abought the desired transformation in the country's socio-political landscape. The process lacked a genuine and impartial effort to disconnect the country from its repressive past and heal its wounds as a guarantee of non-repetition of violence. Instead, it was a disguised partisan endeavour that has allowed for the continuation of large-scale and clandestine violence. The ill-conceived transitional justice process has not only failed in design and implementation but has also brought the country back into armed conflict.

Julia Viebach

Rwanda: Transitional Justice after Genocide

Introduction

After the 1994 Genocide against the Tutsi (hereafter, Genocide or 1994 Genocide), the Rwandan government under the leadership of the Rwandan Patriotic Front (RPF) embarked on a comprehensive, complex and creative transitional justice strategy to rebuild the country. Until around 1998 the RPF followed a maximal accountability approach to end the cycle of impunity in the country; reconciliation and therefore a truth commission were not an option at that point. At the end of the 1990s, however, Paul Kagame – Rwanda's president – changed course and introduced comprehensive and wide-reaching measures to embed the accountability approach into societal and civic education measures that included the creation of the National Unity and Reconciliation Commission (NURC) and national commemoration events, as well as the establishment of memorials. In its approach, the government used especially 'traditional', home-grown solutions, of which *gacaca* is perhaps the best known.

For many commentators, Rwanda has made remarkable progress in economic development, nation-building and peace-building, whilst for others Rwanda remains an authoritarian regime that has imposed 'victors' justice' over its Hutu population, thus limiting democratic space and the opportunity to talk openly about what happened in 1994. Some scholars have declared a 'tutsification' of society and politics and have even warned of civil unrest and violence, but these predictions have not materialized thus far. Rwanda remains, however, a contested and highly politicized country, in the 'real world' and in academic scholarship alike.

This report does not take a neutral stand towards these critiques, nor does it romanticize Rwanda's efforts in coming to terms with the past. It attempts to paint a balanced picture of the many successes as well as the shortcomings in Rwanda's transitional justice programme. Any transitional justice process is imperfect, and social repair processes are necessarily complex, messy and, at times, even violent – this is the starting point for this report. In drawing out the complexities of transition, the report will first give a brief overview of the history of Rwanda and the events that culminated in the explosion of violence there. In the second part it will critically assess criminal prosecutions on the local (*gacaca*) national (Specialized Chambers) and international (International Criminal Tribunal for Rwanda, hereafter ICTR or the Tribunal) level, discuss (the lack of) reparations, reconciliation measures such as the NURC and detail memorialization in form of archives, memorials and commemoration, before critically assessing some of these institutions.

It is difficult to provide a 'measurable' assessment of Rwanda's long, comprehensive and ever-changing process of dealing with the past. Therefore, this report does not claim to be exhaustive and to cover all aspects of Rwanda's transition 27 years

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after the Genocide. The report is based on an analysis of secondary literature and more than ten years of research experience in the country, and with Rwandans in the diaspora. The use of the terminology 'Genocide against the Tutsi' does not imply a positive bias towards the government, but is rather an attempt to use the official United Nations (UN) terminology that was introduced in 2003.

1 The Experience of Dictatorship

1.1 Relevant Period

There are several critical junctures in the history of Rwanda that can help explain the long way to the 1994 Genocide and the particular choices made in the national response to its legacy. The history of Rwanda is contested, and several different narratives thereof, especially concerning the role of ethnicity and inter-communal relations, exist in the scholarship and in Rwanda itself. As will be shown later, the Rwandan government has pursued a particular historical narrative that depicts Rwandan community life as peaceful and harmonious before the arrival of the German colonizers. Independent of instrumentalized historical narratives, one can locate critical junctures at (1) the colonial period and the 'social revolution', (2) the First republic, (3) the Second republic and finally (4) the unresolved crisis of 'case-load' refugees.

1.1.1 Colonial Period and the 'Social Revolution'

Rwanda was colonized in 1899 by the Germans. They introduced a system of indirect rule and elevated the power of the *mwami* (Tutsi dynasty). In the wake of rising race ideology in Europe at that time, the German colonial powers declared the Tutsi the superior race both in mental and physical capacity. Hence, they put Tutsi chiefs in control of the population. Tutsi, Hutu and Twa, however, were originally social castes and therefore fluid in nature. The Tutsi were pastoralists (and constituted the *mwami* royal family), the Hutu agriculturalists and the Twa hunter-gatherers who lived at the bottom of the social hierarchy. However, it was possible to 'climb up' the social hierarchy and become Hutu or Tutsi through the generation of wealth, especially in the form of cattle and land. The groups had lived together (though not without conflict) in communities for centuries and shared the same customs and beliefs. Hutus were more and more controlled and forced into precarious patron-client relations, and increased shortage of land led to an increase in the institutionalized exploitation of the lower classes even before colonialism (1860 – 1895). Rwandan society and culture were organized and structured along this classsystem, so that the establishment of indirect rule unbalanced cultural norms and societal rules and at the same time

furthered the exploitation of the Hutu and Twa – now under a racial lens – even more. Racial education became an important strategy in colonial rule[1] and ultimately led to the formation of ethnic identities, which justifies the use of the term 'genocide'.

With the loss of World War I, Germany was forced to give up its colonial territories, and Rwanda was handed to Belgium, which had already violently conquered and ruled neighbouring Congo (which was property of King Leopold). Under Belgian rule, the control of the Hutu population tightened (in the form of forced labour), and colonial authorities emphasized racial identities. In a census of 1933, everyone with more than 10 cattle (usually cows) was identified as Tutsi; everyone was given an identity card declaring their 'race' or 'ethnic group', which was often used during the Genocide to identify the Tutsi at roadblocks.[2]

In 1946, after World War II, Rwanda had become trustee territory of the UN, which allowed the international body to investigate the situation in its territories. The discrimination of the Hutu was noted as a problem in the governance of the country and the demands for political representation of the Hutu increased. The Church played an important role in the emancipation of the Hutu population, which was open to conversion to Christianity, whilst especially the *mwami* continued to hold on to their customary beliefs. In 1957, the Hutu Manifesto was published, with the help of Belgian priests, by Hutu elites, amongst them the future president Grégoire Kayibanda. The Manifesto recognized the legal distinction between the 'races' and demanded egalitarian representation of the Hutu in political positions; it furthermore demanded the end of colonialism and the Tutsi monarchy, arguing that the Tutsi had invaded Hutu land (the so-called Hamite thesis).[3] The end of the 1950s saw the rise of political parties along ethnic lines and 'ethnic' tensions that broke out in open anti-Tutsi violence in 1959, which resulted in the death of the incumbent king (under mysterious circumstances). As a response to the civil unrest and in support of the Hutu, colonial authorities replaced Tutsi chiefs with Hutu ones. This move led to even more violence and consequently more than 100,000 refugees, also called 'old-case load' refugees, sought refuge in neighbouring countries. The Hutu 'social revolution' was born. In the wake of the 'social revolution', the King fled to Uganda and the monarchy was officially abolished in 1961.

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1 Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2001), 19.

2 Since Tutsi, Hutu and Twa are not racial groups, they cannot be distinguished by physical markers, although the race ideology of the European colonizers clearly invented physical distinctions between the groups; e.g. the Tutsi were supposed to be tall with filigree, long limbs and fine facial features. These physical differences were later also used in the propagation of the so-called Hamite thesis that declared that the Tutsi were foreigners originating from Ethiopia.

3 Catharine Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda, 1860–1960* (New York: Colombia University Press, 1988), 191.

1.1.2 Republic under President Kayibanda

Rwanda gained independence from colonial rule on 1 July 1962 after elections under the auspices of the UN favoured a clear majority for the *Parti du Mouvement d'Émanicpation Hutu*, PARMEHUTU (founded by Kayibanda). In late 1963, Tutsi exiles invaded Rwanda in order to bring the Tutsi back into power, but failed in their attempt. As a consequence, 'ethnic' violence against the Tutsi population and political opponents reached unprecedent brutality and proportions. In over three years of the 'social revolution' approximately 10,000 people died and another 130,000 were forced into exile.[4]

1.1.3 Republic under President Habyarimana

The years 1972 and 1973 were characterized by further turmoil and change partially rooted in developments in neighbouring Burundi, where a coup against the military Tutsi junta failed, which led to the revenge massacre of around 200,000 Hutus. This triggered an influx of Hutu refugees into Rwanda that not only created a volatile situation, but also saw further violence against the Tutsi to revenge the death of Hutus in Burundi. In 1973, General Juvénal Habyarimana ousted Kayibanda and declared himself president. Under his totalitarian rule, the Tutsi were further discriminated against and cast out of public offices. With Habyarimana, the southern dominated rule of the PARMEHUTU came to an end and opened the door for a far more radical Hutu elite from the north, who later became the masterminds of the Genocide and who were key figures in Habyarimana's *Mouvement Révolutionnaire National pour le Développement* (MRND).

1.1.4 The unresolved refugee crisis

There are several developments under Habyarimana's totalitarian reign that are important for understanding the background to the 1994 Genocide. In the late 1980s, his power began to crumble due to the fall in coffee and tea prices. Whilst he became a close ally of France and in particular François Mitterrand, he proved more and more unable to control the radical forces in his own party. At the same time, with the end of the Cold War and the 'third wave of democratization', international demands to pluralize the country became louder. But perhaps the most important aspect was the unresolved refugee crisis of Tutsi who had fled the 'ethnic' violence in the wake of the 'social revolution' and the 1963 and 1973 turmoil. Many of them in

4 Paul J. Magnarella, 'The Background and Causes of the Genocide in Rwanda,' *Journal of International Criminal Justice* 3(4) (2005), 809 – 810.

Uganda (the country that hosted the majority of Tutsi refugees) had joined Musevini's revolutionary army and were extremely well-trained in warfare and guerrilla tactics; they helped Musevini's National Resistance Movement (NRM) fight then president Obote's (1980 – 1985) national army in Uganda's five-year civil war. In return, Musevini had promised them citizenship, a promise which was to remain an unfulfilled due to protests by Ugandans once he took power in 1986. So too had the MDNR continuously refused to allow the Tutsi refugees to return to Rwanda. The hopes of thousands of Tutsi to come home were thus shattered, and must be seen as the main reason for the RPF's invasion of Rwanda on 1 October 1990.

1.2 Political Background

The historical junctures outlined above constitute the indirect causes of the Genocide of 1994. With the military invasion driven by the Rwandan Patriotic Army (RPA)[5] under Major Paul Kagame, the Rwandan civil war began. The invasion caused an outcry within the Western world, which was largely sympathetic to the Habyarimana regime, which had brought relative peace and stability to the region, and prompted France (under Mitterrand) to send troops to Rwanda to help push back the RPA. Despite its initial failure, the RPA continued to run insurgency operations in the north of Rwanda and destabilized the region. The MDNR quickly realized that this war – given the extraordinary military training of the RPA – could not be won. Under pressure from the African Union (then the Organization of African Unity, OAU), the Rwandan government entered negotiations with the RPA. In August 1993, the Arusha Peace Accords were signed after more than a year of negotiations. The Arusha Accords stipulated a power-sharing regime representing all (ethnic) factions including the RPF, and the UN was to deploy a peacekeeping force (United Nation Assistance Mission for Rwanda, UNAMIR)[6] to monitor the smooth running of the political and military reform process and to provide humanitarian assistance.[7]

The radical forces within the MDNR saw their power crumbling in the wake of the peace agreement and feared the prospect of a power-sharing government that would allow the Tutsi to gain back control of political affairs. Between 1992 and 1993 there were already rumours that the radical wing of the MDNR was organizing

5 The RPA was the military wing of the Rwandan Patriotic Front (RPF), which was founded in Uganda in the 1980s. RPA and RPF are used interchangeably.

6 UNAMIR was established by UN SC resolution 872 on 5 October 1993. The peacekeeping force, however, did not have the power to use force (only in self-defence) to implement their mission; they were to be sent to Rwanda in a supporting and monitoring function; i.e. they were not deployed under a Chapter VII mandate but under a Chapter VI one only. This was largely because the United States wanted to avoid another Somalia debacle.

7 See further on the mandate of UNAMIR, accessed 23 January 2021, https://peacekeeping.un.org/sites/default/files/past/unamirFT.htm.

death squads, and the peace negotiations fuelled an extremism that was communicated to the population in form of hate propaganda.[8] This increased the fear of many Hutu that a new Tutsi regime would be installed.[9] Habyarimana was largely powerless against the radicalization of his party and his closest allies, who increasingly and openly resisted his moderate course and his willingness to cooperate with the RPF, which was seen as giving in to the international community's demands of democratization.

In sum, between 1990 and 1994 Rwanda fell into a deep, multifaceted and escalating crisis. Three years of civil war and violent politics (there were small-scale massacres of the Tutsi in 1992 and 1993 already) had brutalized the country, leaving thousands of internally displaced people in the north and thousands of Burundian refugees in the south. Despite the peace agreement, both parties were rearming and preparing for war. Hutu hardliners continued their efforts to remain in power by irregular means and started the training of militias, developed assassination plans and funded racist propaganda.[10]

1.3 Ideological Justification

The so-called *akazu*[11], a circle of influential politicians, military personnel, businessmen and intellectual elites around Habyarimana's wife Agathe Kanziga, was the central force behind the Hutu Power movement and the increasing radicalization of the MDNR. According to their extremist ideology, Rwanda should be a nation of and for the Hutu only. They cast the Tutsi as invaders from Ethiopia who wanted to reinstall the monarchy and exploit the Hutu. The invasion of the RPA gave the Hutu Power movement a boost, as they used this as a welcome opportunity to mobilize the population against the Tutsi, spreading fear and using dehumanizing language such as *inyenzi*, cockroach, to refer to Tutsi. In 1990 Hutu Power published the notorious *Hutu Ten Commandments*, which called on all Hutu to refrain from any relation with the Tutsi, in particular Tutsi women, and encouraged the Hutu to uphold the values of the 'social revolution'.

8 Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Colombia University Press, 1997), 170 – 173.

9 Mamdami, *When Victims Become Killers*.

10 Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca and London: Cornell University Press, 2006), 31 – 32.

11 *Akazu* means 'small house' and was traditionally used to describe the circle of courtiers around the *mwami*. Most of this inner circle was later indicted by the ICTR, except Agathe Kanziga, who escaped with the help of France and still lives there today. The RPF ever since has tried to convince French authorities to extradite her to stand trial in Rwanda, which would make an important case in proving their claim that the Genocide was planned long before its execution.

Hutu Power founded the newspaper *Kangura* and the radio station Radio Télévision Libre des Mille Collines (RTLM), which broadcast their racist propaganda and during the Genocide incited killings, including the publication of lists of Tutsi to be killed as well as orders of where to set up roadblocks (see ICTR media case in section 2.9). Music also played a role in fuelling anti-Tutsi propaganda.[12] Crucially, Hutu Power formed the *Coalition pour la Défense de la République* (CDR) and founded the 'youth wing' of the MDNR, the notorious *Interahamwe*, which committed the majority of massacres during the Genocide.

1.4 Structures of Persecution

1.4.1 The Genocide and the International Community

The Genocide started on the night of 6 to 7 April, when the plane of president Habyarimana was shot down over Kigali. The killings started all over the country the same night. With the death of Habyarimana, Prime Minister Agathe Uwilingiyimana, a moderate Hutu, had become head of state. She was killed by the Presidential Guard as early as 7 April, together with the Belgian UN blue helmets who were ordered to protect her. Jean Kambanda, a member of Hutu Power, then became head of state and further incited violence and planned the military strategy against the RPA (especially together with Colonel Théoneste Bagosora), which had resumed their military operations again and crossed the northern border from Uganda.

The UNAMIR peacekeepers were passive witnesses to the massacres unfolding around them.[13] They were even more weakened by the decision of the Belgian government to withdraw their contingent after the murder of ten of their soldiers. The force was reduced from more than 2,500 to only 270 peacekeepers in UN resolution 912 of 21 April 1994, whilst the special forces of Western nations evacuated their citizens but left the Tutsi behind to die.[14] The UN SC and especially its permanent members from the United States and the UK refused to declare that the massacres unfolding in Rwanda constituted genocide, which would have obliged the SC to intervene

12 See, e. g., Prosecutor vs. Simon Bikindi, ICTR-99 – 52-T. Bikindi was a MDNR propagandist and singer who called on the population to 'be vigilant against Rwanda's enemies' (Straus 2006, 29).
13 See for a detailed account Dallaire 2003. Dallaire was the Canadian commander of the UN troops. Thanks to his wholehearted intervention, thousands of Tutsi were saved. In a deal with the *Interahamwe*, he negotiated the exchange of Tutsi civilians. Dallaire never came to terms with the failure of the UN and the horror he had witnessed; he attempted suicide several times.
14 It is uncontested that the elite forces that evacuated their citizens together with the UN troops and further stationed US marines in Bujumbura and further Western armies in Nairobi and Eastern Africa could have easily ended the Genocide by military means in its very early stages in April 1994; see further Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999).

according to the 1948 Genocide Convention.[15] Only in June 1994, when the scale of the massacres could no longer be ignored, did France suggest the humanitarian intervention *Opération Turquoise* to the Security Council. The intervention would open a safe corridor to save the Tutsi in the southwest of Rwanda. However, it turned into a disaster, enabling a safe haven for the killers and providing them shelter from the RPA whilst the massacres continued.[16] Through the *Zone Turquoise*, many *génocidaires* escaped to Zaire and were later involved in massacres in the Zairian refugee camps.

The RPA won the civil war and ended the Genocide by military means on 4 July 1994.

1.4.2 Extent and structure of the violence

Two peculiarities characterize the Genocide in Rwanda compared to other genocides of the twentieth century[17]: one is the *mass participation* of the population.[18] Neighbours killed neighbours and, even within families, people were forced to kill their loved ones.

The second unique aspect of the Genocide was its *extreme level of brutality*. In particular, traditional weapons and agricultural tools such as machetes, (nail-studded) clubs and spears were used. Until that point, machetes had only been used for work on the farms and banana plantations. These weapons humiliated, mutilated and maimed the bodies of their Tutsi victims, often causing a slow and tremendously painful death. In addition, within the Hutu radical ideology, the Tutsi were depicted not only as traitors, enemies and foreigners[19], but also as 'blocking beings': those who could potentially 'impede the movement of the material/symbolic material necessary to the social reproduction of human beings'[20]. The killers therefore ascribed and inscribed cultural symbolism on the bodies of their victims. The cutting off of the Achilles tendons, arms and legs can be understood in this way. Cruelty served

15 See for a detailed analysis of the failure of the international community Linda Melvern, *A People Betrayed: The role of the West in Rwanda's Genocide* (London: Zed Books, 2019); Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (London: Verso, 2006).

16 Prunier, *The Rwanda Crisis*, 288 – 290.

17 This analysis of the genocidal violence is taken from Julia Viebach, 'Mediating "absence-presence" at Rwanda's genocide memorials: of care-taking, memory and proximity to the dead,' *Critical African Studies* 12(2) (2020): 245 – 247.

18 For a compelling account of the rationale of the killings that goes beyond fear or ethnic hatred, see Lee Fujii, *Killing Neighbors: Webs of Violence in Rwanda* (New York: Cornell University Press, 2011).

19 Cf. Mamdami, *When Victims Become Killers*; Prunier, *The Rwanda Crisis*.

20 Christopher Taylor, 'The Cultural Face of Terror in the Rwandan Genocide of 1994,' in *Annihilating Difference: The Anthropology of Genocide*, ed. Alexander Laban Hinton (Berkley: University of California Press, 2002), 164.

to humiliate, dehumanize and inflict unimaginable suffering on the bodies of Tutsi as a group. However, the level of cruelty differed according to area and region. Some early reports by local actors like IBUKA (survivor umbrella organization, see further section 2.10), which investigated the methods of killing, concluded that instruments such as clubs and machetes were used across the country, but that the patterns of use differed within regions.[21] Nyarabuye, for instance, is known amongst survivors for cannibalism, whereas Nyamata is infamous for sexual violence against Tutsi women.

Another aspect of the cruelty was the widespread horrendous and systematic *sexual violence against women*. The cruelty can be linked to culturally encoded beliefs and customs around the flow and blockage of body fluids.[22] Taylor describes the impalement of women, often from the vagina to the mouth, or anus to head, as being associated with the 'body of conduit' which was, in pre-colonial times, connected to an idea of forming social relations by the flow of conduits through the digestive and reproductive systems of the human body.[23] Accounts of sexualized violence were retold in interviews the author conducted with individuals who survived these atrocities. For instance, the Nyamata memorial crypt displays the coffin of a woman named Annonciata Mukandoli, who was gang-raped together with a group of women whilst she still had her baby on her back. Today, her coffin symbolizes the violation of the female Tutsi body during the Genocide, which is closely linked to Hutu ideology (in particular the *Hutu ten Commandments*, see above) and the belief that Tutsi women were superior to Hutu women (personal interview, 10.09.2014). Killers not only humiliated the bodies of their victims ante-mortem, as the case of Annonciata exemplifies, but also post-mortem: they were often thrown in latrines or buried (sometimes alive) in mass graves or left naked on the ground to be eaten by dogs and other animals.[24]

An estimated 49.9 percent of surviving women and girls (living in Rwanda in 1994) were (gang-) raped, held as sexual slaves, forced into 'marriages' and/or sexually tortured and mutilated during the Genocide;[25] approximately 25,000 contracted HIV/AIDS through this strategically deployed and devastating 'weapon of war'.[26]

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21 Remi Korman, 'The Tutsi Body in the 1994 Genocide: Ideology, Physical Destruction, and Memory,' in *Destruction and Human Remains: Disposal and Concealment in Genocide and Mass Violence*, ed. Jean-Marc Dreyfus and Elisabeth Anstett (Manchester: Manchester University Press, 2014), 8.

22 Taylor, 'The Cultural Face of Terror in the Rwandan Genocide of 1994.'

23 Taylor, 'The Cultural Face of Terror in the Rwandan Genocide of 1994,' 155, 165–166.

24 This is one of the reasons that the laws introducing the gacaca jurisdiction listed the crime of humiliating dead bodies; see further section 2.2.2.

25 Jennie E. Burnet, 'Rape as a Weapon of Genocide: Gender, Patriarchy, and Sexual Violence in the Rwandan Genocide,' *Anthropology Faculty Publications* 13 (2015), 1. Many Hutu women also endured sexual violence, and Burnet argues that an unknown number of women and girls independent of ethnicity were pressured into sexual relations with RPF soldiers after they had reached the IDP camps in RPF territory (Burnet 2012, 98).

1.5 Victim Groups

The primary victims of the Genocide were Tutsi. The plan was to eradicate Tutsi, so killers did not spare women, the elderly, children or babies. Particularly in the countryside, where people knew each other very well, it was easy to identify who was Tutsi, and escape was almost impossible except with the help of neighbours or kind strangers.

Especially in the beginning of the Genocide, the intellectual Hutu elite, politicians, journalists and academics were killed, too. Furthermore, some Hutu who resisted the killings or were found hiding Tutsi were murdered. The Twa were less targeted but also fell victim to the massacres; there is much less information on their fate than about Tutsi and Hutu victims. An estimated 800,000 to one million Tutsi and approximately 200,000 Hutu were killed.[27]

The Genocide left around 100,000 orphans and hundreds of thousands more were separated from their parents during forced repatriations between 1995 and 1997. 'Estimates suggest that 10 per cent of children aged 0 – 18 years old lost one or both parents, 110,000 children are living in child-headed households due to parental death or imprisonment, 7,000 children live on the street and 19,000 children under 14 years old are infected by HIV/AIDS'.[28]

The Hutu were also victims of (systematic) killings, namely by the RPA during the civil war and towards the end of the Genocide.[29] Human rights groups estimate that between 25,000 and 30,000 people were killed by the RPA in 1994.[30] The infamous Gersony Report of 1994 estimated 30,000 RPF killings in the north-west and Kibungo alone.[31] A further 4,000 civilians were massacred in April 1995 during the forceful repatriation of internally displaced people from the Kibeho refugee

26 Mary Kayitesi-Blewitt, 'Funding development in Rwanda: the survivors' perspective,' *Development in Practice* 16 (2006), 318. See for a detailed description of sexual violence during the Genocide, Human Rights Watch 1996 Shattered Lives, accessed 23 January 2021, https://www.hrw.org/reports/1996/Rwanda.htm.

27 There are contestations around the exact number of Genocide victims. De Forges reports 800,000 victims, whilst the government promotes a number of 1 million victims. Most frequently used in the literature is the figure of 800,000 victims.

28 Kirrily Pells, ''Rights are everything we don't have': Clashing Conceptions of Vulnerability and Agency in the Daily Lives of Rwandan Children and Youth,' *Children's Geographies* 10(4) (2012): 427 – 440.

29 Prunier identifies three periods of RPF killings (1997, 361): large and frequent killings right at the start of the Genocide until around mid-1995; a second period of semi-respect for human rights until early 1996 in an attempt to control revenge killings; and finally, renewed killings in 1996 when the cross-border raids from the Kivu became more frequent and the RPF started to kill civilians as reprisal for supporting the guerrilla (counterinsurgency tactic).

30 Des Forges, *Leave None to tell the story*, 734.

31 Accessed 30 January 2021, https://richardwilsonauthor.files.wordpress.com/2010/09/gersony_report.pdf.

camp.[32] The killings were justified as self-defence, but commander Colonel Ibingira was put on military trial in 1996. The killings in Kivu must be seen against the backdrop of the 'Kivu crisis' in former Zaire (today DR Congo) and an eroding situation in Burundi. Extremist Hutu who had fled the advancing RPF forces saw a chance to reconquer Rwanda from the destabilized Kivus or to install a separate Hutu state in the region. Moreover, the extremists were collaborating with local Hutu and subsequently started killing Tutsi in the region and intensified the cross-border raids into Rwanda (1995 – 1996). A further 6,000 – 8,000 are believed to have been killed during the violent dismantling of the refugee camps in the DR Congo, which marked the beginning of the First Congo War and the descent into violent chaos of the Great Lakes Region (GLR).

1.6 Responsible Persons

The Genocide was well-planned and highly structured. Especially in Kigali the Presidential Guard killed all 'primary targets' within the first 36 hours (starting the night of 6 April) but they were supported by the militias too, comprised of ordinary citizens who had received military training (that was partially provided by French military).[33] These militia death squads that existed everywhere in the country were aided by the Rwandan army and the gendarmerie in the villages and towns. The killers were controlled and directed by civil servants in the central government, *préfets, bourgemestres* and local councillors in the capital and the regions. The highly centralized governance of the country facilitated these command structures. These civil servants encouraged (and sometimes forced) the local population to 'go to work', i. e. hunt down and kill Tutsi.[34]

The number of perpetrators involved is contested. Straus estimates 170,000 to 210,000 individuals, excluding military, gendarmerie or Presidential Guards.[35] Others claim that there were hundreds of thousands[36] or as few as tens of thousands.[37] The Rwandan government claims there were approximately three million perpetrators.[38] These discrepancies are due to different definitions of who constituted a perpetrator and obvious ideological underpinnings. The exact number of perpetrators will likely

32 The advance of the RPF and the military defeat of the genocidal regime in summer 1994 had caused a large flow of refugees into neighbouring countries and internally displaced people seeking refuge at Rwanda's borders.

33 Prunier, *The Rwanda Crisis*, 246.

34 Many of the defendants before the International Criminal Tribunal served in such a civil servant, military or clerical role.

35 Straus, *The Order of Genocide*.

36 Cf. Des Forges, *Leave none to tell the story*; Mamdami, *When Victims Become Killers*.

37 Bruce D. Jones, *Peacemaking in Rwanda: The Dynamics of Failure* (Boulder, CO: Lynne Rienner, 2001).

38 MINALOC 2002.

remain unknown, but it is crucial that numbers should not criminalize an entire 'ethnic' group or become instrumentalized to relativize or even deny the Genocide.

1.7 Places of Persecution

Massacres took place throughout Rwanda, but with regional variance as to the level of brutality and number of killings. Prominent places were churches, nunneries, schools and stadiums where Tutsi had fled to find refuge or were herded together. Many memorial sites in Rwanda constitute such 'places of persecution'. However, many Tutsi were also killed at roadblocks, on their homesteads or thrown into latrines, rubbish pits or rivers. In some instances, as for example in Gisenyi, Kinazi or Kigali (the latter related to the ETO school massacre), Tutsi were forced to march to prepared mass graves, into which there were often thrown alive.

Further sites of persecution are related to the government's attempt to dismantle refugee camps on Rwandan and Congolese soil between 1994 and 1997 (see section 1.5).

2 Transitional Justice

2.1 Political and Institutional Changes and Elite exchange

Many commentators describe the post-genocide transformation as 'victors' justice'. With the military victory over the genocidal regime, the RPF was able to mould the political landscape to its favour without having to follow a negotiated power-sharing agreement. That said, in the immediate aftermath of the Genocide, the RPF did (loosely) implement the Arusha peace agreement and installed a 'government of national unity' (GU). Whilst it excluded the Hutu extremist parties (e. g. CDR), it included ministers from former opposition parties, even the MDNR, the Social Democratic Party (SDP) and *Parti Libéral* (PL). MDNR leader Faustin Twagiramungu, a Hutu, was appointed prime minister; Pasteur Bizimungu, a Hutu RPF member became president, and Paul Kagame secured the post of vice-president and minister of defence. Many of the new political elite came either from RPF cadres or were Tutsi returnees who grabbed the chance of a new beginning in a 'liberated' (and now Tutsi-friendly) Rwanda. This form of elite exchange enabled the RPF and Kagame to exercise control: 'where a Hutu led a ministry, a Tutsi RPF officer (usually a former refugee from Uganda) serving as second- or third-ranking post actually called the shots'.[39] Twagiramungu and other Hutu ministers resigned in 1995 over

39 Timothy Longman, 'Limitations to Political Reform: The Undemocratic Nature of Transition in

the lack of control. In 2000, his replacement, Prime Minister Pierre-Celestin Rwigema, a Hutu from the MDNR, and President Bizimungu[40] were forced from office, which made room for Kagame to become president and hand-pick his new PM and speaker.[41] In 2003, the parliament voted to ban the MDNR, which had popular support amongst the Hutu population and perhaps posed the greatest threat to RPF dominance.[42] The ban was preceded by the disappearances of leading party figures, their arrests on the grounds of divisionism and their escapes to other countries. These concerning early developments have prompted some scholars to speak of the 'tutsification' of Rwandan politics. The crackdown on political opponents is a strategy still used until today, as, for example, the case of Boniface Twagirimana demonstrates, a leading opposition leader who 'disappeared' (2018) from a prison, or the arrest of Diane Rwigara, who challenged Kagame in the run-up to the 2017 elections.[43]

Unsurprisingly, Rwanda falls short of the standards of liberal democracies and has been continuously categorized as 'not free' by the Freedom House Index.[44] Elections are held under a presidential multi-party system introduced after the Genocide. In 1999, the National Assembly approved a four-year extension of the GU, which was governed by the Fundamental Law which encompassed the 1991 constitution, the Arusha Accords, the RPF Declaration of 17 July 1994 and a memorandum of understanding between the eight participating political parties. Local level elections took place in 1999; district-level elections took place in 2001. The first presidential and parliamentary elections took place in 2003. Kagame was elected with 95.5 percent of the vote, and the REPF won with almost 74 percent. In 2008 the RPF won again by a large margin and secured 42 seats in parliament. Kagame was re-elected in the 2010 election with 93 percent; in the 2013 parliamentary elections the RPF received 76 percent.[45] The 2017 elections followed a similar pattern.

Human Rights Watch and Amnesty International have continuously complained about limited free speech and the lack of political space in which elections take

Rwanda,' in *Remaking Rwanda: State-Building and Human Rights after Mass Violence*, ed. Scott Straus and Lars Waldorf (Wisconsin: Wisconsin University Press, 2011), 32.

40 In 2001, Bizimungu formed a new political party which was immediately banned. Bizimungu and a former minister of his government (Charles Ntakirutinka) were imprisoned and one of the party members assassinated.

41 Filip Reyntjens, 'Rwanda, Ten Years on: From Genocide to Dictatorship,' *African Affairs* 103(411) (2004): 177–210.

42 Cf. Longman, 'Limitations to Political Reform: The Undemocratic Nature of Transition in Rwanda.'

43 Accessed 27 January 2021, https://www.theguardian.com/world/2018/nov/07/rwandan-dissident-politician-diane-rwigara-protests-innocence-as-trial-opens; https://www.bpb.de/internationales/weltweit/innerstaatliche-konflikte/54803/ruanda.

44 Cf. Longman, 'Limitations to Political Reform: The Undemocratic Nature of Transition in Rwanda.'

45 *Setting the Scene for Elections: Two Decades of Silencing Dissent in Rwanda*, accessed 27 January 2021, https://www.refworld.org/pdfid/595fa1774.pdf.

place,[46] which in fact secured landslide wins for Kagame and furthered the dominance of the RPF in the parliament. The National Electoral Commission (NEC) holds the power to block candidacies and has introduced limitations on free speech on social media. The next elections are to be held in 2024; it is assumed that the only real opposition to the RPF will be the Green Party, which was also under massive attack in the run-up to previous elections but managed to secure, for the first time, seats in parliament.

2.1.1 In the Name of the Developmental State

According to critiques, the RPF has more and more co-opted the vibrant civil society along often ethnic lines and limited freedom of press and freedom of speech. Disrespect for human rights is either denied or framed as necessary 'in the name of the developmental state'. Therefore, as Longman claims, particularly Hutu groups that existed prior to the Genocide have faced increased restrictions and pressure to change leadership over time. Human rights organizations, many of which formed in the early 1990s in the wake of the country's democratization process, faced similar pressures of co-optation and coercion to align to RPF ideology, which includes a narrative of itself as heroic liberator, which automatically excluded investigations into RPF crimes. As some commentators note, the pressure put on civil society organizations in some instances culminated in assassination and disappearances. Whilst Hutu organizations were shut down or leadership ousted through accusations of divisionism or genocide ideology, Tutsi organizations were harassed on grounds of corruption or mismanagement of funds. Several IBUKA[47] members had to flee the country, and in 2010 senior officials were arrested on the above-mentioned grounds. Filip Reyntjens, one of the most vehement critics of the regime, concluded in 2004 what in many commentators' view remains true today: 'in sum, civil society is controlled by the regime'[48]. The international community has raised critiques but continues to support the Rwandan state in its pursuit of reconciliation, unity and development. As Longman argues, Rwanda managed well to build an image of 'technocratic competence' and to follow a strategy of 'performance legitimation' addressed to international donors, but also to Rwandan citizens, in the belief that donors and 'the public will not care about political liberties if the government brings them prosperity'.[49]

46 *Rwanda Politically Closed Elections*, accessed 27 January 2021, https://www.hrw.org/news/2017/08/18/rwanda-politically-closed-elections#.

47 IBUKA is the genocide survivor umbrella organization. See section 1.5.

48 Reyntjens, 'Rwanda, Ten Years on: From Genocide to Dictatorship,' 185.

49 Cf. Longman, 'Limitations to Political Reform: The Undemocratic Nature of Transition in Rwanda,' 41.

2.1.2 Constitutional Amendments and (Juridical) Reforms

In 2003 Rwanda introduced, by referendum, its new constitution (replacing the constitution of 1991 that governed the transition period) which officially ended the transition period.[50] It grants broad powers to the president, who is given the authority to appoint the PM and to dissolve parliament.[51] The constitution also made provisions for the establishment of the Commission for the Fight Against Genocide (CNLG, see section 2.9) and acknowledges the need of survivors for compensation and rehabilitation (see section 2.3). In a 2015 referendum, Rwandans voted for the amendment of the 2003 constitution with almost 100 percent of the votes. The amendment retained a two-term limit for the presidency and shortened the terms from seven to five years. It explicitly stated that Paul Kagame would be eligible for one additional seven-year term, after which he could run for two of the new five-year terms. Under the new constitution, he could technically rule until 2034.[52]

As part of the government's far-reaching nation-building programme, the judiciary underwent substantial reforms in order to provide for the establishment of *gacaca* (see section 2.2.1) and for the prosecution of crimes against humanity and genocide in the national courts (see section 2.2.2); Rwanda's organic laws concerning criminal prosecution and reparations were amended several times as recently as 2012 (see further section 2.2). Rwanda abolished the death penalty in 2007, but the last death sentences were imposed in 2003. The last executions were carried out in 1998, when 22 people were found guilty of genocide-related crimes.[53]

2.2 Prosecution

There were three levels of justice concerning crimes committed during the Genocide: (1) *gacaca*; (2) National courts; (3) The International Criminal Tribunal for Rwanda (ICTR).

The criminal prosecutions put in place after the Genocide in Rwanda focused on crimes committed during the Genocide such as murder, rape, torture and property crimes, whilst prosecutions on the international level concentrated primarily on genocide and crimes against humanity, i. e. on establishing the broader pattern, and only tried the most responsible, the planners (*génocidaires*) of the Genocide. All relevant

50 The 1991 constitution introduced the multi-party system, separation of powers and the rule of law, but was never applied due to the start of the civil war. Together with the Arusha Peace Accords and additional protocols on the rule of law, it constituted the constitutional framework during the transition period.

51 Accessed 26 January 2021, https://freedomhouse.org/country/rwanda/freedom-world/2019.

52 Accessed 26 January 2021, https://freedomhouse.org/country/rwanda/freedom-world/2019.

53 Accessed 26 January 2021, https://www.amnesty.org/download/Documents/60000/afr470102007en.pdf.

jurisdictions were temporally restricted to crimes committed during the time period 1994 (ICTR) and 1990 – 1994 (national courts and *gacaca*). It is important to note that only crimes against the Tutsi population as part of the Genocide were prosecuted. War crimes and revenge killings committed by the RPF during the civil war and in the aftermath of the Genocide (e. g. as part of the Zaire/Congo war and the dismantling of refugee camps) remain unaddressed until today.

2.2.1 National justice: Rwanda's courts

At the Kigali National Conference in 1995 it was decided that the Penal Code and the national judiciary should be reformed to allow the prosecution of genocide suspects. The full destruction of the pre-Genocide judiciary led to overcrowded prisons and detention centres. Particularly in the 1990s, international organizations criticized the Rwandan government for its pretrial detention practice that resulted in human rights violations which, at their worst, amounted to cruel, inhuman and degrading treatment.[54] Prunier estimates that 'from 1000 prisoners in August 1994, the numbers had risen to 6000 at the end of the year and kept growing exponentially to reach 23,000 by March 1995'[55]. The forceful closure of refugee camps in Kibeho in 1995, in the DRC in September 1996 and 1998, led to a stark rise in the prison population, which in turn saw detention conditions deteriorate.[56] Amnesty International estimated that by 1997 more than 100,000 people were detained, the majority charged with genocide.[57] This dire situation in Rwanda's prisons built the background for the reform of the juridical system and the introduction of new laws to regulate and mitigate the backlog of genocide cases.

Organic Law No. 08/96 was ratified on August 30th 1996, with the aim to establish criminal proceedings against those accused of acts sanctioned in the Penal Code as constituting genocide and crimes against humanity.[58] It followed the government's 'policy of maximal accountability' in which all senior and low-level participants would be held accountable, designed to end any practices of impunity, which was

54 Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (Oxford: Oxford University Press, 2015), 98.

55 Prunier, *The Rwanda Crisis*, 9.

56 Mark A. Drumbl, 'Rule of Law Amid Lawlessness: Counselling the Accused in Rwanda's Domestic Genocide Trials,' *Colombia Human Rights Law Review* 29 (1997 – 1998): 545 – 639.

57 Palmer, *Courts in Conflict*, 100.

58 The crime of genocide and crimes against humanity did not exist in Rwanda's penal code, which made this reform necessary. The Specialized Chambers had jurisdiction over these crimes (as well as offences in connection with the events surrounding the genocide and crimes against humanity) committed since 1 October 1990, whereas the ICTR was temporarily restricted to crimes committed in 1994 only.

later also used to justify the establishment of *gacaca*.[59] The preamble of the Organic Law (OL) 16/2004 speaks directly to the government's policy of maximal accountability:

> Considering the necessity to eradicate forever the culture of impunity in order to achieve justice and reconciliation in Rwanda, and thus to adopt provisions enabling rapid prosecutions and trials of perpetrators and accomplices of genocide, not only with the aim of providing punishment, but also reconstructing the Rwandan Society that had been destroyed by bad leaders who incited the population into exterminating part of the Society. (Preamble, Organic Law 16/2004)

This policy of maximal accountability can be understood as a response to the pre-Genocide amnesty law that granted impunity for crimes committed against the Tutsi population in the service of the Hutu 'social revolution'.[60] Murder and other serious criminal acts committed by Hutu who challenged Tutsi political domination were effectively forgiven. This amnesty law also built the backdrop for the modernization and constant change (at least until 2012) of the rule of law in Rwanda.[61]

Some cynical commentators have argued that maximal accountability was the government's strategy to eradicate any (military) opposition to their transitional and post-genocide policies.[62] Given that prisons were overcrowded and in inhumane conditions, one might wonder why maximal accountability was given priority. However, the OL of 1996 established regulations that would accelerate the trial process. It was decided that cases of genocide and crimes against humanity should be tried before Specialized Chambers[63] that would rule according to Rwanda's Penal Code, which had adopted International Criminal Law standards with regard to the Genocide Convention, the Geneva Conventions, war crimes and crimes against humanity. It was noted that 'the exceptional situation in the country requires the adoption of specially adapted measures to satisfy the need for justice of the people of Rwanda' (Article 39, OL 08/96), which pertained to the categorization of offenders according to the gravity of the crimes they had committed and the introduction of a plea-bargaining system. These measures were to facilitate the effectiveness and expedition of the juridical process.[64] A Specialized Chamber could have several benches presided

59 Nicholas A. Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (New York: Routledge, 2010), 80.

60 Augustine Brannigan and Nicholas A. Jones, 'Genocide and the Legal Process in Rwanda: From Genocide Amnesty to the New Rule of Law,' *International Criminal Justice Review* 19(2) (2009): 192–207.

61 Brannigan and Jones, 'Genocide and the Legal Process in Rwanda'.

62 Cf. Palmer, Courts in Conflict.

63 Article 1 stipulated that the Specialized Chambers should adjudicate genocide and crimes against humanity perpetrated by civilians in ordinary courts, whereas those crimes committed by members of the defence forces should be tried by specialized chambers in the military courts.

64 Usta Kaitesi, 'Genocidal Gender and Sexual Violence: The legacy of the ICTR, Rwanda's ordinary courts and gacaca courts' (PhD Thesis: Utrecht University, 2013), 60; Olivier Dubois, 'Rwanda's na-

over by a president, and the bench consisted of three judges who were chosen from the ordinary judges of the court of first instance. Judgements given by the Specialized Chambers could be appealed on the basis of law or procedural errors. Decisions from the appeals chamber were not appealable (except in very limited cases).

The OL 08/96 introduced the categorization of crimes to mirror the different levels of participation and gravity of crimes, which was later used in *gacaca* to divide juridical responsibilities between the different courts. Until the establishment of *gacaca*, however, the Specialized Chambers built on this categorization in the juridical process. A new OL 16/2004 which also governed the functioning of *gacaca* reduced the categories to three; Category 2 and 3 crimes against persons were merged to Category 2 and property crimes were put into Category 3.[65]

The plea-bargaining system formed a cornerstone of the OL of 1996. It would not only expedite the cases but would also encourage confession and collaboration with the justice system and elicit apologies to victims.[66] In practice, this meant that defendants who offered a complete confession including a detailed description of the acts committed, the names of accomplices and an apology to the victims could benefit from a significant reduction in their sentences if they pled guilty. Depending on when in the criminal process the confession was made, convicted individuals in Category 2 had their sentence reduced by seven to eleven years, and those in Category 3 were given only one-third of the sentence. However, the plea-bargaining system was especially for Category 2, 3 and 4 crimes. Until 2007 (when Rwanda abolished the death penalty), Category 1 perpetrators could expect the death penalty if found guilty, whereas Category 2 defendants risked life imprisonment. A prison sentence was never served for property offences (Category 4), which technically amounted to civil damages only.

The first trials began on 27 December 1996 but were vehemently criticized because international observers noted the violation of the rights of the defence. A report by the UN High Commissioner for Human Rights states that by the end of June 1997, 142 judgments had been handed down by the Specialized Chambers, which included six acquittals and 61 death sentences, 13 of which were against individuals on the list of Category 1 cases; of those early 142 convictions, 25 were delivered after the acceptance of a confession and guilty plea.[67]

The revisions of the OL of 1996 in 2004 formed part of another substantial reform of the juridical system. The Specialized Chambers were abolished in 2000 and the

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tional criminal courts and the International Tribunal,' *International Review of the Red Cross* 79(828) (1997): 717–730.

65 Barbora Hola and Hollie Brehm, 'Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts,' *Genocide Studies and Prevention: An International Journal* 10(3) (2016): 62.

66 Dubois, 'Rwanda's national criminal courts and the International Tribunal.'

67 Dubois, 'Rwanda's national criminal courts and the International Tribunal,' 730.

national courts (where the Chambers had been based) were given authority to try genocide cases. Following the 2004 reform, 15 courts had jurisdiction over genocide cases. The appeal process was also improved by allowing the High Courts to preside over such cases, and a request for review could even be lodged at the Supreme Court. 'Arguably, the standards applied in genocide-related trials improved as a consequence of these reforms'.[68]

Official court statistics are unavailable, and the scholarly exploration of the domestic genocide trials in Rwanda is sparse. It is therefore difficult to reach an informed assessment of the trials (see in more detail section 2.1). According to Hola and Brehm, approximately 4,122 individuals had been tried by the end of 2001.[69] Jones notes that an additional 2,332 Rwandans had been tried in 2002 and 2003[70], and the United Nations reports that by mid-2006 approximately 10,000 individuals had been prosecuted.[71] With the nationwide establishment of *gacaca* in 2005, however, most cases were transferred to the lower courts, and only Category 1 cases were kept under the jurisdiction of the national courts. Even those cases were transferred to *gacaca* from 2008 onwards, and only those most responsible for the killings were tried before the national courts.

In 2012 the juridical system underwent yet another reform:[72] in February 2012 a Special Chamber at the High Court was set up to try international crimes. The Chamber tries individuals accused of genocide, crimes against humanity and war crimes extradited to Rwanda from other countries and the International Criminal Tribunal.[73] This new Chamber has six judges including then president Athanase Bakuzakundi. The first accused person to appear before the Special Chamber was Léon Mugesera, who was deported from Canada after a long legal battle against his extradition. He had been wanted since 1995 in connection with a 1992 speech (he was then vice-president of the Gisenyi prefecture) in which he incited Hutu to kill Tutsi. The second person was Pastor Jean Uwinkindi, who was the first person to be transferred from the ICTR to the Rwandan national courts.

68 Hola and Brehm, 'Punishing Genocide", 63.

69 Hola and Brehm, 'Punishing Genocide", 63.

70 Jones, *The Courts of Genocide*, 88.

71 UN Outreach Programme on the Rwanda Genocide and the United Nations, *Justice and Reconciliation in Rwanda*. Background Note (2012) accessed 18 January 2020, http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.

72 This paragraph is based on justiceinfo.net *Rwanda Creates Special Chamber for International Crimes*, 16 February 2012, accessed 19 January 2021, https://www.justiceinfo.net/en/24222-160212-rwandajustice-rwanda-creates-special-chamber-for-international-crimes.html.

73 As of 2018, Rwanda had sent out 845 indictments to different countries, but only 17 individuals were transferred, the majority from European countries. In 2018 the new facility for the Chamber and the International Crimes Unit of the National Public Prosecution Authority was inaugurated in Nyanza. See *International Crimes High Court Chamber inaugurated in Nyanza*, accessed 19 January 2021, https://www.newtimes.co.rw/news/international-crimes-high-court-chamber-inaugurated-nyanza.

2.2.2 Localized justice: Inkiko *Gacaca*

Given the complete destruction of the political and legal infrastructure, it would have taken an estimated 100 years to try all the defendants in the national courts. Soon after the Genocide, the government of national unity started negotiations on 'traditional' ways of dealing with the backlog of prisoners. It was clear from the very start for Rwandan officials that the South African model of a truth and reconciliation commission would not be enough to deal with the magnitude and extent of the killings and the foregoing decades of impunity regarding ethnic targeting of Tutsi since independence in the 1960s (see section 1.1.2).

Against this backdrop, the idea to revise and modernize *gacaca* was born.[74] *Gacaca* was a traditional conflict resolution mechanism that had been used in the country already in pre-colonial times to mitigate and resolve low level community conflicts involving elders, the *inyangamugayo*,[75] who would preside over the proceedings and decide on appropriate ways of conflict resolution that usually pertained to restorative measures. An expert committee appointed by the government was tasked to adapt and revise these community courts to fit crimes against humanity and genocide, which had both been ratified and codified in national legislation. *Gacaca* was adapted to encompass punitive as well as restorative elements, so that it is seen in the literature as a hybrid model of criminal prosecution. It follows a complex structure encoded in several OLs that were revised multiple times during the duration of *gacaca*.[76] The courts started in a pilot phase in 2002. On the eve of the election of the *inyangamugayo* in 2002, President Kagame formulated the expectations for *gacaca* in the following words:

> What Rwanda expects from the gacaca courts is to establish the truth about what happened, to expedite the backlog of Genocide cases, to eradicate the culture of impunity and to consolidate the unity of our people. Furthermore, if the gacaca courts function as we anticipate, it will be an important contribution to the understanding and advancement of international law.[77]

Surely *gacaca* should have sped up the trials given the number of genocide suspects and the many victims that expected a fair and speedy trial, so as to roll back the long-established culture of impunity. The objective of expeditious justice, however, had to be reconciled with the objective of unity and reconciliation. 'Thus gacaca

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74 *Gacaca* means 'sitting in the tall grass'.

75 Which means 'person of integrity'.

76 See section 2.6 on laws for a full list of laws related to *gacaca* and criminal prosecution in Rwanda more broadly. The revisions of the OL demonstrates the fast-changing character of *gacaca* but also the willingness of policy-makers to respond to (unforeseen) problems. At the same time, it also points to the many challenges *gacaca* posed in its nationwide implementation.

77 Address to the nation by H. E. Paul Kagame, President of the Republic of Rwanda on the eve of the election of Gacaca Judges on 3 October 2001, accessed 19 January 2021, www.rwanda1.com/government/07 11 01 add.htm.

courts were historically and circumstantially brought within the perspective of contemporary judicial system of Rwanda'.[78]

In a nutshell, their working and structure can be summarized as follows:

The *gacaca* laws provided for *different crime categories:* (1) those participants who planned and organized the Genocide, who were high-ranking officials within religious or state institutions or the militias, who incited to violence, supervised or led others to commit violence. Rape, sexual torture, murder and the violation of dead bodies also fell within Category 1 crimes, reflecting the gravity of the crime rather than the level of involvement. There were an estimated 70 – 80,000 suspects in this category, of which there were around 7,000 indicted for rape and sexual torture.[79] (2) Category 2 crimes pertained to those who distinguished themselves by the zealousness or excessive wickedness with which they participated in the Genocide; torture (though sexual torture remained under Category 1 throughout the juridical revisions), those who violated victims post-mortem; killers; and those who intended to kill but did not succeed. (3) Category 3 crimes entailed property crimes. Whilst such acts, by definition, do not fall under the definition of genocide, Rwandan laws had included this category because the destruction and theft of property originated in the same rationale as to why Tutsi were hunted and killed.[80] Property stolen or destroyed often constituted symbols of Tutsi wealth such as cows and homes. Personal belongings such as clothes and even personal photographs were stolen to further humiliate and make Tutsi suffer.

Community involvement meant that lawyers or formally trained judges were not part of the process, so as to avoid the traditionally adversarial juridical setup; together with the plea-bargaining, this constituted the restorative element of *gacaca*. The *inyangamugayo* judges were elected by the community (everyone older than 18 was allowed to vote) and the whole community was asked to take part in the proceedings and had the possibility to appear as witnesses. The judge's role did not require a legal education (although they received a brief legal training in the run-up to the courts' working), but a judge had to be at least 21 years old, could not have prior criminal convictions or have participated in the Genocide or held a position within the government at the time of election. More than 250,000 men and women were subsequently elected as *inyangamugayo*. The trials usually occurred on a weekly basis in communities throughout Rwanda, and community participation was a duty (Art. 29, OL 16/2004).

Punitive and restorative measures were to be applied by the bench of lay judges according to sentencing guidelines. Judges had the ability to sentence defendants to 25 years, imprisonment or to community service, so-called *travaux d'intérêt général* (TIG), depending on the severity of the crime and a defendant's display of remorse

78 Kaitesi, *Genocidal Gender and Sexual Violence*, 66.
79 Kaitesi, *Genocidal Gender and Sexual Violence*, 68.
80 Kaitesi, *Genocidal Gender and Sexual Violence*, 69.

(e. g. asking for forgiveness or disclosing the whereabouts of bodies). For instance, defendants had to help build communal roads or even memorials.[81] Judges could also sentence them to TIG helping repair or maintain survivors' houses.[82]

OL 40/2000 established **courts** operating on different political levels of decentralization that were tasked with distinctive crime categories: the cell/cellule or *akagari* level (the smallest political entity)[83] was responsible for evidence collection in the investigation phase, which involved the entire community; at this stage it was important to make lists of those who were killed or presumed missing and to take stock of looted property. The cell level was also responsible for trying property crimes (Category 4, later Category 3), whereas the sector *umurenge* level tried Category 2 crimes and dealt with appeal cases. Category 1 cases were in the beginning referred to national courts but in 2008 were tried before *gacaca* sector courts. According to the report of the National Service of Gacaca Courts, there were a total of 9,013 cell courts, 1,545 sector courts, and 1,545 courts of appeal.[84] Each level of court was comprised of a general assembly, a bench of judges, a president and a coordinating committee.

After the pilot phase, in 2005, *gacaca* was implemented nationwide under the slogan 'the truth heals'. The government and local authorities campaigned for the population to take part in the proceedings and help find out what exactly happened during the Genocide. The *gacaca* courts ended their work in 2012; they had tried 1,003,227 individuals in 1,958,634 cases (see also Tab.1).[85] According to an evaluation study, *gacaca* had reached its objectives with an average of 85 percent.[86] Worldwide, *gacaca* is the largest and furthest reaching localized criminal prosecution after genocide and dictatorship. Yet it has from the very start been critiqued by international human rights experts and non-governmental organizations; likewise, its success is contested in Rwanda itself. Section 2.10 presents a detailed assessment of *gacaca*.

81 Author fieldwork notes August 2014.

82 Personal interview, February 2017.

83 The court levels matched the provincial and local administrative structures of Rwanda at the time. Kigali being the only provincial/city of Kigali courts. Following the juridical reforms in 2003 and 2004, the provincial level was merged with the sector level.

84 National Service of Gacaca Jurisdictions, *Report on the Activities of the Gacaca Courts*, 5.

85 Hollie Brehm, Christopher Uggen, Jean-Damascène, 'Genocide, justice, and Rwanda's Gacaca courts," *Journal of Contemporary Criminal Justice* 30(3) (2014), 333 – 352.

86 See *Gacaca Courts Genesis Implementation and Achievements*, accessed 19 January 2021, http://rpfinkotanyi.org/wp/?p=1958. This report provides a summary of the courts from the state's perspective.

Tab. 1: Decisions by gacaca courts (total number of cases: 1,951,388 as of 31 January 2012)[87]

Category	No. of Cases	Guilty	Not Guilty
First	31,453	24,730 (79%)	6,723 (21%)
Second	649,599	433,471 (67%)	216,128 (33%)
Third	1,270,336	1,270,336 (96%)	49,865 (4%)

2.2.3 International Justice: The International Criminal Tribunal for Rwanda (ICTR)

The ICTR was established by the UN Security Council (hereafter SC) under Chapter VII in resolution 955 as response to the gross human rights violations committed in Rwanda.[88] It aimed to 'put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them (...) [and] to contribute to the process of national reconciliation and to the restoration and maintenance of peace' (S/RES/ 955 1994, 1–2).

Some commentators[89] opine that the SC established the ICTR due to the international community's failure to recognize the crimes as genocide and intervene accordingly under a UN Chapter VII Mandate (which would have allowed the use of force). The ICTR was an ad hoc tribunal founded to try the planners of and parties most responsible for the Genocide, the *génocidaires*. Its jurisdiction encompassed crimes against humanity, genocide, war crimes and its statute set out to try serious violations of international humanitarian law committed in the territory of Rwanda, against Rwandan citizens and in neighbouring countries between 1 January 1994 and 31 December 1994.[90]

It was based in Arusha[91], Tanzania so as to avoid political interference from the Rwandan government, which had originally requested the establishment of the court, but ultimately voted against the UN resolution, citing the following reasons:[92]

87 The overall cases in this table vary slightly from the those reported by Brehm et al.; table taken from the Kigali Bar Association's report *Lessons from Rwanda's National and International Transitional Justice*.

88 See further Security Council, Resolution 955 (1994), November 8, 1994, UN Doc. S/RES/955 (1994).

89 Payam Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda,' *Duke Journal of Comparative & International Law* 7 (1997): 325–348.

90 ICTR Statue, 1994.

91 Resolution 955 postponed a decision on the seat of the Tribunal. For political, economic and geographical reasons Arusha was established as a location in Resolution 977 of 22 February 1995.

92 See for the full reasoning Security Council, Forty-ninth Year, 3453rd Meeting, 8 November 1994, S/PV.3453. Cf. Hola and Brehm, *Punishing Genocide*; Dubois, *Rwanda's national criminal courts and the International Tribunal*; Gerald Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity* (New York: Routledge, 2013).

the temporally limited jurisdiction that only included crimes committed in 1994 (whereas the national courts and *gacaca*, see above, tried crimes committed between 1990 and 1994); its location outside of Rwanda and the therefore lack of opportunity for Rwanda to influence the functioning of the ICTR, but also the missed opportunity for the Tribunal to play an explanatory and representative role among the Rwanda population; that sentences were to be served outside of Rwanda and excluded capital punishment. And finally, the Rwandan representative to the UN stated that the Tribunal was inadequately equipped for the task at hand, given that the Appeals Chamber and the Prosecutor were to be common to the Tribunals for both Rwanda and the former Yugoslavia[93].

The ICTR consisted of three trial and appeal chambers. In total, 53 judges served at the Tribunal; they were elected by the UN General Assembly for a four-year term and were eligible for re-election. The majority of judges were men; 34 percent came from the African continent and 34 percent from Europe.

The ICTR closed its doors on 14 December 2015. In total, the ICTR indicted 90 individuals for war crimes, crimes against humanity and genocide.[94] It prosecuted cabinet members, regional and local politicians, military leaders and members of the *Interahamwe* militia. Some prominent businessmen and media representatives were also prosecuted for the incitement of violence. A total of 73 individuals were tried and received a verdict, and of these 14 were acquitted and 59 were convicted.[95] 52 of the 59 convicted individuals (88 percent) were found guilty of genocide and were convicted of participation in killings and other offenses against persons.[96]

In 2010 the UN SC created the International Residual Mechanism for Criminal Tribunals (hereafter IRMCT or Mechanism) in resolution 1966 (of 22 December 2010) in order to help 'guarantee that the closure of the two pioneering ad hoc tribunals does not open the way for impunity to reign once more (President Theodor Meron, UN SC, 7 June 2012).[97] It started operating on 1 July 2012, divided into a branch in Arusha continuing the work of the ICTR and a branch in The Hague ensuing the work of the ICTY.[98] For the first three years the IRMCT operated alongside the two

93 The International Criminal Tribunal for the Former Yugoslavia (ICTY) was set up by the United Nations SC in 1993 through resolution 827 as response to the war crimes committed in the Balkans in the 1990s. It is often referred to as the sister Tribunal to the ICTR. They both influenced each other in the advancement of international criminal law/international humanitarian law and especially the juridical application and further delineation of genocide as an international crime. (Dubois, *Rwanda's national criminal courts and the International Tribunal*.).

94 Hola and Brehm, *Punishing Genocide*, 61.

95 See for a detailed discussion on figures Hola and Smeulers, *Rwanda and the ICTR*, 2016.

96 Hola and Brehm, *Punishing Genocide*, 61.

97 Accessed 20 January 2021, https://www.irmct.org/en/about.

98 It consists of a Trial Chamber for each branch and a joint Appeals Chamber, the Registrar and Office of the Prosecutor; it draws on a roster of 25 judges from 24 different countries and staff representing 65 nationalities (as of 2016), accessed 20 January 2021, https://www.irmct.org/en/about/organization.

Tribunals but has since 2015 operated as stand-alone international institution. It is mandated to perform a number of essential functions previously carried out by the ICTR (and ICTY) so as to 'maintain the legacies of these two pioneering ad hoc international criminal courts and strives to reflect best practices in the field of international criminal justice' (President Theodor Meron, UN SC, 7 June 2012).

In accordance with its mandate, the Mechanism has the following responsibilities:[99] (1) the tracking and prosecution of remaining fugitives, especially related to the six individuals at large who will be expected to be tried in Rwanda; (2) the completion of remaining appeal proceedings; (3) review of proceedings, i. e. of judgements if, for instance, new facts are discovered that could have been a decisive factor in reaching the judgement; (4) retrials (currently only conducted at the ICTY branch of the Mechanism); (5) trials for contempt and false testimony committed in the course of proceedings before either Tribunal or the Mechanism; (6) the monitoring of cases referred to national courts; (7) the protection of victims and witnesses for ongoing and completed cases (out of 7,000 witnesses/victims who testified before the Tribunals, 46 percent were granted protective measures); (8) the supervision of enforcement of sentences and decision of requests for pardon or early release (made by the President of the Mechanism); (9) assisting national jurisdictions; (10) the preservation and management of archives.

Some of the ICTR's most prominent cases include the media case, the military and the landmark Akayesu case, which built a cornerstone in the delineation of the definition of genocide and sexual violence (see a detailed analysis of the legacy of the ICTR section 2.10). As such, work on the international level in bringing the planners and most responsible to justice is ongoing through the work of the Mechanism and via trials taking place under universal jurisdiction in foremost European countries and Canada.[100] The arrest of one of the three remaining fugitives, Félicien Kabuga, sparked much media attention in late May 2020. Kabuga had lived under a false name in a suburb of Paris. He was wanted for seven counts of genocide, attempt to commit genocide, conspiracy to commit genocide and persecution and extermination in his role as an influential businessman prior and during the 1994 Genocide.[101] He controlled many of Rwanda's coffee and tea plantations and co-owned the notorious *Radio Télévision Mille Collines*, which incited violence, including publishing the names of Tutsi who should be killed.[102] A High Court in Paris decided to

99 Accessed 20 January 2021, https://www.irmct.org/en/about/functions.

100 In June 2020 Karenzi Karake, a high-ranking RPA military commander, was arrested in London over allegations of serious crimes, including crimes against humanity between 1990 – 2002 in Rwanda and the DRC. He is the first RPA member arrested for such crimes, currently fighting an extradition request from Spain. Accessed 20 January 2021, https://www.hrw.org/news/2015/06/26/dispatches-ending-genocide-rwanda-does-not-excuse-murder-0.

101 Accessed 20 January 2021, https://www.reuters.com/article/us-france-rwanda-arrest-neighbours/he-wouldnt-say-a-word-rwanda-genocide-fugitive-lived-incognito-in-paris-idUSKBN22T0RE.

102 Accessed 20 January 2021, https://www.bbc.co.uk/news/world-africa-52690464.

transfer Kabuga to the Mechanism branch in The Hague, where he currently awaits trial.[103]

2.3 Reparations

Reparations are civil remedies designed to redress harm resulting from an unlawful act that violates the rights of a person.[104] 'They should seek to restore victims' sense of dignity and moral worth, remove the burden of disparagement often tied to victimhood, and return their political status as citizens.[105]

In Rwanda, debates around reparations centre on what is owed to genocide survivors for their experience of victimization and the losses suffered and, crucially, which actors bear the burden of repair.[106] 27 years after the Genocide, survivors are still waiting for reparative justice, i. e. their right to reparations as outlined in international human rights law and national legislation in Rwanda. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafter Basic Principles) clearly state the right of victims to different types of reparation such as restitution (to the status quo ante), compensation (monetary) rehabilitation (medical, psychological, legal and social), satisfaction and the right to non-recurrence, and outline a positive duty of the state to 'provide victims with adequate, effective and prompt reparation' (Principle 15).[107] The Rwandan state endorsed these international principles in its 2003 constitution, which promises that 'the state shall, within the limits of its capacity, take special measures for the welfare of the survivors who were rendered destitute by the genocide against the Tutsi committed in Rwanda from October 1st, 1990 to December 31st, 1994' (Art. 14). As will be shown, the governments' interpretation of 'within the limits of capacity' is narrowly defined, so that reparations in the form of any compensation

103 Accessed 29 June 2022, https://www.voanews.com/a/kabuga-fit-to-stand-trial-over-rwanda-genocide-un-tribunal/6616463.html.

104 Lisa J. Laplante, 'The plural justice aims of reparations,' in *Transitional Justice Theories*, ed. Susanne Buckley-Zistel et al., 40 – 66 (New York: Routledge, 2014).

105 Felix Ndahinda Mukwiza, 'Debating and Litigating Post-Genocide Reparations in the Rwandan Context,' in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, ed. Carla Ferstman and Mariana Goetz, 629 – 655 (Leiden: Brill Nijhoff, 2020), 631.

106 Ndahinda, 'Debating and Litigating Post-Genocide Reparations in the Rwandan Context,' 640.

107 In addition, several international human rights treaties impose obligations on the State to provide effective remedy, redress and – in the case of Rwanda in particular important – an enforceable right to fair and adequate compensation: Art 2 of the International Covenant on Civil and Political Rights (ICCPR); Art 14 of the UN Convention against Torture and other cruel, inhuman and degrading treatment or punishment (UNCAT); Art 7 of the African Charter on Human and Peoples' Rights (ACHRP).

remain largely unfulfilled.[108] The government does not seem to see the burden of repair as falling on it, which is demonstrated in its refusal to pay compensation and in the conviction that the FARG (see below) constitutes reparative justice, an idea which survivors vehemently and openly reject. Reparations shall carry 'an acknowledgment on the part of the transgressor that what he is doing is required of him because of his prior error'.[109] This is clearly not the case here.

2.3.1 Legal Provisions

In the national courts (Specialized Chambers, see 2.2), survivors – or in legal terms, victims – constitute *partie civile* and as civil claimants can join the criminal proceedings. That means that the Specialized Chambers could order compensation payments either against the individual convict or the State.[110] Between 1996 and 2001 an estimated two-thirds of cases were attended by survivors and 50 percent of survivors who filed for compensation against individual perpetrators were awarded compensation. The amounts awarded do not follow any guidelines. For instance, for the loss of a husband courts awarded between approximately 400 and 13,000 US dollars without detailing how they arrived at this figure.[111]

The civil verdicts of compensation payments against the State rendered by the Specialized Chambers were never implemented[112], despite the acknowledgement of the civil liability of the state in the 2001 OL on *gacaca* which states 'in return for the percentage of the annual budget that the State must reserve each year to the Compensation Fund, and having accepted its role in the genocide and crimes against humanity, any civil action filed against the State is to be declared inadmissible' (Art. 91, para. 2). That means in practice that whilst the Rwandan state is obliged to finance FARG, it cannot be held liable for not paying compensation. Survivors therefore are reliant on the compensation fund (*Fonds d'Indemnisation*, FIND) to implement the compensation orders issued by the courts and *gacaca*.[113] However, despite several draft laws, FIND has yet to be established. With the revised OL of 2008, the rights of victims to claim reparations against the orders of both *gacaca*

108 Noam Schimmel, *Advancing International Human Rights Law Responsibilities of Development NGOs: Respecting and Fulfilling the Right to Reparative Justice for Genocide Survivors in Rwanda* (New York: Palgrave Macmillan, 2020).

109 Bernard R. Boxill, 'The Morality of Reparation,' *Social Theory and Practice* 2(1) (1972): 118.

110 Heidy Rombouts and Stef Vandeginste, 'Reparation for Victims in Rwanda: Caught Between Theory and Practice,' in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, ed. Karl De Feyter et al. (Antwerp: Intersentia, 2005).

111 Stef Vandeginste, 'Reparation pour les victimes de genocide, de crimes contre l'humanité et de crimes de guerre au Rwanda,' *L'Afrique des Grands Lacs Annuaire 2000 – 2001* (2000 – 2001): 10.

112 Vandeginste, 'Reparation pour les victimes de genocide, de crimes contre l'humanité et de crimes de guerre au Rwanda,' 10.

113 Rombouts and Vandeginste, 'Reparation for Victims in Rwanda".

and the courts has been further limited. It is the Fund (FARG) only that is henceforth 'entitled to undertake civil action on behalf of the victims of the Tutsi genocide, and other crimes against humanity, against persons convicted of crimes classifying them in the first category' (69/2008, Art. 20).[114]

The 2001 OL also makes provisions for civilly liable individuals before *gacaca*. As part of the evidence-finding process at cell level (see 2.3), a list of victims and damages/losses was drawn up and bodily harms noted. According to Article 67, all judgements must indicate the amount of compensation awarded. However, the amount must be within the scales foreseen under the law regarding the creation of the prospective FIND; the latter would be mandated to oversee the implementation of the compensation order.[115] Persons who committed offenzes against property during the Genocide were liable to pay 'civil damages determined by amicable agreement between the parties with the assistance of the community' (OL 08/96 Art. 2, para. 14). According to statistics, 1,320,554 cases fell under category 3/4: offenzes of looting and destruction of property. The Ministry of Justice released a report in 2018 stating that only 54,160 cases remained unsettled, with the prospect of approximately 25,187 to be settled in the future, whilst 28,973 cases could not be as convicts had either died, fled the country or did not have enough property to compensate victims.[116] Since *gacaca* tried foremost ordinary citizens who had participated in the Genocide, it is not surprising that they had not the financial means to pay any damages to those they had harmed, and even if they could offer compensation, e. g. in helping survivors in agricultural activities or repair their houses (as a form of TIG), this hardly amounted to the actual property damages caused. It also left the convicts' families in a precarious situation if labour had to be divided between (poor) households. In this case, it is the state's obligation (as codified in international human rights law) to take up the burden of repair, so that victims can be compensated for their material losses (not even mentioning the damages caused by injury, e. g. rape and loss of family members, i. e. restitution and rehabilitation). As Ndahinda argues,[117] the absence of an overreaching approach to reparation for survivors, including first and second category offenses, remains an unfulfilled governmental commitment to deliver reparative justice as initially codified in OL of 1996.

In sum, whilst some legal provisions have been put in place, the actual implementation of reparation orders is missing, and there does not seem to be the political will (mirrored in the failure to put in force the law on the compensation fund, for ex-

114 On a positive note, the 2008 amendments expanded the definition of beneficiaries to include not only those targeted for their Tutsi identity (as defined in OL of 1998) but 'the neediest survivors', and the Fund is entitled to undertake civil action on behalf of the victims of the Tutsi genocide and other crimes against humanity'. However, in the 2013 amendments to the OL the reference to victims of other crimes was dropped, so that the beneficiaries are solely genocide survivors.

115 Rombouts and Vandeginste, 'Reparation for Victims in Rwanda'.

116 Ndahinda, 'Debating and Litigating Post-Genocide Reparations in the Rwandan Context,' 640.

117 Ndahinda, 'Debating and Litigating Post-Genocide Reparations in the Rwandan Context,' 641.

ample) to address the gap in reparation payments to the most vulnerable of Rwandan society. With the withdrawal of the Compensation Law in 2002 by the Ministry of Justice, 'a definition of who merits compensation and to what extent has never been legally defined in Rwanda, and, consequently, never implemented'.[118]

Jean-Pierre Duzingizemungu, President of IBUKA, the main organization of genocide survivors, denounced these shortcomings', saying, 'for survivors, reparation means restitution and compensation for moral and material damage, rehabilitation and guarantee of non-repetition'. For Naphthal Ahishakiye, Executive Secretary of IBUKA, this legal vacuum in the *gacaca* constitutes, for the survivors, 'a major denial of justice'. 'All in all, it's as if all the judicial bodies didn't want to render us justice, he concluded.[119]

2.3.2 FARG

In 1998, the government created FARG, the Fund for Support and Assistance to the Neediest Survivors of the Genocide Against the Tutsi (*Fonds d'Assistance pour les Rescapés du Génocide*, hereafter the Fund), which offers assistance in the areas of education, housing, health, human rehabilitation and income generation.[120] The government opted for this type of assistance to survivors rather than direct financial compensation, reasoning that the current Rwandan state was not responsible for the crimes. The government is bound to pay six percent percentage of its annual budget (which remains an unfulfilled promise) to the FARG, which is substituted by funding from international organizations.[121] The Fund operates along five lines, providing medical care to the sick and assistance to the most vulnerable, financial

118 Schimmel, Advancing International Human Rights Law Responsibilities of Development NGOs, 74.

119 Accessed 26 January 2021, https://www.justiceinfo.net/en/40610-rwandan-reparations-fund-breaks-ground-but-is-still-not-enough-say-victims.html. The ICTR did not have the mandate to order reparations (as the ICC has) and the attempt of ICTR judges (in a recognition that the justice rendered before the Tribunal was incomplete without reparations) to better care for and include victims in the proceedings and to order reparations was rejected by the SC (see for a detailed analysis, Ndahinda, 'Debating and Litigating Post-Genocide Reparations in the Rwandan Context;' Rombouts and Vandeginste, 'Reparation for Victims in Rwanda'.). However, the ICTR launched a formal request in 2013 to study how a programme of reparative justice for survivors could be developed and implemented. In 2014 the 'Task Force to Remember Survivors 20' was launched to advance genocide commemoration and to coordinate the campaign for reparative justice. The Task Force comprises the organized survivor community in Rwanda and represents over 300,000 survivors. Its objectives are, among other things, to realize the creation of a trust fund that will implement compensation payments and support rehabilitation and non-recurrence efforts. See further Schimmel, *Advancing International Human Rights Law Responsibilities of Development NGOs*.

120 Accessed 26 January 2021, https://www.farg.gov.rw/about-farg.

121 Accessed 26 January 2021, https://www.justiceinfo.net/en/40610-rwandan-reparations-fund-breaks-ground-but-is-still-not-enough-say-victims.html.

support for children in education and the building of houses. It thus focuses on rehabilitation and satisfaction matters in its approach to reparations.

FARG has a Board of Directors of seven members appointed by the Prime Minister's Office for a three-year term; however, survivors or survivor organizations are currently not selected as members of the Board. The Board is responsible for the strategic vision, approving the budget, performance evaluation and, crucially, deciding 'upon those people who shall be assisted, the quantity and nature of the assistance as well as criteria for its distribution' (OL 59/2008 Art. 9, para. 9).

After 20 years, the fund has in total paid for medical care on over 2 million occasions; nearly 110,000 children and orphans have been enrolled in the education programme at all levels up to university; the Fund has also enabled the construction of approximately 45,000 housing units, some of which are in 'reconciliation villages' (see section 2.5), and has helped 54,000 people in income-generating activities; approximately 270 million Euro have been spent to assist Genocide survivors.[122]

These figures cannot distract from the critique launched at the FARG for its many shortcomings in implementing its objectives and even for corruption.[123] Schimmel identifies the distribution of funds to district governments as a major structural problem, as this creates opportunities for corruption.[124] In addition, the Fund was slow in operating and was dealing with a backlog of thousands of cases lasting for years. Only in 2016 did it begin to address housing shortages that had been known about for more than six years. A CNLG survey in 2016 concluded 'about 9000 genocide survivors who completed secondary school are still waiting for support to go to university while 2105 student survivors who dropped out of primary school and 3582 who didn't complete secondary school need special support' (CNLG 2016).[125]

Especially orphans, elderly survivors and women who suffer from profound mental and physical damage inflicted by rape – those who are identified as 'neediest' in legal provisions and policy documents – agonize over the lack of state support. Orphans are often not able to commit to their education because they are caring for family members despite lacking means to do so, and hence fall into a poverty trap. They are unable to complete secondary school or go to university and are therefore unprepared for the job market, which renders them vulnerable. With regard to this shortcoming, SURF's 2013 annual report states that 'existing programmes are

122 Accessed 26 January 2021, https://www.justiceinfo.net/en/40610-rwandan-reparations-fund-breaks-ground-but-is-still-not-enough-say-victims.html.

123 Schimmel, *Advancing International Human Rights Law Responsibilities of Development NGOs*, 85.

124 See also above, accessed 26 January 2021, https://www.justiceinfo.net/en/40610-rwandan-reparations-fund-breaks-ground-but-is-still-not-enough-say-victims.html. The article states, 'embezzlement, houses built in a shoddy way to last only 5 to 10 years, corruption in the selection of beneficiaries, even allowing former militiamen to benefit. In 2010, following an assessment, more than 17,000 cases of malpractice were detected, and 47 dishonest entrepreneurs identified and brought to justice'.

125 Accessed 26 January 2021, https://survivors-fund.org.uk/news/cnlg-survey/.

largely inaccessible or ineffective, as they do not accommodate for the multifaceted needs of young survivors'.[126] 80 percent of the survivor population in need of scholarship assistance is excluded from FARG's social provisions.

Widowed genocide survivors who are often HIV/AIDS positive have received 'paltry assistance' despite being the most vulnerable in the survivor population. In a report on their situation, issued in 2013, AVEGA paints a desolate picture: of 1,462 widows who took part in the survey, 60 percent had no living relatives; over 65 percent had some difficulty or needed help with the most basic physical tasks of daily living such as walking 100 metres; 89 percent reported health problems and chronic illness; 75 percent were in need of direct and regular support and 60 percent reported that their houses needed renovation.[127] Trauma remains a continuous issue among the survivors in Rwanda, which is purported by poverty, homelessness and the lack of access to resources. Rombouts contends that psychological assistance has been almost non-existent.[128]

One survivor summarized the critique of the inadequacies of the FARG in stark words which are worth citing at length:

> Since its establishment, the Government has injected into FARG over 200 billion Rfrw, at least on paper, but where is the impact? Objectively speaking, very little impact – if any, at least as long as income generation and self-reliance of survivors – is concerned. 21 years since the genocide, survivors are getting poorer. Many survivors are still without a roof over their heads, others – especially the elderly – are dying day by day due to genocide consequences. HIV/ AIDS positive women raped during the genocide are dying due to lack of treatment and proper diet, many young survivors who dropped out secondary schools in order to cater for their young siblings are unable to resume their studies (...). Programmes such as the income generation projects are technically great if they are well designed and monitored. But in light of FARG's weaknesses such programmes should be implemented by a separate institution such as micro-finances that have necessary expertise in project management, monitoring and evaluation for low-income communities.[129]

Despite the establishment of FARG as early as 1998, the situation of survivors in Rwanda remains desolate and their right to reparative justice denied. By many, they are seen as a burden to society, a perspective which fails to acknowledge their plight and pain (informal conversation, January 2018). In the process of rebuilding the nation, fighting impunity and the commitment to the sustainable development goals (SDGs), survivors of the Genocide have been left behind. This includes victims of other crimes against humanity and war crimes that were harmed during

126 Schimmel, *Advancing International Human Rights Law Responsibilities of Development NGOs*, 87.
127 Schimmel, *Advancing International Human Rights Law Responsibilities of Development NGOs*, 94.
128 Heidy Rombouts, *Victim Organisations and the Politics of Reparation: a case study of Rwanda* (Antwerp: Intersentia, 2004).
129 Accessed 26 January 2021, https://survivors-fund.org.uk/awareness-raising/holistic-approach/ https://justice-survivors.com/2015/05/08/rwanda-genocide-survivors-getting-poorer-as-farg-changes-strategy/.

the civil war and in its aftermath. The lack of reparations and care for survivors potentially also hampers the governments' reconciliation efforts. To conclude, there seem to be 'purported fears that reparative justice will somehow hinder Rwanda's national development and be perceived [as] unfairly favouring survivors.'[130]

2.4 Reconciliation

Reconciliation can be broadly defined as the restoration of trust and positive relations between formerly adversarial groups. It is therefore a dynamic process that requires change to occur at the individual and the societal level.[131]

Since around 1998, the RPF promoted a strong narrative of national unity and reconciliation to reach reconciliation on both levels, as reflected in the many legal provisions that were created and several mechanisms that were put in place to further this vision of a reconciled peaceful and prosperous Rwanda, such as *gacaca* and the National Unity and Reconciliation Commission (NURC); therefore the National Unity and Reconciliation policy, formally introduced in 2007, is directly linked to the governments' socio-economic development *Vision 2020*.[132] Much of the transitional justice strategy that was designed follows this vision and is in fact an ambitious social engineering project to foster reconciliation between genocide survivors and perpetrators but also between citizens and the state (horizontal and vertical reconciliation).[133] However, the government's national unity and reconciliation efforts have been heavily criticized by international commentators and scholars alike for being overly elite-driven and neglecting the struggle of everyday lives of ordinary citizens and even of triggering open and subtle acts of resistance.[134] In their view, the vision of a rehabilitated nation closed down discussions of how ethnicity shaped the violence during the Genocide and led to a one-sided acknowledgement of victims being Tutsi only. Unity and reconciliation were furthermore promoted through the

130 Schimmel, *Advancing International Human Rights Law Responsibilities of Development NGOs*, 105.

131 Laura Blackie and Nicki Hitchcott, 'I am Rwandan': Unity and Reconciliation in Post-Genocide Rwanda,' *Genocide Studies and Prevention: An International Journal* 12(1) (2018): 24.

132 Andrea Purdeková, '"Civic Education" and Social Transformation in Post-Genocide Rwanda: Forging the Perfect Development Subjects,' in *Rwanda Fast Forward: Social, Economic, Military and Reconciliation* ed. Maddalena Campioni and Patrick Noack, 192–213 (New York: Palgrave Macmillan, 2012); Scott Straus and Lars Waldorf (eds.), *Remaking Rwanda: State Building and Human Rights after Mass Violence* (Madison, WI: University of Wisconsin Press, 2011).

133 Jennifer Melvin, 'Correcting history: mandatory education in Rwanda,' *Journal of Human Rights in the Commonwealth* 1(2) (2013): 14–22.

134 Cf. Susan Thompson, *Whispering Truth to Power: Everyday resistance to reconciliation in postgenocide Rwanda, Africa and the Diaspora: History, Politics, Culture* (Wisconsin: University of Wisconsin Press, 2013); Eugenia Zorbas, 'What does reconciliation after genocide mean? Public transcripts and hidden transcripts in post-genocide Rwanda,' *Journal of Genocide Research* 11(1) (2009).

legal abandonment of ethnicity from public and political life. In 1999, the Office of the President stated, 'traditional value which must be reasserted, reinforced and taught to all Rwandans is considered to be 'the basis of future peace and security'[135]. Rwandanness was imposed as a strategic tool to foster unity and reconciliation. *Ndi Umunyarwanda* means 'I am Rwandan', which especially encourages youth to better understand their heritage. As such, Rwandanness adds to the official government narrative of colonialism having introduced and made salient ethnicity as a social and political concept. Critical commentators accuse the Rwandan government of using *Ndi Umunyarwanda* as a tool with which to silence critics and political opponents rather than to educate the younger generation about the country's history.[136]

As aforementioned, there were two main institutions introduced in order to facilitate reconciliation. As a restorative justice instrument, *gacaca* was supposed to reconcile through its robust truth-finding element and broad community participation. But perhaps the strongest mandate to foster reconciliation was held by the NURC,[137] founded in 1999 by the RPF government as a body fully accountable to parliament. Its council of commissioners, who act in an advisory function under the guidance of the chairperson, are all appointed by the president directly. In its activities, the NURC focuses on civic education and conflict management as well as peacebuilding. In line with the national unity policy, NURC was established to sensitize the population to the need for reconciliation and to emphasize (through educational programmes) shared aspects of history, such as culture and language, and the nation's historical oppression under colonial rule, which introduced divisive politics. The audience of NURC's activities, however, is not only the broader population but also the government, private sector, civil society and the media. Therefore, its primary task is to 'reinforce national unity and reconciliation, denounce and fight against acts, writings and utterances which are intended to promote any kind of discrimination or intolerance' (NURC 2007).[138] As outlined in their citizen charter of 2008, NURC is strongly committed to 'homegrown approaches', which they foster through *ingando* (solidarity camps), *itorero ry'igihugu* (traditional Rwandan school that instills moral values that have been modernized to promote unity and truth and work towards *Vision 2020*), *umuganda* (community work in the interest of national reconstruction) and *girinka* (one cow per family).[139] In 2015, NURC found in their Reconciliation Barometer that the status of reconciliation in Rwanda was at 92.5 percent, that 95.4 percent trusted in their leaders, 93.7 percent believed in apology and forgiveness, and that

135 Thompson, *Whispering Truth to Power*, 111.

136 Cf. Susanne Buckley-Zistel, 'Nation, narration, unification? The politics of history teaching after the Rwandan genocide,' *Journal of Genocide Research* 11(1) (2009).

137 Accessed 9 Januar 2021, https://www.nurc.gov.rw/index.php?id=69.

138 Under law no 35/2008 of 08/08/2008, NURC was given eight core functions.

139 Accessed 9 January 2021, www.nurc.gover.rw.

95.1 percent trusted their fellow citizens.[140] These figures show a high level of compliance with the unity and reconciliation strategy and in turn demonstrate the government's success in introducing social cohesion as a broad societal norm, although various other factors might have affected this. As alluded to earlier in this section, some scholars opine that the population has internalized this societal norm out of fear of repression, denunciation and, at worst, imprisonment.[141] Without empirical evidence for these claims, however, it is difficult to assess the 'real' state of reconciliation in Rwanda: what is obvious is that the inter-ethnic violence feared and predicted by many scholars has not occurred, and it is unlikely that it will in the mid to long-term future. Whether this is because of 'real' reconciliation, fear or a felt duty to forgive, apologize and reconcile must remain an unanswered question.

One of the most recent reconciliation initiatives supported by the government and under the auspices of the NURC are the so-called reconciliation villages. As of 2019, there were six such villages established by Prison Fellowship Rwanda, a Christian non-governmental organization. Funding comes mainly from the USA and the United Nations to promote healing and reconciliation. In the villages, perpetrators, survivors and their families live together and are financially supported with housing and school fees. Around 3,000 Rwandans live in these villages.[142] There has not been any sustained research undertaken into the level of 'reconciliation' in these villages or what their inhabitants think about their lives in these spaces.

According to the author's own research with survivors[143], they are often very sceptical of the government's top-down approach of an enforced reconciliation policy that requires survivors to forgive and reconcile. In many interviews, survivors preferred to speak about 'co-existence' with those who took part in the Genocide and sometimes even expressed anxiety about living next-door to people who had killed their family members.[144] To some extent, the need at least to share communal spaces again with alleged perpetrators became virulent when in 2003, by presidential decree, thousands of prisoners were released from prison and returned to their villages. Hence, survivors were forced to embrace the idea of reconciliation, but there was also a felt obligation to prevent further violence, which encouraged survivors to embark on the long and difficult process of coming to terms with the violence inflicted on them.[145] Blackie and Hitchcott found that in testimonies (translated from the Geno-

140 Accessed 20 January 2021, https://www.nurc.gov.rw/fileadmin/Documents/Others/Rwanda_Reconciliation_Barometer_2015.pdf.

141 Cf. Lars Waldorf, 'Revisiting Hotel Rwanda: genocide ideology, reconciliation, and rescuers,' *Journal of Genocide Research* 11(1) (2009); Filip Reyntjens, 'Constructing the truth, dealing with dissent, domesticating the world: Governance in post-genocide Rwanda,' *African Affairs* 110(438) (2011).

142 Ignatius Ssuuna, '25 years genocide can Rwanda heal? 6 villages try,"'*AP News*, 6 April 2019, accessed 11 January 2021, https://apnews.com/article/719ac8f0c4da4d2b80976057d869562a.

143 See e. g. Thompson, *Whispering Truth to Power.*

144 Personal interviews 2014; 2017.

145 Blackie and Hitchcott, 'I am Rwandan'.

cide Archive Rwanda, see 2.6), Rwandans often named pragmatic reasons to embrace reconciliation: the government strategy provided them with continuous political stability and economic development. At times they also cited benefits from taking part in NURC activities that fostered empathy between survivors and perpetrators. In conclusion, reconciliation is a complex and messy reality in Rwanda; it remains contested by Rwandans and foreign commentators alike.

2.5 Laws Relating to Transitional Justice

2.5.1 Laws Concerning Memorialization

- Law No. 56/2008 of 10/09/2008 Governing Memorial Sites and Cemeteries of Victims of the Genocide Against the Tutsi in Rwanda.[146]
- Law No 15/2016 of 02/05/2016 governing ceremonies to commemorate the Genocide against the Tutsi and the organization and management of memorial sites for the Genocide against the Tutsi, sets out new rules regarding the management of memorial sites.
- Presidential Order No. 061/01 of 20/05/2019 determining modalities for consolidation of memorial sites for the Genocide against the Tutsi.

2.5.2 Laws Concerning Reparation

- Law No. 2/1998 of 22 January 1998 Establishing a National Assistance Fund for the Neediest Victims of Genocide and Massacres Committed in Rwanda Between 1 October 1990 and 31 December 1994.
- Law No. 11/1998 of 1998 Amending and Completing the Law No. 2/1998 of 22 January 1998 Establishing a National Assistance Fund for the Neediest Victims of Genocide and Massacres Committed in Rwanda Between 1 October 1990 and 31 December 1994.
- Article 14 of the 2003 Rwandan constitution as amended to date provides, 'the state shall within the limits of its capacity, take special measures for the welfare of the survivors who were rendered destitute by genocide against the Tutsi committed in Rwanda from October 1st, 1990 to December 31st 1994 (...)'.
- Law No. 69/2008 of 30/12/2008 Relating to the Establishment of the Fund for the Support and Assistance to the Survivors of the Tutsi Genocide and other Crimes Against Humanity committed between 1st October 1990 and 31st December 1994, and determining its Organisation, Powers and Functioning.

146 The list of laws and regulations is taken from www.refworld.de and accessed 18 Januray 2021, https://cnlg.gov.rw/index.php?id=115.

- Law No. 81/2013 of 11 September 2013 establishing the Fund for Support and Assistance to the neediest Survivors of the Genocide against the Tutsi Committed Between 01 October 1990 and 31 December 1994 and Determining its Mission, Powers, Organisation and Functioning, OG. No. 45 of 11 November 2013.

2.5.3 Laws Concerning Criminal Prosecution

- Law No. 16/1997 of 26 December 1997 Modifying the Law No. 9/1996 of 8 September 1996 Relating to Provisional Modifications to the Criminal Procedure Code.
- Organic Law No. 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity committed since 1 October 1990.
- Law No. 33/2003 of 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes of 6 September 2003.
- Law No. 13/2004 Relating to the Code of Criminal Procedure.
- Organic Law No. 40/2000 of 26 January 2001 Setting Up 'Gacaca Jurisdictions" and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994.
- Organic Law No. 33/2001 of 2001 Modifying and Completing Organic Law No. 40/2000 of 26 January 2001.
- Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994.
- Organic Law No. 28/2006 of 27/06/2006 Modifying and Complementing Organic Law No. 16/2004 of 19/06/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994.
- Organic Law No. 10/2007 of 01/03/2007 amending Organic Law of 2004.
- Organic Law No 11/2007 of 16/03/2007 concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States.
- Organic Law No. 13/2008 of 19/05/2008 amending previous Organic Laws.
- Organic Law No. 04/2012/OL terminating Gacaca Courts and determining Mechanisms for solving Issues which were under their Jurisdiction, adopted on 15. June 2012.

2.5.4 Laws Concerning Transitional Justice Institutions

- Law No. 03/99 of 12/03/1999 establishing the National Unity and Reconciliation Commission, O.G. No. 6 of 15/03/1999.
- Law No. 04/99 of 12/03/1999 establishing the National Commission of Human Rights, O.G. No. 6 of 15/03/1999.
- Law No. 09/2007 of 16/02/2007 on the Attributions, Organisation and Functioning of the National Commission for the Fight Against Genocide.

2.5.5 Others

- Law No. 18/2008 of 23/07/2008 relating to the punishment of the crime of genocide ideology that defines genocide ideology and sets out specific penalties.
- Law No. 47/2001 of 18/12/2001 on Prevention, Suppression and Punishment of the Crimes of Discrimination and Sectarianism which effectively builds the foundation on which 'divisionism' is invoked for which no specific law exists.
- Law No. 02/2013 on regulating media (Media law) adopted 11 March 2013.
- Law No. 41/2013 of 16/06/2013 establishing the National Itorero Commission and determining its mission, organisation and functioning.

2.6 Access to Files

Archives are an important cornerstone in the fight against impunity after mass atrocity and genocide, as outlined in the updated set of UN principles of 2005 for the protection and promotion of human rights through action to combat impunity, also referred to as the Joinet (after former UN Special Rapporteur Louis Joinet) / Orentlicher Principles (named after Diane Orentlicher who updated the principles; E/CN.4/2005/102/Add.1).[147] According to 'The Right to Know', access to archives is especially highlighted as a means for a society to be informed about its own history and for victims and kin of victims to know about the injustices that occurred.[148] In a recent report of 2020 by the UN special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, access to archives was marked as a crucial step in reaching justice and in satisfying the right of victims to know the truth of what happened (A/HRC/45/45).[149]

Several institutions within and outside of Rwanda have collected files detailing specific aspects of the 1994 Genocide: (1) ICTR archive (2) *gacaca* archive (3) Geno-

147 Accessed 15 January 2021, https://undocs.org/E/CN.4/2005/102/Add.1.

148 See principles 2,4; principles 14–18 outline measures to guarantee access to archives and their preservation.

149 Accessed 15 January 2021, https://undocs.org/A/HRC/45/45.

cide Archive Rwanda (GAR) (4) the Shoah Archive. However, access to those files is regulated by each body individually, and especially the *gacaca* archive is not easily accessible either from within and from outside of Rwanda. Together these archives offer a rich and comprehensive account of the Genocide from various perspectives.

2.6.1 The ICTR Archive

The most extensive archive is the ICTR archive, which has thousands of metres of records and more than 3 petabytes of digital records including photographs, audio files and video files. The majority of files are accessible online through a database which allows a keyword and search for specific cases. Records include audio files as well as objects (see e. g. ICTR online exhibition 'Glimpse into the Archives').[150] Many files were redacted so as to protect the identity of witnesses. Many files, however, are not accessible online but can be viewed upon request on-site in Arusha at the MICT headquarters. The UN built a state-of-the-art building to allow for a safe holding environment for the archives.

Similar to the holdings of the ICTR's sister tribunal, the ICTY, there was and still is an ongoing debate about the custodianship of the archive. The Rwandan government requested the return of the documents to Rwanda and claims that they are the heritage of the Rwandan people, whilst the UN declared the ICTR archive the heritage of humanity and has refused to return any of the data to the Rwandan state out of fear that the government will restrict access to the archive.

2.6.2 The *gacaca* Archive

The *gacaca* archive is the most extensive local record of the Genocide. Due to the nature of the courts, it provides a very different narrative of the Genocide compared to the ICTR archive. All proceedings were recorded in writing, and trials include a list of victims, property stolen, injuries inflicted on survivors and/or dead bodies and the testimonies of defendants and witnesses. However, the decision-making of how the bench decided on a judgement was not noted. The archive's custodian is the CNLG, which regulates the access policy, something that is not formulated in any official document. It is only possible to get access through a lengthy permissions process, and some cases, such as those involving rape cases, are not accessible for international researchers or historians, at least momentarily. However, the proclaimed aim of the archive is to make past events accessible to the wider population and in particular to victims. In practice, though, access has not been provided to these population groups. Access for national researchers is given, however, and does not re-

150 Accessed 15 January 2021, https://www.irmct.org/specials/glimpse-into-the-archives/index.html.

quire a lengthy permission process. The *gacaca* archive is also used internationally for evidencing asylum claims brought forward by Rwandans abroad.

The archive is well protected, housed in a police station after a grenade attack in the 2000s. The Aegis Trust has been commissioned to catalogue and digitize the records. As of 2018, the process was not yet complete. The Aegis Trust is supported in its endeavour by the Dutch research organization NIOD, King's College London and the Shoah Foundation Centre at the University of Southern California, which offer training workshops and advise on international standards of cataloguing and digitization practices.

2.6.3 The Genocide Archive Rwanda

The GAR is a comprehensive collection of survivor testimonies gathered after the Genocide to specifically document the journey of survivors, but they also collected perpetrator testimonies and preserved the testimonies of elders; the collection is supported by IBUKA. Their interview methodology follows an oral history approach so that viewers and listeners are also informed about the socio-political context before, during and after the Genocide. It is run by the Aegis Trust and housed at the Kigali Genocide Memorial Centre (KGM). It was established in 2010. The majority of the interviews are accessible online to the wider national and international public, although many interviews were not translated from Kinyarwanda. As part of the archive, the team – mainly consisting of Genocide survivors themselves – also preserves photographs of those who perished during the killings. These photographs are often given to the archive by surviving family members in order to preserve the memory of the dead. More recently, the archive has substantially extended its website to include testimonies of perpetrators, some recorded at *gacaca*, and those of rescuers. In addition, they built an interactive online map of genocide memorials that offers geographical location and a brief history of the place.

2.6.4 USC Shoah Foundation Visual History Archive

The Visual History Archive has in close cooperation with the Genocide Archive Rwanda collected a further 86 audio-visual testimonies of survivors and witnesses of the 1994 Genocide.[151] It is to date the largest archive containing survivor testimonies outside of Rwanda. The Foundation furthermore supports the digitization and preservation of the *gacaca* files.

151 The Visual History Archive covers diverse mass atrocities and genocides globally, including those in Cambodia, Armenia, Guatemala and ongoing conflicts in the Central African Republic, South Sudan and the violence against the Rohingya.

2.7 Memorial Sites

As recently as 2020, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence issued a report on the pillars of transitional justice emphasizing memorialization as a crucial aspect of any transition process and suggested adding memorialization as the fifth pillar (alongside the right to truth, the right to justice, the right to non-recurrence, the right to know; see section 2.6). Memorialization concerns the establishment of memorials, commemorative events, renaming of buildings, streets etc. and the introduction of history textbooks, as well as the preservation of the documentation of abuses and archival material. Furthermore, memorialization can be understood as symbolic reparation[152] for victims, as it honours the dead and keeps the memory of the injustices experienced alive.[153]

2.7.1 National Memorials

Rwanda has undertaken all of these memorialization measures (as discussed in different sections in this report) but has perhaps put most emphasis on the establishment of genocide memorials. These were, however, never framed around symbolic reparation and are not seen as such by survivors, either. Today, around 243 memorials exist in Rwanda, although this number is in constant flux due to the dislocation of some memorials on the cell level and their (combined) re-location at the district level. Law No. 56 sets out that a memorial site includes mass graves, is dedicated to the memory of the Genocide and further delineates the specificities of national memorials, of which today eight exist in total. These national memorials have an elevated significance because of either a particularly high number of victims killed, particularly gruesome massacres or because they have historically been sites of persecution. These are

- Kigali Genocide Memorial
- Bisesero Memorial
- Nyanze Memorial
- Ntarama Memorial
- Nyamata Memorial
- Nyarabuye Memorial

152 Legally symbolic reparations fall under satisfaction; see section 2.3. Whilst in Rwanda courts have not ordered any satisfaction measures, the symbolism of the memorials, their sheer number and the acknowledgement of the past that come with the commemoration are a steady reminder of the violent past.

153 Julia Viebach, 'Principle 3: The duty to preserve memory,' in *The United Nations Principles to Combat Impunity: A Commentary*, ed. Frank Haldemann and Thomas Unger (Oxford: Oxford University Press, 2018).

– Nyange Memorial
– Murambi Memorial.

These national memorials, but also most other memorials in Rwanda, are 'authentic' places where massacres were carried out. They therefore narrativize a powerful traumatic story that conveys the horrors of the 1994 events. The memorials Nyamata and Ntarama in the Bugesera district, near Kigali, for instance, are churches where thousands of Tutsi were killed. The inside of the Nyamata church is still covered in the blood of the many victims, and clothes were laid out all over the church benches to give the onlooker an idea of the sheer quantity of individuals killed at the site, and ultimately their absence. The Nyamata church has several crypts where thousands of remains are housed and which are accessible to visitors. The nearby smaller Ntarama church displays clothes, personal belongings as well as skulls and bones, but in addition features a small garden and a wall of names which is still incomplete. Some adjunct buildings to the smaller church were left in the violent disarray in which they were found after the massacres, which underlines the authenticity of the place and creates a feeling of intimacy to both the violence and the victims. The national memorials are gated buildings that comprise a collection of textiles, artifacts and human remains that shall bear witness – through the careful curation of these materials – to victimhood, the dead, the scale of violence and stand as evidence of the Genocide. An interpretation of the events that took place is given by staff, who are often survivors from these sites themselves. More recently, however, the staff of national memorials has been replaced by staff from the CNLG,[154] which was established in 2007. The CNLG is mandated to coordinate commemorative activities, oversee the memorials on the national level, educate and research about the Genocide, and has become more recently the custodian of the *gacaca* archive after the national *gacaca* commission was closed. The national memorial sites are mainly funded by the state, which receives in turn funding from international donors to preserve the sites and technical support from selected partners that advise on the preservation of textiles and the forensic analysis of human remains.[155]

Two national memorials stand out in design and authenticity: the Kigali Genocide Memorial and Murambi in the Southern Province. The KGM was founded in 2004 with the financial help of Western donors, including the Israeli government, and with the technical expertise of Aegis Trust (see section 2.9 on commemorative events), a UK-based charity that runs the Nottingham Holocaust Museum. The KGM features permanent exhibitions on the Genocide, including one on children which narrates the fates of little ones (even babies and toddlers) who were killed during the Genocide. The exhibition follows a linear narrative that fits into the govern-

154 Accessed 15 January 2021, https://cnlg.gov.rw/index.php?id=2.
155 Randall Mason, 'Conserving Rwandan Genocide Memorials,' *The Journal of Preservation Technology* 50(2/3) (2019): 17–26.

ment's meta-narrative of how the division in Rwanda was created by the colonists, was further fostered by 'bad governance' and finally resulted in the explosion of murderous violence in 1994. It also features some panels on the rescuers, however. The museum displays clothes, and one room features some skulls and bones in glass vitrines. In another room visitors can listen to the stories of genocide survivors, some of whom work at the memorial. The beautiful memorial gardens house the remains of approximately 200,000 Genocide victims and a wall of names which has not been completed yet. The KGM has more recently expanded and now houses a peacebuilding training centre and a small amphitheatre where plays and poetry are performed. The KGM follows the global model of 'memorial museums', with a strong imperative of 'never again'.[156]

The Murambi Memorial is located in the Southern Province near Huye (formerly Butare), the second biggest city in the country; it was created in 1995. Around 50,000 people who had sought refuge there were murdered in the polytechnic school (which never opened its doors) within only a couple of days. The victims were hastily buried in mass graves in the school compound. Today, around 800 of these victims' bodies are on 'display' in the classrooms of the school – often still in the exact posture they were killed. The main school building houses an exhibition that details the official narrative of the Genocide but which also narrates the history of the region and the particularities of the killings in that place. Its opening was delayed because of a disagreement as to the specific narrative of the exhibition, and some donors withdrew their financial support. However, the exhibition finally opened in 2011 and is an important addition to the display of the remains, as it contextualizes the violence for visitors. In the long-term, however, the CNLG plans to drastically reduce the number of remains and to put only very few of them in glass coffins, integrated into the main exhibition. Currently, the CNLG together with international partners is undertaking forensic examination of the remains in order to discover how they were murdered.

2.7.2 Local Memorials

Whilst the national memorials are directed to an international audience (in particular KGM and Murambi), the much smaller local memorials honour the dead and stand as a stark local reminder of the horrors of 1994. These memorials are often managed by survivors themselves in cooperation with local authorities. They do not follow specific designs or global norms of how to memorialize human rights violations. Despite Law No. 56, which only mandates national memorials to display human remains, many local memorials display remains in various and creative ways. At Kaduha, for instance, the remains are housed in glass coffins and the me-

156 Paul Williams, *Memorial Museums: The Global Rush to Commemorate Atrocities* (Oxford: Berg, 2007).

morial building is surrounded by a flower beds that cover the mass graves. They are intimate spaces where the world of the living meets the world of the ancestors and where communication between those worlds can take place.[157] Many of these memorials are funded through private donations, which makes their long-term preservation a real concern for survivors. The government's plan to significantly reduce the number of memorials by exhuming and relocating genocide victims to district memorials is problematic because it closes the space for such local memorials to function as sites of mourning and reflection. IBUKA is especially involved in these local memorials and is dedicated to the preservation of the memory of the Genocide. In conversations with the association, they revealed plans to install plaques for roadblocks that were erected across the country in 1994, where many people were killed, and they discussed funding for building a memorial to the victims who were killed in the swamps of Bugesera (near the Ntarama Memorial). It seems unrealistic that in the current climate and without donor support such plans will be realized in the near future.

2.7.3 Memorials from a Survivors' Perspective

Rwanda's particular way of memorializing the dead has been heavily critiqued by scholars and presented as a 'spectacle of bones'[158] that supports a dominant, state-controlled performance of, fixation upon and reinterpretation of the past.[159] It is clearly not without controversy, and there have been contestations within Rwanda, too, as to how the dead should be remembered and for what purpose. After the Genocide, it was first and foremost survivors who decided how to commemorate their dead and to do so at authentic sites. At the Murambi Memorial, the idea to display lime-powdered bodies originates from survivors who founded the survivor organization 'Amagaju' in 1995; they lobbied to preserve 'facts for history'.[160] The display of human remains was later co-opted by the state and embedded in its attempt to create a single meta-narrative partially based on remains as 'evidence' or 'proof' of genocide.[161]

Some survivors, 'care-takers'[162], have pledged their lives to the care of these dead at the memorial sites, and in particular local memorials. Research has shown that

157 Viebach, 'Mediating "absence-presence" at Rwanda's genocide memorials'.
158 Sara Guyer, 'Rwanda's Bones,' *Boundary 2* 36(2) (2009): 155 – 175.
159 Timothy Longman, *Memory and Justice in Post-Genocide Rwanda* (Cambridge: Cambridge University Press, 2017).
160 Viebach, 'Mediating "absence-presence" at Rwanda's genocide memorials', 240.
161 However, this is also a view often stated by survivors working at the memorials (Viebach 2019).
162 Julia Viebach, 'Aletheia and the Making of the World: Inner and Outer Dimensions of Memorials in Rwanda,' in: Memorials in Times of Transition, ed. Susanne Buckley-Zistel and Stefanie Schaefer (Antwerp: Intersentia, 2014).

human remains have an 'affective force' that brings survivors closer to their loved ones. The memorials constitute a 'place-bound proximity' to the dead and open up communication to dead loved ones; they are material places where survivors can mourn and honour their deceased loved ones.[163]

2.8 Commemorative Events

The annual commemoration period in Rwanda lasts from April to July, with 7 April marking the opening and 4 July, 'liberation day', the end. The origin of this commemorative period lies in a number of initiatives by survivor associations, in particular the umbrella survivor organization *IBUKA*. Immediately following the Genocide, it was primarily small-scale, self-reliant initiatives that were dedicated to the memory of the dead (personal interview, January 2013). Only since about 1998 has there been a national mourning period with corresponding events. The official commemoration week on a national level takes place from 7 April to 13 April only.[164] During the night of 6 April to 7 April 1994, the presidential airplane carrying then President Juvenal Habyarimana aboard was shot down, marking the beginning of the Genocide, which started immediately after the plane crash. The dates of the national mourning period play a significant role: commemoration events largely take place at the original sites on the respective/calendric days of a given massacre. However, at the national level the opening and closing events constitute an exception. Traditionally, the mourning period is opened by President Kagame and his wife igniting the 'eternal flame'[165] at the Kigali Genocide Memorial Centre. The ignition of the 'eternal flame' is a performative act that signifies hope and a better future. The light of the flame must be seen against its referential frame: darkness. In conversations with survivors, but also in famous commemoration songs and the memorial museum exhibitions at KGM and Murambi, the Genocide is referred to as the 'time of darkness'. But the flame also implies a political connotation rooted in the foundation myth of the Rwandan nation during the feudal system under the *mwami* king.[166] Here, the flame signifies an eternal life that is equated with the eternity of the nation. During commemoration the flame symbolizes this foundation myth of the nation, which is

163 Julia Viebach, 'Of other times: Temporality, memory and trauma in post-genocide Rwanda,' *International Review of Victimology* 25(3) (2019): 277–301; Viebach, 'Mediating "absence-presence" at Rwanda's genocide memorials'.

164 Since 2008, the national mourning period takes place every year under a new theme. In 2012 the theme was 'We learn from our history for a better tomorrow'. In 2013, the commemoration ceremony's title was 'Striving for Self-Reliance'.

165 This flame burns continually until the end of the mourning period, but not so during the remainder of the year. A similar flame, the Flame of Hope, is ignited during the commemoration ceremonies at the Nyaza memorial, which was established at IBUKA's head quarter in 2012.

166 Personal interview, Kigali, February 2012.

deeply embedded in the national discourse of a new-born united Rwanda after the Genocide.

Since the 2014 commemoration there have been several changes with regard to the number and type of activities planned by state actors, which will be outlined below. Whilst the ignition of the flame still marks the beginning of the mourning period, several new activities such as the 'walk of remembrance', and especially a strong online presence that reaches a global audience, have been added. The commemoration has proven to be open to change over the last couple of years, mainly due to some new actors involved (described below) and an increasingly global outlook.

Amahoro Stadium Opening Ceremony: After the ignition of the flame, the country's official and largest mourning event takes place at Kigali's Amahoro Stadium. The stadium's history bears a connection to the genocide as well: throughout the Genocide, the Amahoro Stadium was used by the remaining UN troop contingents (UNAMIR) as a safe haven. During the commemoration event, President Kagame and other leading politicians give memorial speeches, highlighting in particular the international community's responsibility for the Genocide, as well as national progress made to date regarding economic development, reconciliation and coming to terms with the past.[167] Furthermore, since 2012 the so-called 'walk of remembrance' takes place in the afternoon of April 7, followed by a night vigil at the Amahoro stadium. The 'walk of remembrance' is led by President Kagame and takes the crowd from the Parliament to the Amahoro Stadium. During the night, vigil plays and commemoration songs are performed, accompanied by the lighting of candles and a large fire. The 2014 commemoration saw the performance of a theatre play that sparked many instances of PTSD among survivors in the stadium audience. Generally, trauma is a huge concern during commemoration. For instance, at the 2012 opening ceremony at the Amahoro stadium alone there were 377 cases of trauma; overall, at the 2012 events at the Amahoro stadium, in Nyamirambo, Nyanza, Rebero and Gisozi there were 613 trauma cases, in 2005, 627 such cases were registered.[168]

The 25th commemoration in 2019 was for the first time not held in the stadium but in Kigali's prestigious Convention Centre and was directed to an international and elite audience rather than the Rwandan population and survivors.

167 Attendance on April 7, 2012, speeches by Paul Kagame in 2008, 2009, 2010, 2011, 2012, accessed 15 January 2021, https://www.paulkagame.com/speeches/.

168 Gishoma and Brackelaire, cited in Rachel Ibreck, 'The Time of Mourning: The Politics of Commemorating the Tutsi Genocide in Rwanda,' in *Public Memory, Public Media, and the Politics of Justice*, ed. Philip Lee and Pradip Thomas, (London: Palgrave Macmillan, 2012): 98–121, 112. See also Freddy Muhanga, 04.12.2012 GIZ-ZFD regional conference. Kibuye based on data by the Rwandan Ministry of Health.

Rebero Closing Ceremony: The closing event of the national mourning week takes place at the Rebero[169] memorial site in Kigali. It is only open to senior figures in politics and society at large.[170] At this ceremony politicians give speeches, in which they point to the heroic traits of those murdered in 1994 as a model for civil courage and a future against violence.[171] As is the case with the political speeches, the commemoration ceremonies are deeply ritualized, performative, and symbolic.

2.8.1 Memory-entrepreneurs

There are several key actors in the commemoration of the 1994 Genocide in Rwanda. Such actors have been described by the scholar Jelin as 'memory-entrepreneurs'[172]: actors who seek to define and advance memory (or their version thereof) in the (global) public sphere. The Ministry for Sports and Culture was the official government body involved in the organization (in collaboration with survivor associations) of the commemoration ceremonies before the establishment of the CNLG. There are the following memory-entrepreneurs: 1) survivor associations, especially IBUKA 2) CNLG 3) Aegis Trust.

1) Survivors have a prominent role in the memory-making process in Rwanda:[173] initiatives to build memorials and to organize commemoration on the local level are one part of survivors' and in particular **IBUKA's** commitment to memory and justice after the Genocide. Before the state's involvement (some would speak of the co-opting of the commemoration by the state, see below), survivors organized their own commemorative ceremonies and searched for and buried bodies. IBUKA was successful in lobbying for the change of commemoration dates from 1–7 April to 7–12 April and has from the very beginning committed a hundred days of mourning to honour their loved ones[174], whereas the state officially commemorates only for those seven days.[175]
2) The second local memory entrepreneur and national body is the **Commission for the Fight Against Genocide,** inaugurated in 2007. The 2003 Rwanda constitution made provisions for such a commission under Article 179, but it took sev-

169 Politicians who were murdered during the genocide are buried there; in particular, at the beginning of the Genocide approximately 200,000 moderate politicians, journalists and other leading figures who had previously stood up to the regime.

170 An invitation is required to attend the ceremony.

171 Field notes commemoration Rebero, 13.04.2012.

172 Elisabeth Jelin, *State Repression and the Labors of Memory* (Minnesota: University of Minnesota Press, 2003).

173 Viebach, 'Mediating "absence-presence" at Rwanda's genocide memorials'.

174 Personal interview January 2013.

175 Kwibuka, however, has taken on survivors' demands, given that IBUKA is part of it and has extended its coverage of commemoration activities up until the beginning of July.

eral years for the commission to take up its work. The commission's mission is to prevent genocide, fight against genocide ideology, conduct research on the genocide and tackle its consequences. Furthermore, it advocates for the cause of genocide survivors nationally and abroad and is responsible for planning and coordinating all activities related to genocide commemoration (RC Art. 179, para. 1–4, 32). The CNLG has therefore been entrusted to manage the national memorials throughout the country in consultation with IBUKA. They have also established a genocide research and documentation centre. Although the CNLG is on paper an independent national organ, it clearly has the mission to promote the government's ambitions related to memorialization and to promote its hegemonic meta-narrative of the past. Over the last couple of years, the commission has increasingly collaborated with international actors in the organization of the national commemoration.

3) There has been an increasing interest on the part of international actors to engage in commemoration practices in the field of peacebuilding and peace education more generally. **Aegis Trust** is one such organization in the 'memory business who can offer a material template for remembering' and who 'often move in to at least partially construct and run them [memorials]'[176]. The motivation to engage in memorialization is often the prescriptive idea of promoting reconciliation and contributing to genocide prevention. Aegis is a UK-based organization that has specialized in Holocaust memory, genocide prevention and peace education. It was founded by Dr James Smith in response to the Kosovo crisis.[177] Aegis runs the National Holocaust Museum Centre in the UK and has used it as a template to build the Kigali Genocide Memorial Centre.

Since the 20th commemoration in 2014, these actors have merged into **Kwibuka**[178], which combines traditional features of Rwandan Genocide commemoration with a globalized vison of the commemoration of human rights violations, so that something new and distinct has emerged. Part of these new features is an increased online presence enabled by social media and website activities, for example. Emphasis is put especially on reaching a diffuse global audience to spread the message of 'never again', which in turn transforms the Genocide into an atrocity that concerns all of humanity.

176 Johanna Mannergren Selimovic, 'Making peace, making memory: peacebuilding and politics of remembrance at memorials of mass atrocities,' *Peacebuilding* 1(3) (2013): 340.

177 Accessed 24 May 2017, https://www.holocaust.org.uk/our-history, ed. https://www.nationalholocaustcentre.net/our-history.

178 Julia Viebach, unpublished manuscript.

2.8.2 Commemoration on the local level

Further commemoration events at different massacre sites throughout the country take place during this national week of mourning. However, many ceremonies are held until July, depending on the calendric date the massacres took place. In contrast to many of the national commemoration ceremonies, these are held at the sites (now often memorial sites) where the massacres took place. At Ntarama, survivors and next of kin of Genocide victims take part in a solemn march to the swamp lands where so many Tutsi were hunted down and brutally killed in 1994.[179] The march honours especially those whose bodies were never retrieved from the swampland; according to local estimates, thousands of bodies are hidden in the swamps of Bugesera. The majority of local commemoration events are organized by IBUKA and local authorities. The population is expected to attend those ceremonies; they are not directed towards an international audience. They are highly symbolic due to the burials that take place as part of the ceremony. Today, remains of genocide victims are still being discovered, which are usually buried during commemoration ceremonies. As part of the localized commemoration, night vigils take place that mirror customary funerary rites, when the deceased was conventionally accompanied to the world of the ancestors by family members and friends.[180] Night vigils are an opportunity for survivors to tell their stories in an informal setting that allows them to narrate their experience outside of the structured testimony-giving during the official commemoration ceremonies. In some instances, the night vigils are joined by perpetrators who have confessed their crimes and those in the community who want to show their support to survivors.

2.8.3 Importance of commemoration for survivors

The time of mourning is an incredibly significant but also difficult time for survivors in Rwanda. The way the state has decided to commemorate the Genocide has led to difficulties for survivors in finding a space outside the prescribed discourse of unity and reconciliation and politically-laden ceremonies to honour their dead loved ones. The decision to show images and even short videos of the Genocide during earlier commemoration ceremonies has led to an outcry by survivors due to the stark increase of trauma cases and mental health issues. IBUKA and other survivor associations have lobbied for a more 'sensitive' approach regarding trauma during commemoration time. In the meantime, the state has improved and increased mental health services to support survivors. Commemoration is a time where survivors'

179 See for a detailed description of the hunt of Tutsi in the Bugesera swampland Jean Hatzfeld, *Life Laid Bare: The Survivors in Rwanda Speak* (New York, NY: Other Press, 2007).

180 Cf. Déogratias Bagilishya, 'Mourning and Recovery from Trauma: In Rwanda, Tears Flow Within,' *Transcultural Psychiatry* 37(3) (2000).

plight can be publicly acknowledged within their communities; it also opens up space to give testimony before the community and to share the experienced pain. Commemoration therefore constitutes for many survivors a form of 'memory-justice'.[181]

2.8.4 The politics of commemoration

Many commentators have stated that the memorialization of the Genocide is a key political instrument of the RPF government in its pursuit of power. Vidal, for example, argues that the RPF instrumentalized the genocide commemoration for the pursuit of power and to uphold law and order in the country.[182] Similar claims are made by de Lame, who concludes that annual commemoration of the Genocide is put centre stage in its nation-building project and its attempt to construct a national identity as 'Rwandans'.[183] Another strand of the literature has put forward a similar critique aimed at the RPF's attempts to construct a unified Rwanda by abandoning ethnic identities. This work contests the notion of a unified Rwanda and points out that the commemoration ceremonies exclude Hutu who were killed during the civil war in whose wake the Genocide was committed.[184] In particular, Lemarchand makes a strong case for these excluding patterns of commemoration, which he couches in a framework of 'thwarted and manipulated' memory.[185] However, such views tend to neglect the agency of ordinary Rwandans and survivors in particular to shape their own remembrance and meaning-making processes alongside and underneath this broader politics of commemoration.[186]

181 Julia Viebach, 'Aletheia and the Making of the World: Inner and Outer Dimensions of Memorials in Rwanda,' in *Memorials in Times of Transition*, ed. Susanne Buckley-Zistel and Stefanie Schaefer (Antwerp: Intersentia, 2014): 69–96.

182 Claudine Vidal, 'Les commémorations du génocide au Rwanda,' *Temps Modernes* 56(613) (2001): 1–46.

183 Danielle De Lame, *Une colline entre mille: Transformations et blocages du Rwanda rural* (Tervuren: Musée Royal de l'Afrique Centrale, 1996).

184 Susanne Buckley-Zistel, 'Remembering to Forget: Chosen Amnesia as Strategy for Local Co-Existence in Post-Genocide Rwanda,' *Africa. The Journal of the International African Institute* 76(2) (2006): 131–150; Anna-Maria Brandstetter, 'Contested Pasts: The Politics of Remembrance in Post-Genocide Rwanda,' in *The Ortelius Lecture*, edited by Netherlands Institute for Advanced Studies in the Humanities and Social Sciences (University of Antwerp: Wassenaar, 2010).

185 Rene Lemarchand, *The Dynamics of Violence in Central Africa* (Philadelphia: University of Pennsylvania Press, 2009).

186 Viebach, 'Mediating "absence-presence" at Rwanda's genocide memorials.'

2.9 Transitional Justice Institutions

This section will return to the transitional justice institutions outlined in section 2.2/ 2.7 with a focus on the assessment of their functioning and their legacy. Especially (1) *gacaca* (2) ICTR (3) memorials.

2.9.1 *Gacaca*'s Contested Legacy

The literature on Rwanda's *gacaca* courts has mushroomed over the last two decades and offers rich insights into the courts' workings, the state's co-optation and the perspectives of ordinary citizens on this 'traditional' transitional justice mechanism. Accordingly, diverse and contested is the assessment of *gacaca*'s success depending on whether scholars focus on the state, legal provisions or an anthropological perspective that contextualizes state intervention, legal shortcomings and the social embeddedness of the courts.

The government perceives *gacaca* as a full success, stating that 'the courts are credited with laying the foundation for peace, reconciliation and unity in Rwanda'. Assessed against its objectives of reaching justice and reconciliation, this perspective is credible, particularly when read together with the NURC's Reconciliation Barometer findings (see section 2.4) and compared to the large number of speedy trials *gacaca* enabled. However, this view lacks an in-depth and critical assessment of *gacaca*'s legal underpinnings and societal implications.

Assessment of legal provisions: gacaca has been especially criticized from a human rights perspective. Many NGOs such as Human Rights Watch, Penal International and Amnesty International have doubted *gacaca*'s fair trial standards and the right to defence. They accuse the government of sacrificing justice (especially the rights of the defendant) in favour of expedited trials through the transformation of the customary *gacaca* into a 'more formal, state-run juridical apparatus'.[187] HRW further states that the infringement of the right to a lawyer was merely based on the fact that the government wanted to speed up the trials (ibid.). Ultimately these critiques fail to acknowledge *gacaca* as a hybrid model of criminal prosecution that entails restorative justice elements which include the lack of legal representatives as a cornerstone. Moreover, as a (semi-)restorative justice institution, *gacaca* did not solely focus on punishment of perpetrators, but was flexible enough to take into account locally defined objects such as community participation. Human rights reports claim, however, that *gacaca* was 'mob justice' (rather than community justice) and therefore failed to apply core and minimal human rights standards such as the impartiality of the justice system; these reports paint a picture of *gacaca* as a 'story

187 *Justice Compromised*, 17, accessed 28 January 2021, https://www.hrw.org/sites/default/files/reports/rwanda0511_cases.pdf.

of stagnation and radical exclusion'.[188] Like many other commentators, international human rights organizations have critiqued *gacaca* 's 'selective justice' in terms of the vacuum left in the prosecution of crimes committed by the RPF. Human Rights Watch and Amnesty International conclude that *gacaca* was at best a mixed success, since it failed to ensure important safeguards against violation of due process and to prompt the government to 'correct the grave injustices that have occurred through this process'.[189] They acknowledge, however, that *gacaca* contributed to truth-telling and ended the cycle of impunity that had dominated Rwandan legal and political structures since the Hutu 'social revolution'. As Clark writes, 'much criticism reflects legal rigidity towards the unprecedented challenges confronting post-genocide Rwanda – and a limited understanding of the aims of the community courts. *Gacaca* was inevitably imperfect, but also highly ambitious and innovative'.[190]

In terms of delivering judgements and perhaps even rendering (legal) 'justice', *gacaca* can be seen as a success. As indicated above, more than one million cases were tried before *gacaca*, whereas the ICTR only tried 90 cases. In comparison with the ICTR, *gacaca* cost about 400 million US dollars, the ICTR more than 1 billion US dollars. Many cases ended in acquittals or sentences were served as community work, so that the backlog of genocide cases in the prisons could be tackled and funds released for reconstruction purposes (ibid.). Moreover, *gacaca* individualized criminal individuality – one of the main objectives of international criminal justice (see below) – and ended decades of festering impunity. Fighting impunity is a major aim of transitional justice and has been codified in soft law on the international level in the Orentlicher Principles (see section 2.6). Contrary to the ICTR, *gacaca* tried planners and low-level perpetrators so that defendants were equal in status before the courts. The 2008 revision of the OL enabled *gacaca* to try former majors and prefects in the very spaces they had exercised their power and control over the population. Impunity was therefore combatted with regard to low and high-level perpetrators.

Assessment of societal impact

The choice to apply a community-based justice system after the Genocide reflects the government's scepticism towards war crimes tribunals such as the ICTR and emphasizes the need to embed (any form of) justice efforts in a broader societal context of psychological healing, reconciliation and truth-telling. Therefore, it is crucial to take

188 Benjamin Thorne and Julia Viebach, 'Human Rights Reporting on Rwanda's Gacaca Courts: A Story of Stagnation and Failure,' in *Rwanda since 1994: Stories of Change*, ed. Hannah Grayson and Nicki Hitchcott, 41–62 (Liverpool: Liverpool University Press, 2019), 42.

189 *Justice Compromised*, 125, accessed 28 January 2021, https://www.hrw.org/sites/default/files/reports/rwanda0511_cases.pdf.

190 *How Rwanda Judged its Genocide*, accessed 28 January 2021, https://www.africaresearchinstitute.org/newsite/publications/how-rwanda-judged-its-genocide-new/.

into account the *societal context* in which *gacaca* operated. It is also important to note that *gacaca* was not a homogenous system but played out very differently according to communities' histories, inter-communal relationships, willingness to engage with the process and openness to telling and hearing about the horrific events of 1994. As such, *gacaca* became entangled with not only people's everyday lives but became an expression of the messy, unequal and at times violent social repair process:

> public, participatory, routinized, and based on oral testimony – and this contextualization formed the basis of its situated relevance to people's efforts to shape forms of sociality. People used gacaca sessions to negotiate the micro-politics of reconciliation, which included debating definitions of 'genocide citizenship', guilt, innocence, exchange, and material loyalty. [191]

Particularly important in *gacaca* were community participation and *truth-telling* ('the truth heals'). Participants of *gacaca* have stressed that truth-telling has led to a release from shame and social dislocation through confessing and apologizing in front of victims. Survivors have emphasized that the communal act of bearing witnesses led to an acknowledgement of their pain. However, truth-telling and truth-hearing have also led to fear and social dislocation where ways of truth-telling and, importantly, truth-acceptance could not be negotiated. As a messy process, *gacaca* led to community distrust in the process of truth-telling until a version could be accepted. Many survivors expressed doubt about perpetrator confessions, especially if only partial truths emerged (e. g. a defendant would confess the murder of one person, but remained silent about the death of another individual or with whom crimes were committed) and remained sceptical about the sincerity of apologies. In interviews, survivors often accused defendants of disingenuous apologies only uttered to reduce their prison sentences. Survivors also complained about the fact that the state had put a 'duty' to forgive upon them without considering the burden they carried by the mere fact of having survived. However, for survivors, *gacaca* was crucial in finding the bodies of their dead loved ones and in discovering what happened to them, i. e. how they had died. Many families were separated during the Genocide, so that the fates of family members was often unknown. It was therefore tremendously important for survivors to be able to learn the location of mass graves during *gacaca* so as to bury their loved ones in dignity.

Whilst *gacaca* has unearthed the 'truth' about what happened during the Genocide and brought closure to some participants, the expectation to reach reconciliation was perhaps too lofty. As a community process, *gacaca* opened up space for debate about the events of 1994 and to what extent individuals had participated in it, and therefore broadened democratic space on the micro-level. But *gacaca* as a process of social repair rather than a mere legal process was perhaps never fit to lead to

191 Kristin Doughty, 'Law and the architecture of social repair: gacaca days in post-genocide Rwanda,' *Journal of the Royal Anthropological Institute* 21(2) (2015): 419.

reconciliation as an end goal, but was one that could in the long-term – precisely because the seal of secrecy around 1994 had finally been lifted – lay the foundation for a reconciliation process.

2.9.2 The ICTR's Legacy

In the context of international criminal tribunals, scholars have defined legacy 'to mean a lasting impact, most notable on bolstering the rule of law in a particular society by conducting effective trials while also strengthening domestic capacity to do so'[192]. The UN OHCHR further defines legacy as a lasting impact on promoting the rule of law through effective trials to end impunity and strengthen domestic capacities.[193]

Assessment of ICTR's reconciliation objective: One of the main objectives of the ICTR as outlined in its statute and emphasized by some commentators was to bring about reconciliation in Rwanda (and the Great Lakes Region) by assigning individual responsibility for the horrific crimes committed. It was believed that replacing the idea of political responsibility with individual criminal responsibility and therefore avoiding regional political or ethnic grounds for collective behaviour would be the most crucial step to reconciliation among Rwandans.[194] However, that proved problematic for several reasons: despite the aim of eradicating collective guilt and diminishing the grounds for demarcating ethnicity, the ICTR had to confirm that Tutsi were an ethnic group and hence that the other ethnic group, Hutu, had attempted to eradicate them. In this process, judgements talked of 'Hutu', 'the local population', a 'mob of Hutu men' etc, which assigned collective responsibility.[195,196] Furthermore, by establishing ethnicity, international justice's attempt at reconciliation contradicted local efforts to abolish ethnic categories and introduce Rwandanness (see section 2.4 on reconciliation). Another reason is that the ICTR had little influence in Rwanda: what Clark has described as 'distant justice'[197] in the context of

192 Milena Sterio, 'The Yugoslavia and Rwanda Tribunals: A Legacy of Human Rights Protection and Contribution to International Criminal Justice,' in *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments*, ed. Michael Scharf and Milena Sterio, 11–24 (Cambridge: Cambridge University Press, 2019), 13.
193 Office of the UN High Commissioner for Human Rights, *Rule of Law Tools for Postconflict States, Maximizing the Legacy of Hybrid Courts*, 4–5, UN Sales No. HR/PUB/08/2 [2008].
194 Jean Marie Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR,' *Leiden Journal of International Law* 16(1) (2003): 115–133.
195 Jean Marie Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR,' *Leiden Journal of International Law* 16(1) (2003): 121–123.
196 Prosecutor vs. Akayesu, ICTR-96–4-T; Prosecutor vs. Clement Kayisheme and Obed Ruzindana, ICTR-95-I-T; Prosecutor vs. Ignace Bagirishema, ICTR-95-I-AT.
197 Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018).

the International Criminal Court holds true for Rwanda as well. ICTR judges showed little interest in Rwandan culture or society so as not to jeopardize their objectivity. The ICTR was hardly known among Rwandans and failed in establishing a rigorous outreach programme – despite an office in Kigali – to inform the public about their work and the judgements rendered. In addition, victims could only appear as witnesses at trials and were denied legal representation and civil party to the trial, so that reparation claims could not be made and clemency granted in consultation with those most affected by the crimes tried before the Tribunal.[198] A link between victims and crime was therefore not established; in the rare cases that apologies were made, as, for instance, in the Omar Serushago trial, where the defendant apologized for the crimes committed and expressed his hope for reconciliation in Rwanda, the apology was made before the Tribunal, but not before the victims in Gisenyi where the killings had taken place.[199] Clemency and pardon can be given on grounds of a guilty plea and display of remorse (Art 27, ICTR Statute); however, the current practice of the Mechanism is questionable. High level convicts such as historian Ferdinand Nahimana (who was behind the creation of RTLM), Father Emmanuel Rukundo (who helped the massacres at Kabgayi) and Colonel Bagosora (one of the military masterminds of the Genocide) were granted early release[200] or had their lifesentences reduced respectively, which caused an outcry by Rwandan victim organizations in Rwanda itself and in the diaspora.[201]

In conclusion, the Tribunal did not achieve its goal of reconciliation among Rwandan groups; therefore, its legacy on the societal level remains limited. Nevertheless, the assessment of its jurisdictional legacy can be seen in a more positive light.[202]

Assessment of the ICTR's jurisprudence: The ICTR played a crucial role in the further delineation of international criminal law five decades after the Nuremberg trials through the development of legal doctrines (in their case law) and the solidification

198 This shortcoming of the role of victims in international criminal justice was corrected in the pursuing institutions, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and later at the International Criminal Court (ICC).

199 Prosecutor vs. Omar Serushago, cited in Jean Marie Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR,' *Leiden Journal of International Law* 16(1) (2003): 130.

200 It is common practice in international criminal justice that defendants request early release after having served two-thirds of their sentence.

201 It seems that after former President of the Mechanism Judge Theodor Meron was heavily criticized for his early release practice, pursuant President Carmel Agius introduces changes to this policy. He accepted a request by the Rwandan government (in September 2020) to reject the early release request by Laurent Semanza (who was sentenced to 35 years imprisonment) and emphasized that the Mechanism would follow a more consultative approach with the Rwandan government in the future. See further, accessed 22 January 2021, https://www.justiceinfo.net/en/45474-rwanda-wins-on-ictr-convict-early-releases.html.

202 For a more positive spin on the ICTR's contribution to reconciliation, see Nsanzuwera 2005.

of human rights norms more broadly. The Akayesu case became the first trial in which an international tribunal interpreted the definition of genocide as set forth in the 1948 Genocide Convention. The ICTR was the first tribunal after Nuremberg that issued a judgement of genocide against a former head of state[203] (Jean Kambanda), defined rape as means of genocide and convicted members of the media for inciting the public to commit acts of genocide (so-called 'media case', Bosco Barayagwiza, Nahimana and Ngeze). Therefore, the 'Tribunals have done much to make the law of genocide workable'[204].

Genocide had never before been legally defined, and it was unclear what precisely the prosecutor had to prove in terms of individual responsibility for the crime. Moreover the 'national, ethnic, racial or religious' group which the Convention protects was difficult to establish given that Tutsi were originally believed to be a social category rather than an ethnic group, i.e. there was a lack of distinct cultural or social identity. Moreover, Tutsi were neither a racial or religious group, so legally, the Convention might not have applied to Tutsi although the term Genocide was widely used (after the end) to describe the heinous crimes committed. The ICTR took a broad approach in interpreting the Convention and hence defined Tutsi as a 'stable and permanent' group, which widened the possibility of future prosecution on these grounds. In addition, the Convention in terms of perpetration speaks of the destruction of a stable and permanent group (the intent to destroy in part or whole). Here, the Tribunal decided upon a broad reading again and emphasized the 'special intent' of destroying a group, whether or not the destruction had actually taken place. In conclusion, the judges decided in the Akayesu case that proof of the killing of one person of a stable group with this 'special intent' is enough to prove individual responsibility for genocide. Therefore, it is now possible to prosecute genocide regardless of the number of individuals of one particular group being killed as long as there is proof of the intent to destroy this group.[205]

The Akayesu case provided a further milestone in the development of international criminal law. For the first time, the judges defined rape in international criminal law and furthermore recognized rape as a form of crimes against humanity and

203 It therefore challenged the principle of 'sovereign immunity' and clarified that even heads of state can be held accountable as subjects bound to international legal obligations for breaches of such. See further Hassan Bubacar Jallow, 'The Contribution of the International Criminal Tribunal for Rwanda to the Development of International Criminal Law,' in *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Phil Clark and Zachary D. Kaufman (London: Hurst, 2008): 261–279, 277.

204 Darryl Robinson and Gillian MacNeil, 'The Tribunals and the Renaissance of International Criminal Law: Three Themes,' *American Journal of International Law* 110(2) (2016): 196.

205 In fact, the Akayesu judgement had direct implications for the rulings of the ICTY that previously had not included genocide in the charges. As a consequence, from the 1998 Akayesu judgement, in 2011 the Tribunal convicted Radislav Krstic of genocide (cf. Jallow, 'The Contribution of the International Criminal Tribunal for Rwanda to the Development of International Criminal Law,' 270–271).

genocide.[206] The trial chamber found that rape constitutes, as outlined in the Convention, 'serious bodily or mental harm' and therefore should be seen as a means of genocide. Importantly the judges found that rape was used intentionally during conflict to control and destroy Tutsi and therefore that such crime was perpetrated as 'an integral part of the process of destruction'[207]. The judgement acknowledged that rape 'cannot be captured in a mechanical description of objects and body parts' and defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'[208]. This definition goes much further than even national jurisdictions, which often focus on consent and penetration. The definition of sexual violence was equally broad, such that the crime need not have entailed physical contact but even just the mere (forced) performance of nudity. The Akayesu ruling widened the possibility to prosecute rape and sexual violence as a means of genocide and crimes against humanity and for the first time took a liberal approach in clearly defining these crimes. Given the prevalence of rape as 'weapon of war' in countless conflicts globally, the Akayesu judgement is monumental.

The so-called media case constitutes a further milestone in the ICTR's development of jurisprudence. The judgement defined the boundaries between free speech and freedom from discrimination and further delineated the root causes of genocide through (mass) communication. This was enabled by the broad interpretation of incitement to genocide as outlined in the Convention. It found that especially *Radio Télévision Libre des Mille Collins* and the *Kangura* newspaper were used for more than just disseminating information or expressing opinions. The media case proved that these outlets were used to directly incite killings and that the orator (and founders) had genocidal intent in doing so (through an assessment of not only words and texts but also editorial policies). One such 'graphic impression of genocide intent' was showing a machete alongside the question: what weapons shall we use to conquer the Inyenzi once and for all?'[209] The media case judgement made clear how to distinguish between political speech, the dissemination of information and genocidal incitement through these and artistic forms.

In conclusion, the ICTR has significantly contributed to the development of international criminal law and has, through its case law, furthered jurisprudence in international criminal justice, which constitutes a lasting legacy to be applied by the ICC and other international tribunals.

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206 Previously rape fell under the rubric of inhumane treatment as a part of crimes against humanity and war crimes; cf. Sterio, 'The Yugoslavia and Rwanda Tribunals'.

207 The prosecutor vs. Akayesu, ICTR-96 – 4, 731, cited in Jallow, 'The Contribution of the International Criminal Tribunal for Rwanda to the Development of International Criminal Law,' 272.

208 ICTR-96 – 4, 687 – 688, cited in Jallow, 'The Contribution of the International Criminal Tribunal for Rwanda to the Development of International Criminal Law'.

209 Cited in Jallow, 'The Contribution of the International Criminal Tribunal for Rwanda to the Development of International Criminal Law,' 274.

2.9.3 Memory at the Crossroads

Much of the transitional justice literature sees memory as something that can be harnessed and deployed. Memorials in this reading shall contribute to reconciliation and contribute to critical thinking and a form of human rights education. These are lofty expectations hardly evidenced in the messy world of social reconstruction. Accordingly, in post-genocide Rwanda, remembrance remains, on the one hand, a politicized process co-opted by the state and, on the other, a very individual process of meaning-making.[210] Despite much of the literature on Rwandan memorialization, it is possible that these two forms of remembrance exist alongside and underneath each other. Scholars have stressed the 'overreach'[211] of the state but have neglected that ordinary citizens have agency in their choices as to how and who to remember, be it in private or in public.

It is questionable whether the memorials further reconciliation. They are rather a steady reminder of the wrongdoings of the past. Some survivors have even opined that the memorials are a form of punishment for the perpetrators, who are reminded of their deeds on a daily basis after serving a prison sentence. In further interviews it was often posited that memorials foster critical thinking and therefore would lead to reconciliation without detailing in their responses how precisely reconciliation should be achieved. Other research has shown in addition that despite the government's attempt to create a homogenic narrative of the past, attitudes towards memorialization are complex and not necessarily determined by ethnicity. Rwanda 'presents an interesting case study of the limits of a government's ability to shape the collective memory of a population'.[212]

2.10 Victims' Associations

Particularly in post-conflict contexts, it is common that groups of victims establish formalized associations to lobby for their interests, which often pertain to reparation or compensation claims (see section 2.3). In Rwanda, Hutu do not have any formal or even informal representation as victim groups, as their victim status is not officially acknowledged.

The lack of state support in the rehabilitation of survivors makes the work of the organized survivor associations even more important. There are several very well-organized victim associations, some of which have close ties to the government but do

210 Viebach, 'Mediating "absence-presence" at Rwanda's genocide memorials.'

211 Bert Ingelaere, *Does the Truth Pass Across Fire without Burning? Transitional Justice and its Discontents in Rwanda's Gacaca Courts* (Antwerp: Management IoDPa Discussion Paper, 2007).

212 Timothy Longman and Theoneste Rutagengwa, 'Memory and Violence in Postgenocide Rwanda,' in *States of Violence, Politics, Youth and Memory in Contemporary Africa*, ed. Edma G. Bay and Donald L. Donham, 243 (Charlottesville and London: University of Virginia Press, 2006).

not necessarily function as their mouthpiece. The most important ones are members of the 'Task Force To Remember Survivors 20' as outlined in section 2.3. These are:[213]

- AVEGA, Association of Widowed Survivors
- IBUKA, umbrella organization of Genocide survivors
- GAERG, National Students, Association of Genocide survivors
- AERG National Graduate Student Association of Genocide Survivors
- Kanyarwanda, a human rights organization that manages the Centre for Rehabilitation of Victims of Torture and Repression, which provides services for survivors
- Barakabaho Foundation, which provides homes for orphaned Genocide survivors
- SURF Survivor's Fund, a UK charity that promotes the human rights of Genocide survivors.

The next section will focus on a brief description of especially 1) IBUKA, 2) AVEGA 3) AERG and GAERG and finally 4) SURF, which are the survivor associations best organized in terms of funding and operational structure and which therefore have the most political and social influence.

2.10.1 IBUKA

IBUKA literally means 'we remember'; it is the victims' umbrella organization in Rwanda, which has much weight when it comes to policies around memorials and commemoration.[214] IBUKA was founded in 1995 and has since lobbied on behalf of victims to improve their living conditions, access to medical treatment and trauma counselling and has helped survivors to claim support from FARG (see section 2.3). 'The vision of IBUKA is that Rwandan society should be a place where the memory of the genocide is preserved and where all the genocide survivors are socially included, financially able and live with full dignity'.[215] IBUKA comprises of 15 member organizations. Furthermore, it has conducted its own studies into the perpetration of the Genocide in the different regions of the country and wrote a report on the stories and fate of rescuers – those persons who saved Tutsi during the Genocide, often under life-threatening conditions for themselves and their families. With the help of international donors, they were able to train their own counsellors (mostly survivors themselves) who support survivors with mental health issues in the remote parts of the country. IBUKA has been extremely successful in influencing commemoration

213 Schimmel, accessed 10 January 2021, *Advancing International Human Rights Law Responsibilities of Development NGOs*.

214 Rachel Ibreck, 'The politics of mourning'; Viebach, 'Mediating "absence-presence" at Rwanda's genocide memorials.'.

215 Accessed 10 January 2021, www.survivors-fund.org.uk.

and memorialization policies. IBUKA runs the non-national memorials and cares for their maintenance and preservation. As such, the preservation of the memory of the Genocide and those who died is a crucial part of their vision.

2.10.2 AVEGA

AVEGA[216] is the Association of Widows that was founded in 1995 by women who lost their husbands during the Genocide. AVEGA is comprised of approximately 20,000 widows and 70,000 of their beneficiaries, mainly orphans.[217] As the majority of men were killed during the Genocide, widows and a large number of orphans are one of the legacies of the Genocide. Oftentimes, women were forced to take on the role of breadwinner after 1994. The organization works for social justice for widows of the 1994 Genocide by improving access to healthcare and socio-economic opportunity. As an organization that is for both Hutu and Tutsi widows, it is able to foster social capital. As part of their work, AVEGA works directly in the communities and informs especially women about their civic rights and particularly rights to justice and socio-economic well-being. Similar to IBUKA, they also offer counselling services, which fill an important gap in the lack of psychological support provided by the FARG and social services. A more recent project is concerned with the collection and digitization of widows' testimonies as part of their conflict transformation and peacebuilding programme.

2.10.3 AERG and GAERG

AERG[218] (*Association des Etudiants et Éleves Rescapés du Genocide*) is the association of student survivors created at the National University of Rwanda in 1996. Its main mission is to connect and represent all student survivors whose parents and relatives were killed during the Genocide and who are in the higher education system or attend secondary school. They provide financial support, help with trauma-related health issues, homelessness and financial problems. It is presented at 27 universities and 300 secondary schools across Rwanda with a total membership of 43,397.

GAERG[219] represents university graduates and students in higher learning institutions; they work closely together with its sister organization AERG. They support survivors in their daily lives and the younger siblings of graduates so as to build

216 AVEGA is the abbreviation of Association des Veuves du Genocide Agahozo. Agahozo means 'a place where your tears dry'; accessed 10 January 2021, https://avega-agahozo.org/.
217 Schimmel, *Advancing International Human Rights Law Responsibilities of Development NGOs*.
218 Accessed 10 January 2021, https://gaerg.org.rw/.
219 Accessed 10 January 2021, https://survivors-fund.org.uk/about/our-work/local-partners/aerg/.

'a new family' for these young adults and children who lost their own families during the Genocide.

2.10.4 SURF

SURF[220] is the only international organization dedicated to the promotion and support of Genocide survivors in Rwanda. It was founded in the UK, in 1995, by Mary Kayitesi Blewitt, a Rwandan citizen. SURF assists the Rwandan survivor associations with financial and technical support and is a conduit for development aid from diverse agencies such as UK's DFID. It is committed to support survivors in their right to reparative justice and supports the documentation of all legal cases of unresolved genocide-related crimes. SURF's annual reports provide an excellent overview of the situation of survivors in Rwanda and the many legal, social and psychological challenges they still face today.

2.11 Measures in the Educational System

2.11.1 *Itorero ry'igihuhu*

As part of the government's National Unity and Reconciliation Programme of 2007, the NURC introduced *itorero ry'igihuhu*, an education programme aimed at teaching cultural values and which can be seen as the broadest of its education programmes. The NURC defines *itorero* as

> a homegrown initiative inspired by the Rwandan culture that was formerly a traditional Rwandan school to instil moral values of integrity, and capacity to deal with one's problems which has today been revived to promote values of unity, truth, culture of hard work and avoiding attitudes and mindsets that deter development all aimed at attainment of Vision 2020, MDGS and EDPRS.[221]

The general population, and implicitly Hutu, is in this vision depicted as demonstrating 'bad behaviour, mindset and engaging in bad practices'[222] which– from the government's perspective – makes a change of their mindsets through civic education necessary.[223] As worded in the policy

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220 Accessed 26 January 2021, https://survivors-fund.org.uk/about/our-work/.

221 NURC, National Policy of Unity and Reconciliation (Kigali, 2007).

222 NURC, Understanding Itorero Ry'igihugu (Kigali, 2011), 1.

223 A rationale behind this thinking is the mass participation in the Genocide. It is therefore believed by the political elite that the authorities could easily manipulate the population because they were not educated enough and that traditional pre-colonial values had been lost. Consequently,

> Unity and reconciliation in Rwanda... It requires every citizen to change their mind completely; hence the country will have unity spread all over the nation, where Rwandans will be free and the country which is always eager to have a better future for every Rwandan.[224]

Itorero was introduced as a one-year pilot after its parliamentary ratification in November 2007. Until the end of 2012 more than three million Rwandans – around 27 percent of the population – should have passed the training programme. The *Itorero* Task Force at the NURC oversaw its implementation until 2011 when the newly founded National Itorero Commission (NIC) took over and extended the programme function to a National Service (*urugerero*) for 18 – 35 years old adults, including mandatory military and civil service.[225]

Itorero is structured around the idea of 'drivers of change', meaning that particular promising individuals divided into specific groups such as family, village, school, public administration, university etc. are selected to be 'mentored' through *itorero*.[226] This mentoring takes place on cell, sector and district level (mirroring the decentralized political governance units) in a comprehensive training process and complex structure. In the training session, a strong association between cultural values from the past, good governance in the present and development in the future is made and, according to NURC, critical thinking fostered.[227] Sessions include physical exercise, a civic education module, character building and a community service module. Training sessions are held in public facilities and last a few days to several weeks. In the graduating ceremony, graduates pledge to the *Itorero* Code of Conduct and sign the *imihugo* performance contract, committing themselves to achieve a set of developmental goals; their performance is monitored through an administrative structure which oversees the *itorero* groups across the country and participants are evaluated according to the achievements of the goals set out in their *imihugo*.[228]

These drivers of change are called *intore*,[229] which refers to 'the chosen ones', pre-colonial Tutsi elite warriors who underwent *itorero*, an old military institution.[230] These 'new Rwandan citizens' are to further the achievement of Vision 2020 and the government's overall nation-building project. According to NURC, an *intore* is regard-

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in this view, the re-education of the general population furthers peacebuilding and conflict prevention.

224 NURC, National Policy of Unity and Reconciliation, 2.

225 Erika Dahlmanns, 'New Community, Old Tradition: The Intore Warrior as a Symbol of the New Man. Rwanda's Itorero-Policy of Societal Recreation,' *Modern Africa: Politics, History and Society* 1 (2015): 120.

226 NURC, Strategic Plan of Itorero ry'Igihugu 2009 – 2012 (Kigali, 2009), 15 – 19. Accessed 25 January 2021, https://www.nic.gov.rw/fileadmin/user_upload/Itorero_strategic_plan_English_2009_-_2012.pdf.

227 Melvin, 'Correcting history'.

228 Dahlmanns, 'New Community, Old Tradition,' 134 – 137.

229 The warrior dance *Intore* has survived in popular culture until today.

230 Dahlmanns, 'New Community, Old Tradition.'.

ed as a driving force of national development and a shining example to his fellow citizens. Anyone living up to the principles of the programme, meeting the performance commitments shall be an *intore*.[231] The best *intore* are celebrated in ceremony in different categories and the country-wide best *intore* are acknowledged on the national level on *Itorero ry'Igihugu* Day, whilst the lowest performers are publicly shamed as *ibigwari*, coward or 'weakling', thereby establishing 'a meritocratic hierarchy of *Intore*'.[232]

For the majority of scholars *itorero* is another government strategy to construct a homogenized narrative of the past and indoctrinate the population into their ambitious social engineering project of creating new and 'good citizens'[233] in a prosperous and reconciled Rwanda.[234] However, a more nuanced assessment of *itorero* is provided by Dahlmanns, who contends that it might further national unity, as it promotes cooperation to achieve a common objective; in addition, it serves nation-rebuilding by defining all Rwandans as victims of a loss of culture and at the same time as heroic promoters of a cultural and moral revolution crystallized in the figure of the *itore*, who stands for the return of a 'Golden-Age'-like state.[235] She concludes that *itorero* 'exemplified numerous facets of harnessing and the complex impacts of a reinterpretation of an old tradition for the purpose of designing a new political order and overcoming inner divisions'.[236]

2.11.2 *Ingando*

Ingando[237] is a further civic education in unity and reconciliation spearheaded by the NURC (originally started by the Ministry of Sports and Culture), which describes this pre-colonial military custom as an activity that has 'facilitated the smooth reintegration of former returnees, ex-FAR, and provisionally released prisoners back into their communities. Target groups include women, youth groups, students joining university and local leaders.'[238] These 'solidarity camps' were particularly important in the 1990s to build national unity and were at that time financially supported by

231 NURC, Strategic Plan of Itorero ry'Igihugu 2009 – 2012, 15, 23.

232 Dahlmanns, 'New Community, Old Tradition,' 137.

233 Simon Turner, 'Making Good Citizens from Bad Life in Post-Genocide Rwanda,' *Development and Change* 45(3) (2014): 415 – 433. doi: accessed 27 April 2022, https://doi.org/10.1111/dech.12093.

234 Cf. Straus and Waldorf, *Remaking Rwanda*.

235 Dahlmanns, 'New Community, Old Tradition,' 143 – 144.

236 Dahlmanns, 'New Community, Old Tradition,' 144.

237 *Ingando* derives from the Kinyarwanda word 'kuganika', which refers to using reflection and time away from daily activities to resolve problems of national concern, free of distractions (Turner, 'Making Good Citizens from Bad Life in Post-Genocide Rwanda').

238 NURC, accessed 25 January 2021, https://www.nurc.gov.rw/index.php?id=81.

UNHCR and the WHO.[239] They can be understood as a predecessor of the less militarized and more community-centred *itorero* schools, which do not take place in encamped and therefore confined spaces (see above). The origin of *ingando* is contested, however. Whilst the government claims it derives from pre-colonial times, researchers have found that it was used during the guerrilla war in Uganda and then again during the 1990 – 1994 civil war by the RPF to solidify a common political ideology in RPF-held territory.[240] Some scholars have therefore unsurprisingly suggested that *ingando* aimed at 'mainstreaming participants into the RPF political ideology'[241], whilst others have highlighted civic education aspects and the significance of the re-education of released prisoners and defendants given the strong prevalence of genocide ideology.[242] The camps could last for weeks or months and happen periodically or once. Camp sessions included military training, physical exercise and – crucially – Rwandan history modules and civic education similar to the later established *itorero*. *Ingando* targeted different types of populations: old and new caseload returnees, ex-FAR soldiers and demobilized adult and youth combatants, provisionally released prisoners, those serving TIG, prison-born children, university students upon entrance into higher education, head teachers, civil servants, *inyangamugayo* and even street children.[243] It seems, though, that there were two different types of camps: 'solidarity camps' for politicians, church leaders, students and civil society more generally, and 're-education camps' for ex-soldiers, released prisoners, convicted *génocidaires*, street children and prostitutes.[244] In particular, released prisoners, ex-soldiers and returnees from the DRC had to undergo the *ingando* camps before returning to their home communities. The government saw this particular group as in special need of 're-education' and 'reintegration' exercises, including education about history, learning about 'overcoming bad governance', 'how to resist divisive and genocidal policies', 'how to become agents of change' and civic values.[245] The solidarity camps were mandatory following high school graduation and for those entering university or receiving government scholarships. Accurate figures of how many Rwandans underwent these camps are lacking. Rwandapedia reports that 50.6 percent of provisionally released prisoners underwent *ingando* and

239 Andrea Purdeková, 'Rwanda's Ingando camps: Liminality and the reproduction of power,' *Refugee Studies Centre*, *University of Oxford Working Paper* 80 (2011).

240 Purdeková, 'Rwanda's Ingando camps'; Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, *Cambridge Studies in Law and Society* (Cambridge: Cambridge University Press, 2010).

241 Chi Adanna Mgbako, 'Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda,' *Harvard Human Rights Journal* 18 (2005): 201 – 224; cf. Turner, 'Making Good Citizens from Bad Life in Post-Genocide Rwanda'.

242 Cf. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*.

243 Purdeková, 'Rwanda's Ingando camps'.

244 Turner, 'Making Good Citizens from Bad Life in Post-Genocide Rwanda,' 425.

245 Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*, 105 – 106; Purdeková, 'Rwanda's Ingando camps'.

41.1 percent of high school graduates entering higher education went through the solidarity camps.[246]

2.11.3 History Textbooks

Research in the field of education after emergency has shown that the promotion of an official narrative in support of the ruling regime is not unique to Rwanda but is commonplace in post-conflict societies.[247] 'Syllabi result from political processes that vary between different state formations and political systems. The common denominator is that syllabi express values that the state sees as desirable for the citizenry'.[248]

It is not surprising against that backdrop that the introduction of history textbooks in Rwandan schools follows the RPF's political objectives of national unity and reconciliation, promoting a specific version of the country's history that mobilizes a shared Rwandanness against a colonialism that is seen as the main cause of the ethnic division. Prior to the Genocide, history was taught with books written by colonial authorities that, according to the government, promoted 'divisionism' and 'genocide ideology'. Therefore, authorities imposed a moratorium on the teaching of history for fear of another genocide.[249] But there was also a lack of material and human resources as well as disagreement over the significance of different events leading up to and during the Genocide, and there were concerns over the promotion of 'divisionism' by teachers.[250] For many, the participation of teachers in the violence and the location of massacres in schools led to 'the total erosion of faith in the education system'.[251] Some scholars have concluded differently regarding the reasons for the lengthy ban, arguing that the RPF exploited the vacuum to introduce a homogenized version of Rwandan history to align with their ambitious social engineering project.

The NURC was entrusted with the development of a new history book – *Histoire du Rwanda* – that would later facilitate the introduction of the official history syllabi and be used for *itorero* and *ingando*. The NURC formulates the need for education as follows

> Young people need to know the origins and causes of the deep divisions that have shaped recent relations between Rwandans. Otherwise, future generations will have a partial vision of the past,

246 Accessed January 25, 2021, http://rwandapedia.rw/explore/ingando.

247 Paul Thomas and Kristin Skinstad van der Kooij, 'The history syllabus in post-genocide Rwanda,' *Cogent Education* 5(1) (2018): 154 – 195.

248 Thomas and van der Kooij, 'The history syllabus in post-genocide Rwanda,' 2.

249 Buckley-Zistel, 'Nation, narration, unification?'; Elisabeth King, 'From classrooms to conflict in Rwanda,' *African Affairs* 114(454) (2014): 156 – 158.

250 Melvin, 'Correcting history'.

251 Melvin, 'Correcting history,' 17.

> fuelled by emotional or popular stories gleaned from parents, friends, newspapers, and other writing or simply from the street.[252]

Only in 2008 did the government introduce the first official history syllabus. The Rwanda Education Board has four publicly available history syllabi at Ordinary Level (2008 and 2015) and Advanced Level (2010 and 2015). Content analysis of these texts has revealed that the blame attribution around ethnicity is in tension with the overall goal of reconciliation, because the Hutu population at large is mainly blamed for the murderous violence of 1994; and some obviously oppressing social structures such as the feudal arrangements *ubujae* and *uburetwa* are portrayed in a positive light, while the literature considers these oppressive clientele systems as benefitting the Tutsi elite.[253] In addition, the RPF's victory over the genocidal regime and its post-genocide nation-building politics are laid out in messianic terms that leave little to no room for the 'critical thinking' that the syllabi attempt to foster.[254] It must also be acknowledged that the pedagogical objectives of these textbooks are to be implemented by teachers who are in some instances terrified to teach about Rwandan history, and especially the Genocide, in an 'incorrect' manner.[255]

2.12 Coming to Terms with the Past through Art

There is a significant extent of artistic reappraisal of the Genocide inside and outside of Rwanda in television, radio, film, literature and, more recently, theatre. One of the best known international films about the Genocide which has been heavily criticized inside Rwanda is Terry George's 2004 'Hotel Rwanda', which tells the story of the prominent *Hôtel des Mille Collines* in Kigali where hundreds of Tutsi sought refuge during the Genocide. The hotel manager Paul Rusesabagina is depicted as the hero who saved many lives. In reality, his role is heavily contested, and in particular survivors who were at the hotel at that time tell quite a different story of the events in question.[256] Hitchcott demonstrates how such 'prosthetic memory' of the Genocide narrated from the standpoint of and for an international audience can have potential harmful consequences for survivors of trauma.[257] The film might also explain the international outcry over the arrest – which was described by international media as

252 NURC, Histoire du Rwanda: des origines à la fin du xxe siècle (Kigali, 2011), 11.
253 Thomas and van der Kooij, 'The history syllabus in post-genocide Rwanda,' 6.
254 Thomas and van der Kooij, 'The history syllabus in post-genocide Rwanda,' 6.
255 Informal conversation, November 2016.
256 Informal conversation with survivors, February 2019.
257 Nicki Hitchcott, 'Seeing the Genocide against the Tutsi through someone else's eyes: Prosthetic memory and Hotel Rwanda,' *Memory Studies* (online first, 2020).

unlawful – of Paul Rusesabagina in 2020, who was charged with terrorism and murder.[258]

Furthermore, similarly to the Holocaust, we can witness the development of survivor novels that tell vivid and heart wrenching stories of despair and survival. Among the most prominent are Immaculée Illibagiza's 'Left to Tell: Discovering God Amidst the Rwandan Holocaust' (2006); Scholastique Mukasonga's 'Our Lady of the Nile' (2012) and Yolande Mukagasana's 'Not My Time to Die' (translated by Zoe Norridge in 2019). This form of writing can be seen as an act of remembrance in itself to honour those who perished in 1994 but also to fight genocide denial and raise awareness of the 1994 Genocide.

3 Stocktaking: Successes and Failures of Transitional Justice in Rwanda

3.1 Successes in Coming to Terms with the Past and their Causes

Implementation of Transitional Justice

After the Genocide, the government introduced a comprehensive, complex and creative transitional strategy that addresses the main goals of transitional justice such as truth, reconciliation and justice. It is perhaps one of the most comprehensive transitional justice strategies in the world and certainly on the African continent.

Fight against impunity

Despite the destruction of the judiciary in 1994, Rwanda reformed and built a completely new judicial system that was equipped to try crimes against humanity and genocide. This enabled Rwanda to fight impunity and try high-level as well as low-ranking perpetrators. More than a million cases were tried before the *gacaca* courts and thousands more before the Specialized Chambers in the national courts. The ICTR contributed by prosecuting 90 planners of the Genocide and through its case law furthered the development of international criminal law.

Truth-telling

Truth-telling and truth-hearing are a cornerstone of transitional justice initiatives globally. The *gacaca* courts were successful in uncovering what happened during the killings in 1994, who participated to what extent, who was bystander and who

258 Accessed 28 September 2021, https://www.bbc.co.uk/news/world-africa-54147759.

rescued. Truth-telling as a social repair measure was, however, a messy, contested and, at times, a violent process.

Memorialization

The government and survivor associations have established a comprehensive and far-reaching memorialization strategy including the establishment of memorials, preservation of the *gacaca* archive and commemorative events. Especially for survivors, this is a significant development, since their suffering is publicly acknowledged and the memorials offer a material space to mourn their loved ones.

Traditional Justice and civic education

Rwanda was very successful in finding 'home-grown' solutions (e. g. *gacaca*, *itorero*, *umuganda*) to tackle the legacies of the Genocide that were sometimes at odds with international ideas of transitional justice, especially criminal prosecution and truth-telling mechanisms. Through teaching pre-colonial military and political customs and societal norms, it was possible to create a sense of Rwandanness among the population and redirect blame for the Genocide to colonialism. The *abunzi*, the successor of *gacaca*, successfully regulate community conflicts today.

Development

Rwanda has been praised by international donors for its implementation of development plans. It has reduced poverty, introduced social service provisions including free health care, invested in the IT, energy and transport sectors. It aspires to become a middle-income country by 2035. Growth averaged 7.5 percent over the decade to 2018, per capita GDP grew five percent annually.

Political stability

Despite, or perhaps precisely because of the lack of respect for basic human rights, the RPF has built political stability not only for the country but the Great Lakes Region as a whole. It is highly unlikely that the country will experience an outbreak of violence again or face political violence as witnessed in neighbouring Burundi and recently Uganda.

3.2 Failures in Coming to Terms with the Past and their Causes

Reparations
The government has not provided meaningful reparations for survivors. In particular, compensation orders were not implemented and the state sees reparation as a favour rather than a human right of survivors.

Human rights
Democratic liberties are extremely limited, freedom of press and freedom of speech heavily restricted; the Freedom House Index categorizes Rwanda as 'not free'. Political and clerical opponents have been systematically persecuted, harassed, imprisoned, disappeared or even murdered. The human rights record of the government has been critiqued by international human rights organizations since the RPF took power in 1994.

'Victors' Justice'
The crimes against humanity and war crimes committed by the RPF during the civil war and in its aftermath have not been addressed. The justice mechanisms put in place exclusively addressed crimes related to the Genocide.

Memorials' impact on reconciliation
The memorials do not lead to reconciliation. Rather, they are a steady reminder of the wrongdoings of the past. There is no empirical evidence for claims in Rwanda and in the literature that memorials lead to reconciliation.

Marginalization of survivors
Survivors in Rwanda surprisingly constitute a vulnerable group in society. It seems that the more the Genocide moves into a distant past, the less understanding there is in society with regard to their plight and the burden they carry – society moves on. The state is concerned with the development of the country but leaves survivors behind.

Hugo van der Merwe

South Africa: Addressing the Unsettled Accounts of Apartheid

1 The Experience of Dictatorship

1.1 Relevant Period

The period of apartheid rule in South Africa officially lasted from 1948 until April 1994, when democratic elections took place. The policy of apartheid (Afrikaans for separateness) was formally introduced in South Africa by the National Party (NP) when it came to power in the whites-only elections of 1948. This culmination of a political, economic and social system of racial discrimination was, however, based on policies of racial discrimination practiced and legislated since the first European settlement in South Africa in 1652. Colonial rule in South Africa by Dutch and British administrations involved wars of conquest, enslavement of local peoples, the deprivation of land and political control of indigenous populations. Colonialism also saw the establishment of numerous waves of Dutch, French and British settlers occupying various parts of the country (particularly the Cape Province and Natal) in subsequent centuries. Dutch settlers who were unhappy with British rule of the Cape Province (including the abolishment of slavery) moved into the country's interior and established independent 'Boer'[1] republics, the Orange Free State and the Transvaal. This migration also involved numerous battles resulting in the conquest of land and the forced displacement of local populations.

Violent conflicts between indigenous people and European settler populations continued until the early twentieth century. The last major military confrontation was the Bambatha Rebellion (1906 – 1907), when the Zulu Chief challenged the introduction of a poll tax by the Natal government.

The whole period of colonial control of South Africa involved various racially discriminatory laws and the denial of political rights. In the early twentieth century this gave rise to a more united African movement of protest and resistance, particularly through the leadership of the African National Congress (ANC), which was founded in 1912 (initially as the South African Native National Congress).

The ANC led various protests against discriminatory laws and campaigned for full democracy. In the 1950s these campaigns became increasingly confrontational while retaining a principled stance of non-violence. In March 1960 the Pan Africanist

1 Boer is the Dutch word for farmer, which is how the majority of Dutch settlers referred to themselves. Their descendants were subsequently called Afrikaners.

https://doi.org/10.1515/9783110796629-005

Congress (PAC), a breakaway group of the ANC, led protest marches against the passing of laws that required Africans to carry permits to reside in 'white' urban centres. At a march to a local police station in Sharpeville, police opened fire on protestors, killing 69 and injuring 180. This became known as the Sharpeville Massacre. In response to the rising tensions, the government banned the ANC and PAC along with various other political organizations. Consequently, the ANC and PAC decided that it was necessary to resort to armed struggle to pursue their goals. Many leaders went into exile and the organizations established military structures to continue their campaigns. The subsequent period up to 1994 is considered a period of armed struggle and severe authoritarian rule. This is the period that the South African Truth and Reconciliation Commission (TRC), described in chapter 2, section 10, was mandated to address.[2]

This period also saw the conflict expand to include neighbouring countries, especially when newly independent states (Botswana, Lesotho, Swaziland, Mozambique, and Zimbabwe) supported or provided bases for the liberation movements. The South African government also directly supported rebel groups and engaged militarily in civil wars in Angola and Mozambique. South Africa's occupation of Namibia (since its takeover from Germany in WWI) witnessed the introduction of apartheid-style policies and fighting against the liberation war conducted by the South West African People's Organisation.[3]

The end of the conflict is generally located at the day of the first democratic election on 27 April 1994. While the interim constitution was signed by the main political parties in December 1993, further violence occurred in the subsequent months, particularly involving the right-wing extremists opposed to democratic elections, and the Inkatha Freedom Party (IFP), which felt that its needs had not been sufficiently addressed in negotiations. After April 1994, further incidents of political violence such as bombings and targeted assassinations continued more sporadically, also involving mainly these two groups.

1.2 Political Background

While the National Party introduced the official state policy of apartheid in 1948, this has been described as simply a concretization of racially discriminatory policies that had been pursued for centuries in South Africa. Previous governments in South Af-

2 Promotion of National Unity and Reconciliation Act (Act 34 of 1995), accessed 14 July 2021, https://www.justice.gov.za/legislation/acts/1995-034.pdf.

3 Guy Lamb, 'Dismantling of the State Security Apparatus,' in *Memory of Nations: Democratic Transitions Guide – The South African Experience*, ed. CEVRO (CEVRO, 2020), 7–17.

rica had provided very limited political rights to black[4] citizens and had introduced laws that robbed them of critical rights and property.[5]

The National Party was established in 1914. It specifically sought to present the interests of Afrikaners (descendants of Dutch settlers) who had suffered intensely at the hands of the British during the South African War of 1899 – 1902. They sought to protect their rights against the dominance of British rule and the economic dominance of British settlers and to assert political and economic dominance in relation to the black majority that was escalating its demands for political rights.

Formative in the Afrikaners' identity was the memory of the South African War (11 October 1899 – 31 May 1902) during which the British pursued a 'scorched earth' policy of burning farms and collecting women and children into concentration camps[6] in order to force soldiers of the Boer republics (Transvaal and Orange Free State) to surrender. More than 25,000 women and children died in these camps due to poor nutrition and living conditions. Blacks were also interned in similar under-resourced concentration camps, where about 20,000 died.[7]

A key cause of the South African War was the tension between British mining interests in the Boer republics after the discovery of gold in the Transvaal. The peace treaty asserted British economic dominance and confirmed the political rights of both Afrikaners and British settlers while denying any rights for indigenous peoples.

The National Party was established as a vehicle for Afrikaner nationalism, perceived to have been stifled by the war and the peace treaty, which sought recognition of an Afrikaner culture, support for Afrikaner economic interests and a political vision of separation of different racial groups.

The National Party first won political power in 1924 and introduced legislative changes that reduced the representation of 'coloureds' (South Africans of mixed de-

4 'Black' is used in this paper as a collective term for citizens who were not considered white. It includes groups such as Asians or those of mixed race who were all discriminated against by the predominantly white government. It is used instead of the more pejorative term 'non-white' commonly used by the apartheid government. Apartheid legislation mainly differentiated between whites, Africans, coloureds and Indians.

5 The key land ownership law that deprived Africans of land was the Natives Land Act of 1913, which restricted their right to own land to reserves that covered less than 13 percent of the country. Cf. William Beinart and Peter Delius, 'The Historical Context and Legacy of the Natives Land Act of 1913,' *Journal of Southern African Studies* 40(4) (2014): 667–688, accessed 14 July 2021, https://doi.org/10.1080/03057070.2014.930623.

6 These concentration camps were some of the first in modern history and received widespread condemnation once the conditions in these camps were made public in Britain by figures like Emily Hobhouse, who campaigned for an improvement of conditions.

7 The official figure is 27,927 whites, which is based on the 'Republikeinse Sterfte' lists compiled by P. A. Goldman. However, due to duplications and methodological errors, recent research has only been able to verify around 25 000 deaths. Liz Stanley and Helen Dampier, 'The Number of the South African War (1899 – 1902) Concentration Camp Dead: Standard Stories, Superior Stories and a Forgotten Proto-Nationalist Research,' *Sociological Research Online* 14(5), 2009: 1 – 14.)

scent). In 1934 the NP joined with the opposition to form the United Party. Afrikaner dissatisfaction with this compromise resulted in the re-establishment of the National Party. Unhappiness with the United Party's decision to join the Second World War on the side of the British fuelled this discontent, which led to a consolidation of Afrikaner support for the NP, which went on to win the 1948 national elections.

The National Party then embarked on implementing its policy of apartheid, which entailed a grand-scale vision of separating South Africa into a country of white citizens and separate, self-governing 'homelands' of the various African tribes. South Africa was thus considered a white state where Africans were tolerated only if they were given official permission to reside there through the migrant labour system and the issuing of passes. Urban centres, particular suburbs, were stipulated as being for whites only, resulting in the forced relocation of many thousands of residents, and sometimes the complete destruction of neighbourhoods.

Apartheid also introduced the strict racial categorization of the population, which facilitated the delineation of separate public services for different groups, which resulted in highly unequal health, education and other human services. Inter-racial marriage was outlawed, and restrictions were placed on cultural and social gatherings which sought to restrict racial mixing. Racial separation shifted from a de facto reality to a much more systematic de jure system of social control. As noted by Allister Sparks, the new policy 'substituted enforcement for convention. What happened automatically before was now codified in law and intensified when possible. . . . [Racism] became a matter of doctrine, of ideology, of theologized faith infused with a special fanaticism, a religious zeal.'[8]

1.3 Ideological Justification

Apartheid ideology is the belief that people inherently belong to different racial groups that should remain separate. In addition, it frames whites as inherently superior due to their genetic inheritance and cultural and religious ancestry. This ideology of white supremacy is historically rooted in the Afrikaner belief in being a people chosen by God, and the political dominance they exercised over others was supported by their interpretation of the Bible.

A large majority of Afrikaners belonged to the Dutch Reformed Church, a conservative, Calvinist Christian church that had long taught racial separation as a biblical injunction. Afrikaners also saw their role in South Africa as a missionary presence of bringing civilization and imposing order on the local population by ensuring the separate development of different groups. The religious foundation of apartheid imbued

8 Allister Sparks, *The Mind of South Africa: The Story of the Rise and Fall of Apartheid* (Johannesburg: Jonathan Ball Publishers, 2006), 190, quoted in Timothy Longman et al., 'Early Apartheid: 1948–1970,' in *Confronting Apartheid* (Brookline: Facing History and Ourselves, 2018), accessed 17 January 2022, https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction.

it with a rigid morality, imposing strict religious rules regarding women's subservience, the severe discipline of children and respect for authority.

The ideology of apartheid was supported by scholars from the various Afrikaner universities who provided 'scientific' support in terms of biological explanations for racial differences and political and sociological support for the notion of race, racial and tribal identity and the benefits of separate development.

Apartheid policies were also intricately tied to economic policies of wealth creation and affirmative action. Protected employment was expanded for white workers through job reservation for whites among the more skilled positions in industry, and expanded state enterprises ensured high levels of employment for less skilled whites. The most far-reaching of the economic policies was the system of migrant labour. This involved African labourers being recruited from the homelands (and from neighbouring countries) to work in industries in South Africa. They were to have limited rights of residence that were strictly tied to their limited contract of employment. This ensured a large supply of cheap labour for mines and other industries that required large numbers of unskilled workers. The repressive political conditions and power of the mines meant that real African wages in the gold mines were higher in 1915 than they were in 1970.[9]

This formula was one that ensured huge profits for the mining industry while externalizing the devastating long-term health costs of the poverty stricken rural communities that supplied the labour.[10] Apartheid was thus pursued in a way that brought large corporations into the design of its fundamental policy development and implementation.

Besides defending the moral premises of racial segregation, the National Party government also increasingly viewed and portrayed itself as a bastion against godless communism. Particularly in the 1960s, as the ANC and PAC received support from the Soviet Union and China, the National Party government viewed the downfall of white rule in South Africa as the doorway to communist rule. The prospect of black majority rule was portrayed as resulting in the suppression of Christianity, the nationalization of industry and the end of any form of democracy (to the extent that it still existed for whites). This vision of a communist onslaught on South Africa further entrenched determination to oppose reforms and strengthen the coercive power of the state.

The authoritarian powers of the state were thus firstly an expression of an authoritarian understanding of the nature of the social control required of a complex society, which necessitated enforced separation through grand state intervention, which in turn required intensive policing and firm rule through the use of extensive

9 Jill Nattrass, *The South African Economy: Its Growth and Change* ²(Cape Town: Oxford University Press, 1988), 139, table 7.2.

10 Jaine Roberts, 'The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa' (Durban: Health Systems Trust, 2009).

laws and bureaucratic controls. Secondly, authoritarian control became increasingly repressive in response to wide-scale black resistance to apartheid rule. This was made even more brutal in response to the shift to armed resistance by the liberation movements and the emergence of an international movement against apartheid, particularly through the support provided to the liberation movements by communist countries. The response to the 'total onslaught' was the development of a 'total strategy' in the 1980s that involved the security forces and the securitization of all aspects of South African society.[11]

As part of the international campaign against apartheid, the UN General Assembly passed a resolution classifying the system of apartheid as a crime against humanity in 1973.[12] This resolution was, however, not supported by Western governments and right up to its demise, Western banks continued to lend money to the South African government, which was used in part to fund its security and military strategies.[13]

1.4 Structures of Persecution

Apartheid was implemented through a system of law passed by parliament and enforced through the courts. In order to maintain its own sense of legitimacy and to portray itself positively to the international community, the government sought to style itself on European systems of governance, if only to the extent that democracy was applicable to whites and the country was governed through a system of law rather than pure force. This was labelled 'rule by law' rather than rule of law by some commentators, as the nature and scope and discretion allowed by these laws and regulations were dramatic and openly discriminatory.[14] These laws were imposed on the disenfranchised majority, which meant that the state had to develop a huge infrastructure of law enforcement. The South African government utilized the police force, the judiciary and a vast bureaucratic network of state officials to impose apartheid laws and regulations, resulting in the forced relocation of hundreds of

11 Robert Davies and Dan O'Meara, 'Total Strategy in Southern Africa: An Analysis of South African Regional Policy since 1978,' *Journal of Southern African Studies* 11(2) (1985): 183 – 211, accessed 14 July 2021, https://doi.org/10.1080/03057078508708096.

12 General Assembly resolution 3068 (XXVIII) of 30 November 1973 (International Convention on the Suppression and Punishment of the Crime of Apartheid).

13 Karyn Maughan, 'Fresh bid to nail banks for helping apartheid SA,' *Financial Mail*, 3 September 2020, accessed 17 January 2022, https://www.businesslive.co.za/fm/features/2020-09-03-fresh-bid-to-nail-banks-for-helping-apartheid-sa/.

14 Richard L. Able, *Politics by Other Means: Law in the Struggle against Apartheid, 1980 – 1994* (Cambridge University Press, 1997).

thousands of citizens and the arrest of over 17 million for contraventions of the pass laws.[15]

In addition to the extensive body of apartheid laws that restricted movement, interaction, and economic and social behaviour among blacks, the state also developed security laws that expanded its ability to repress political opposition. When the ANC and PAC stepped up their military campaign against the apartheid government, the state developed more sophisticated structures to persecute its opponents. This involved the development of various police and military intelligence units, public policing units and coordination bodies that ensured an elaborate and sophisticated approach.[16] At the height of apartheid repression in the 1980s, the state established a National Security Management System under the control of the State Security Council, which was composed of military personnel. This structure acted as a shadow cabinet and oversaw a national network of Joint Management Centres that coordinated local-level intelligence and interventions.

Legislation was passed that gradually broadened state security powers by expanding the scope of what was considered illegal activity: it broadened the definition of terrorism, extended the powers of the security forces to conduct surveillance, arrest and detain suspects, and reduced the rights of detainees. In 1950 the parliament had passed the Suppression of Communism Act (Act No. 44 of 1950) specifically to ban the South African Communist Party, which was a close ally of the ANC. In 1967, the state passed the Terrorism Act (Act No. 83), which allowed the government to detain individuals indefinitely, which was replaced in 1982 by the Internal Security Act of 1982 (Act No. 74), which gave the government broad powers to ban or restrict organizations, publications, people and public gatherings, and to detain people without trial.[17]

This expansion of state repression reached a pinnacle in the 1980s when the state declared a state of emergency in 1985 in response to the mass protest campaign led by the newly established United Democratic Front (UDF). This group had brought together a wide range of civil society organizations in support of democratic change. This popular movement had gained broad support among organizations from across the racial divide and presented a broad umbrella that included both liberal and more radical political movements. The UDF and its affiliates were broadly ANC aligned, supporting its political agenda while not necessarily supporting its military campaign. The state of emergency provided additional powers for the state to censor

15 Michael Savage, 'The Imposition of Pass Laws on the African Population in South Africa 1916–1984,' *African Affairs* 85 (339) (1986): 181.

16 There was, however, competition among different agencies, particularly between the military and police structures, and different Prime Ministers gave priority or restructured these based on their cabinet preferences.

17 A more detailed list of security legislation and their provisions can be found here, accessed 14 July 2021, https://sahistory.org.za/archive/many-faces-apartheid-repression.

media coverage of protest events, impose curfew times and restrict people's movements, and ban organizations.

1.5 Victim Groups

In additional to its systemic and structural violence aimed the majority of South African citizens,[18] more targeted forms of persecution were developed to counter political resistance to apartheid. Political repression took on a number of forms and targeted different groups, which evolved over the different periods of apartheid rule and which responded to different state perceptions of the nature and extent of the threats they were facing.

The nature and extent of the conflict and the numerous forms of repression used by the state, along with the lack of public accounting by the apartheid government and its destruction of records, makes it difficult to present a clear and comprehensive statistical picture of the abuses during this period.

The highest number of deaths due to political violence occurred in the fighting between the ANC and IFP in the period 1990 – 1994.[19] While some attacks were seemingly authorized by local political leaders, others took the form of local rivalries, internal battles within parties, personalized retaliations, etc. A second issue is the lack of state records of most offences. The state did not keep track separately of political versus criminal offences, and many of those who were killed or detained by the state were categorized simply as criminals. Only certain offences and certain security measures were specifically political (e. g. terrorism and detention under particular emergency regulations). Furthermore, the state did not maintain detailed records of offences or release figures publically. Monitoring bodies during apartheid, such as the Network of Independent Monitors, the Human Rights Commission, also focused their attention on documenting individual cases (often with a view towards legal action), and spent relatively little effort compiling accurate estimates of the numbers involved.

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18 Apartheid was a system that committed political, social and economic abuses against millions of South Africans on the basis of their race and ethnicity. In terms of this broad conceptualization, tens of millions of people were victimized by being robbed of their land, deprived of their political rights and had their life chances diminished through lack of education, deprived of work opportunities, denied health services, etc. In terms of the Apartheid Convention, they can all be classified as victims of an international crime. The apartheid policies such as the migrant labour system and labour laws gave rise to very direct physical harm, such as when unsafe working conditions in the mines resulted in tens of thousands of premature deaths due to silicosis, and similar things also occurred among migrant workers who had little access to workplace protection or health services.

19 From February 1990 to April 1994, 14,807 people were killed, compared to 5,387 in the previous five years. (Brandon Hamber '"Have no Doubt it is Fear in the Land": An Exploration of the Continuing Cycles of Violence in South Africa,' *Southern African Journal of Child and Adolescent Mental Health* 12(1) (2000): 7; South African Institute of Race Relations, Race Relations Survey 1993/1994, 1994, 39).

After the transition, the issue of counting particular cases has not been viewed as particularly valuable either by the TRC or by political actors. The TRC focused most of its attention on public truth telling or, as it termed it, 'narrative truth,' through which it sought to build public empathy and understanding (see section 2.10.1 of this report). At times it treated statistical information about abuses with disinterest, if not suspicion. In its investigations and research, the TRC made little attempt to develop accurate counts of particular phenomena. It did do some statistical analysis of the statements it received from victims and applications for amnesty. These figures were used particularly to provide a broad sense of the dynamics of conflicts in particular regions (such as the graphs in volume 3, chapter 1 of the TRC final report.) These figures are, however, by no means a census of the victim or perpetrator populations and clearly provide a very biased sample of both populations. The TRC used such statistics mostly as illustrative backdrop for its narration of the conflict dynamics in different parts of the country.[20]

1.5.1 Political Trials, Imprisonment and Judicial Executions

The array of political offences created by the state provided a basis for a large number of political trials. Even when not convicted in these trials, this strategy ensured that political opponents spent much of their time in jail awaiting trial or in court defending themselves. According to Max Coleman (former director of the Human Rights Commission, a non-governmental organization that monitored apartheid human rights abuses),

> An estimated 50,000 persons over the last 5 years [1985–1989] have found themselves in court as a result of involvement in the violence arising from mass resistance to apartheid. The vast majority has been acquitted or had their charges dropped.[21]

20 In political debates, the numbers have also not featured as a key contention. Both the ANC and the NP are unable to use the numbers to their advantage in scoring political points. They are both still seen as not having fully acknowledged responsibility for the suffering they have caused. Maintaining a mutual silence about the number of deaths or other abuses at their own hands appears to serve their interests best. Where victim organizations have organized and made claims regarding the numbers of those who were victims that should benefit from reparations, the state has simply remained silent, not disputing the figures but also not confirming that tens of thousands of victims may still be entitled to reparations payments. The statistics are also at odds with the political narrative of the liberation struggle. The few members of military or police killed by the ANC (and the fact that it killed more civilians than combatants) does not align with its historical narrative of military heroism and the success of its military wing in pressuring the apartheid government.

21 Max Coleman, ed., *A Crime Against Humanity: Analysing the Repression of the Apartheid State* (Cape Town: David Philip Pub, 1998). Cited by SAHO, accessed 14 July 2021, https://www.sahistory.org.za/archive/post-detention-weapons.

While no detailed analysis of the total number of people sentenced for political offences is available[22], Coleman noted that at the end of 1989 the number of political prisoners then serving sentences for 'security offences' was about 350, and those serving time for 'unrest offences' (such as participating in illegal protest or public violence) numbered somewhere between 2000 and 3000.[23]

About 150 of those convicted for political offences were sentenced to death and executed.[24]

1.5.2 Detention without Trial

Persecution was not just targeted at those operating illegally or planning violence. All forms of opposition to the state were kept under surveillance, and legislation was introduced that gave the state the power to detain suspects without charging them. Detention without trial became a widely used strategy by the police.[25] While specifically targeted activists had been detained in earlier periods, such detention was used on a much wider scale when protests escalated into broad social uprisings, such as during the Soweto Uprising of 1976, by the end of which about 700 people had died,[26] and the United Democratic Front mass mobilization campaign of 1984. It is conservatively estimated that 80,000 people were detained under security regulation between 1960 and 1989, of whom 15,000 to 20,000 were below the age of 18.

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22 The two organizations that provided the most regular monitoring of political repression during apartheid were the South African Institute for Race Relations, which produced an annual report, the Race Relations Survey, and the Human Rights Commission which produced a series of reports on events and trends. The two organizations represented different ideological positions and utilized different methodologies, different definitions and covered different periods of the regime. They were also not consistent in monitoring particular forms of repression on an ongoing basis. After 1989, no attempt was made to provide an overview or summary of these various records, as their attention shifted to addressing new political and social issues in the post-transition context.

23 Coleman, *A Crime Against Humanity.* Cited by SAHO, accessed 14 July 2021, https://sahistory.org.za/archive/many-faces-apartheid-repression.

24 Executions in South Africa were done by hanging. According to Capital Punishment UK (accessed July 14, 2021, http://www.capitalpunishmentuk.org/common.html) more than 4,200 people have been executed in South Africa since 1910 and more than half of this number were hanged between 1967 and 1989, the period of intense resistance to white rule and apartheid, although it is thought that only 152 of these were for 'political' crimes. This figure aligns with those found on, accessed 14 July 2021, https://www.sahistory.org.za/article/political-executions-south-africa-apartheid-government-1961-1989#:~:text=After%20the%20first%20democratic%20election,were%20dismantled%20the%20following%20year which reports that between 1961 and 1989, about 134 political prisoners were executed by the apartheid government at Pretoria Central Prison (where most executions were carried out).

25 Coleman, *A Crime Against Humanity.*

26 Helena Pohlandt-McCormick, "I Saw a Nightmare...': Violence and the Construction of Memory (Soweto, June 16, 1976),' *History and Theory* 39(4) (2000): 23–44.

Among the detainees were those directly involved in protests as well as many who were seen as organizing these activities.[27] Organizational bans, targeted arrests and mass detentions particularly focused on student associations, trade unions, church structures, and progressive media.

1.5.3 Torture

Many of those detained were subject to torture and severe ill-treatment. The use of torture was routine and sanctioned by higher police and political authorities.[28] The TRC also found that,

> Torture was not confined to particular police stations, particular regions or particular individual police officers (...). Torture was used by the security police and by other elements of the security forces, including the Reaction Unit, the Municipal Police, the CID and, to some extent, by the military intelligence unit of the SADF.[29]

1.5.4 Banning

Another form of restriction imposed on many opponents was being banned.[30] This entailed numerous restrictions on movement and interaction, such as being restricted in the kinds and number of people one could meet, the places one could travel to and the requirement to report regularly (in many cases every day) to a local police station. In many cases this was equivalent to being under house arrest. It also meant that such people could not be quoted in the media. Banning was often used for many years against targeted individuals. Figures for the number of people banned is not clear, but is estimated to have reached over 1,800 by 1985.[31]

Many detainees were also murdered while in detention. Many of these deaths were classified as suicides or accidents, and state health officials and judicial officers

27 Coleman, *A Crime Against Humanity.*

28 The TRC established that the 'South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of torture against detainees and that Cabinet was indirectly responsible.' TRC, *Truth and Reconciliation Commission Final Report Volume 6*, 2003, 617.

29 TRC, *Truth and Reconciliation Final Report, Volume 2*, 1998, 187, accessed 14 July 2021, https://www.justice.gov.za/trc/report/finalreport/Volume%202.pdf.

30 Other similar restrictions on movement included being banished to a particular area or being listed, which mainly involved restrictions on being quoted in public documents.

31 Coleman, *A Crime Against Humanity.*

were complicit in covering up the true causes of these deaths. At least 67 political prisoners died while in police custody.[32]

1.5.5 Assassinations

Assassinations of political opponents were carried out by specialized tactical security force units which targeted both members of liberation military forces but also civilian political opponents deemed to present a serious threat. Such units existed both within police counter-intelligence (Unit C10, better known as the unit headquartered at Vlakplaas), and within military Special Forces (Civil Cooperation Bureau). The security apparatus was also involved in training IFP paramilitaries, which were implicated in subsequent assistanations of ANC leaders. Key apartheid opponents, particularly leadership figures of the ANC, were also targeted in foreign countries through the use of parcel bombs and direct assassination. Those targeted also included high-profile supporters of the ANC who were seen as mobilizing support for the ANC cause among other constituencies. This included instances such as the bombing of the Khotso House of the South African Council of Churches on 31 August 1988 (and the attempted assassination of its Secretary General in April 1989), and the torture and murder of trade union leaders, Muslim clerics, youth and student leaders.

1.5.6 Forced disappearances

The TRC has recognized 477 cases of missing and disappeared persons from the apartheid era. Some of these disappearances served to hide evidence of torture and extrajudicial killings by security operatives. The fate and context of other disappearances are much less clear.[33]

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32 Mogomotsi Magome, 'South Africa Probes Apartheid-Era Death in Police Custody,' AP NEWS, February 3, 2020, accessed 14 July 2021, https://apnews.com/article/0a4ea5b33bcef3c5d044d801d30173a7.

33 J. D. Aronson, 'The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons,' *International Journal of Transitional Justice* 5(2) (2011): 262–281, accessed 14 July 2021, https://doi.org/10.1093/ijtj/ijr013. Determining the exact number of political disappearances is complicated by the fact that some activists were thought to have left the country to join the ANC or PAC and were not heard from again. Many who joined the ANC in exile did so under pseudonyms, which in turn made it difficult to trace their family in the event of their death. The category of political disappearance is also quite vague. Some included in this group comprise those killed during political clashes who were buried in paupers' graves when their identity was not immediately clear. It also included those executed for political offences and then buried in unmarked graves.

1.5.7 Violent repression of protests

Another common cause of death during the political conflict was the excessive use of violence by police in response to public protests. The right to public protest was severely curtailed and many public demonstrations and marches ended with police action that resulted in injuries or deaths. While the Sharpeville Massacre was the most extreme case of such abuse, police use of live ammunition or other forms of extreme force in response to protests led to hundreds of deaths over the last three decades of apartheid rule. This continued up till the final days of apartheid, with incidents like the Bisho Massacre on 7 September 1992, where 28 ANC supporters were killed by the Ciskei Defence Force.

The excessive use of violence to quell protests also resulted in the killing and injuring of many individuals who were not direct members of political organizations. The indiscriminate nature of the force used also meant that a number of people were injured or killed who were not involved in the protests.

1.5.8 State Sponsorship of Indirect Violence

The apartheid security forces often took action through less direct means against the liberation movements. Instead of directly confronting political opponents, the state sponsored competing political groups, or in some cases criminal networks, to attack the liberation movements and their allies. While weakening their opponents, this strategy also allowed the state to present itself as the guarantor of safety and order. This strategy was most effectively pursued in the late 1980s and early 1990s through the support for the Inkatha Freedom Party (IFP) in its conflict with the ANC. The IFP was initially established as a Zulu cultural movement and maintained positive relationships with the ANC. As it became a more prominent force with a clearer ethnic and political identity, its ties with the ANC soured and eventually became deeply conflicted. The ANC accused the IFP of collaborating with the apartheid government while the IFP in turn accused the ANC of being intolerant of other political groups. Most of the deaths due to political violence since the 1960s in fact occurred as a result of clashes between the ANC and the IFP.

By arming the IFP and providing security support during some of their attacks against ANC supporting communities, the state directly exacerbated a conflict that witnessed over 20,000 deaths in the internecine fighting between the two parties.[34] These deaths occurred almost exclusively in the two provinces of Natal and Transvaal, where the ANC and IFP were seeking to assert dominance. In Natal province both the IFP and ANC battled for control of territory, resulting in indiscriminate at-

34 Stuart J. Kaufman, 'South Africa's Civil War, 1985–1995,' *South African Journal of International Affairs* 24(4) (2017): 501–521, accessed 14 July 2021, https://doi.org/10.1080/10220461.2017.1422012.

tacks on rural villages and the assassination of targeted leaders, with both sides being composed of Zulu speakers. In the Transvaal, particularly in the mining areas around Johannesburg, Zulu migrants housed mainly in hostels were pitted against non-Zulu migrants housed mainly in the neighbouring townships. Attempts to control particular territories, reprisal attacks and the operation of criminally connected war-lords contributed to a spiral of violence that led to particularly intensive fighting between 1990 and 1994.

In a similar fashion, the South African government provided military and intelligence support to the homeland security structures who, in turn, also repressed the liberation movements. Liberation movements also targeted these homeland structures, particularly as homeland leaders stood accused of collaborating with the apartheid state.

There is no reliable figure for the total number of people killed or tortured during the political conflict. The TRC reported that, of 9,043 statements received regarding killings, over half of these (5,695) occurred during the 1990 to 1994 period.[35]

1.5.9 Abuses Committed by Liberation Forces

The ANC and PAC also committed human rights violations in their military campaigns. While initially targeting only security installations, they increasingly blurred the lines between military and civilian targets, and the PAC in particular viewed whites in general as legitimate targets in their attacks. At least 210 people were killed by the ANC's military wing *Umkhonto we Sizwe* (MK) before 1989.[36]

In addition, the ANC was responsible for the torture and extra-judicial executions of their own members in the military camps they operated in other countries. This arose both in response to protests among military staff about camp conditions and the suspicions of infiltration by South African government spies.[37] The TRC documented a few dozen cases of torture and executions, but neither the TRC nor

35 TRC Final Report, Volume 2, Chapter 7, 584.

36 The TRC report found that, despite its policy to avoid civilian deaths, the majority of casualties of the ANC's Military wing's (*Umkhonto we Sizwe)* operations were civilians. It found that a total of 71 people died in such attacks between 1976 and 1984. Of these, 52 were civilians and 19 were security force members. TRC, *Truth and Reconciliation Commission Final Report Volume 6*, 277. This is also supported by subsequent more detailed research. See Janet Cherry, *Spear of the Nation: Umkhonto We-Sizwe* (Athens: Ohio University Press, 2012), accessed 14 July 2021, https://www.bookdepository.com/Spear-Nation-Umkhonto-weSizwe-Janet-Cherry/9780821420263; a more comprehensive list of MK operations can be found, accessed 11 May 2022, https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv02918/06lv02949.htm.

37 Accessed 14 July 2021, https://sabctrc.saha.org.za/glossary/anc_camps.htm?tab=victims. Both mutinies were put down with loss of lives on both sides. Many MK members were detained in connection with the uprisings, and some were tortured. Two groups of mutineers were tried by military tribunals and seven were executed.

the ANC established a commission of enquiry or provided any specific estimates of the total numbers involved. The TRC did, however, find that:

> Torture (...) was not used in a systematic or widespread way by the ANC. It was used by a limited number of ANC members who were members of the security department and in specific time periods. It was not an accepted practice within the ANC and was not used for most of the three decades with which the Commission is concerned. The relatively low number of such violations and the limited extent to which they occurred demonstrate that torture was not a policy of the ANC.[38]

Supporters of the liberation forces also carried out attacks on people seen as collaborating with the apartheid system. Such attacks, often involving brutal killings carried out by burning people to death (necklacing), targeted suspected informers, black police officers, local government staff or state-instituted representative structures. This occurred particularly in the context of the mass mobilization in the mid to late 1980s. The TRC puts the number of such necklace deaths between 1984 (when the first such incident occurred) and 1989 at about 700.[39]

1.5.10 Gendered Dimensions of Repression

Political violence in South Africa also had a gender dimension shaped by the patriarchal, heteronormative values of the state and shared by much of the population. Many women who were imprisoned or detained were subjected to sexual forms of torture and humiliation. Homophobia within the military also led to the establishment of 'conversion therapy' programmes, which used shock therapy and surgical interventions on coerced subjects.

1.5.11 Southern African regional Dimensions of Repression and Conflict

The largest number of victims of direct physical violence were the citizens of neighbouring countries (Mozambique, Zimbabwe, Namibia and Angola), where civil wars and anti-liberation struggles were fought through the sponsorship of the South African government. These victims have largely remained undocumented, but number in the hundreds of thousands, mainly civilians.

38 TRC, *Truth and Reconciliation Final Report, Volume 2*, 362.
39 TRC, *Truth and Reconciliation Final Report, Volume 2*, 389.

1.6 Those Responsible

Direct responsibility for human rights violations is difficult to define and to assess numerically in the South African context. This is due to a number of factors. First, the complex mix of actors and varied forms of violations that occurred without clear lines of authority.

In the TRC's final report, it acknowledged some of the challenges in allocating responsibility for much of the violence due to how the conflict played out:

> In the 1990s particularly, more gross violations were carried out by members of South African society acting in what they considered to be the pursuit of a political aim than by members of political organisations acting on the express orders of their superiors. Both the state security services and guerrilla organisations such as MK [the ANC's military wing] aimed to supply such social actors with the means to achieve their aims – including weapons, information, trained personnel, and, in the case of the state, funding. It was therefore difficult to attribute direct responsibility for many violations, such as the lynchings or necklacings carried out by crowds loosely aligned to the ANC/UDF in the 1980s, and attacks carried out by social groups such as the 'witdoeke' in Crossroads, encouraged and endorsed by state security forces. (...) By the 1990s, the great majority of human rights violations, especially killings, were being carried out by persons who were not bound to a political authority.

The identities of those individuals directly responsible for human rights abuses have been established in or many cases, particularly in relation to assassinations, deaths in custody and the torture of high-profile individuals.[40] Those individuals responsible for armed attacks by the ANC and PAC have also largely been identified. These cases generally involved formal police investigations, court hearings and ultimately amnesty hearings, where many perpetrators were given the opportunity to apply for amnesty. While the facts are generally known in most of these cases, the specific details (did he jump or was he pushed from the fifth-floor window?) remain contested for some cases and legal guilt has not been established by the courts.

In cases involving deaths during mass protests or attacks on villages or townships, individual responsibility has been much less clear. Such cases involving random and low-profile individuals attracted much less investigative rigour and judicial oversight and also saw fewer amnesty applications at the TRC.

Those victims who provided statements to the TRC of 'gross human rights violations'[41] generally knew the political or institutional affiliation (e.g. police or ANC supporter) of the perpetrators, but not their identities. This is likely also to be the case for the tens of thousands of other victims of human rights abuses who did

40 Calculations of the total numbers are not mentioned in the literature. The TRC's Amnesty Committee received 293 amnesty applications from the security forces, with 229 of these from the Security Branch (TRC Final Report, Vol. 6, 182).

41 TRC defined gross human rights violations as including killing, abduction, torture or severe ill-treatment of any person.

not approach the TRC. Most individuals directly responsible for committing abuses have not been identified.

Senior police and military leadership responsibility for these abuses has also not been clearly established in most cases. Direct lines of authority between perpetrators and leadership are often obscured by the level of discretion given to lower-level officials. The commander in charge of a death squad, Colonel Eugene de Kock, was, for example, given instructions to take care of a situation and was given medals in acknowledgement of his contribution. While he was convicted for numerous murders and acts of torture, nobody was held responsible for directing him to carry out these activities. Even where there is a record of security leaders giving instructions for someone to be 'permanently removed from society,' this has been seen as insufficient evidence by South Africa's prosecution authorities for holding them responsible for the murders committed.[42]

Very few senior police applied for amnesty. The most high-profile exceptions were that of Minister of Police Adriaan Vlok and police chief General Johan van der Merwe, who accepted responsibility for authorizing the bombing of the South African Council of Churches (SACC) headquarters. They subsequently entered a plea agreement after admitting to the attempted murder of the SACC Secretary General.

In relation to torture, TRC found that,

> the South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of torture against detainees and that Cabinet was indirectly responsible.[43]

In its Final Report in relation to the amnesty hearings,

> The Commission noted a number of words and phrases in security policy documents, speeches in Parliament and elsewhere in the mid-1980s such as: 'elimineer' (eliminate); 'uithaal' (take out); 'fisiese vernietiging – mense, fasiliteite, fondse' (physical destruction – people, facilities, funds); 'maak 'n plan' (make a plan); 'uitwis' (wipe out). Numerous amnesty applicants, including senior personnel, confirmed that they had understood such words to mean killing. Major Williamson told the Committee that he understood 'these words to have a simple meaning and that is to get rid of, kill, destroy'. Despite this, former Minister Vlok and Generals van der Merwe and Coetzee continued to assert that at no stage did the State Security Council authorise any policies that included extrajudicial killing.[44]

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42 Derek Catsam, '"Permanently Removed from Society": The Cradock Four, the TRC, Moral Judgments, Historical Truth, and the Dilemmas of Contemporary History,' *Historia Actual Online*, January 1, 2005. F. W. de Klerk, who subsequently became President, was identified as being at the State Security Council meeting where these instructions were this decision was made. Accessed 14 July 2021, https://mg.co.za/news/2020-02-20-cradock-four-back-to-haunt-de-klerk.

43 TRC, *Truth and Reconciliation Commission Final Report*, Vol. 6, 2003, 617. Accessed 14 July 2021, https://www.justice.gov.za/trc/report/finalreport/vol6_s5.pdf.

44 TRC, *Final Report*, Vol. 6, 251.

Political responsibility for specific abuses is also still not clearly established. Political leaders responsible for the design and implementation the apartheid policies are clear. Senior politicians and state officials implicated in designing and implementing apartheid policies were 'rehabilitated' by the international community for their subsequent engagement in its dismantling. The nature of this responsibility and guilt is highly disputed, however, as seen in the invitation and subsequent withdrawal (after protests by victims and civil society organizations) of an invitation by the American Bar Association to F. W. (Frederik Willem) de Klerk to address its annual conference. To date, nobody has been prosecuted for the specific international crime of apartheid, either in South Africa or any other national jurisdiction.[45]

Similarly, no corporate actors were held criminally or civicly responsible for supporting apartheid, for providing financial support to the apartheid government or even for directly supplying equipment used by the police or the military. The TRC, as part of its mandate to examine and make recommendations on gross human rights violations committed during apartheid South Africa, held special hearings on the business sector. At these hearings, various stakeholders presented arguments regarding business complicity in the state's apartheid policies and businesses' direct participation in practices of discrimination and repression.

The TRC concluded that many businesses, and particularly the mining companies, were directly complicit in the policies of apartheid: 'To the extent that business played a central role in helping to design and implement apartheid policies, it must be held accountable. This applies particularly to the mining industry.'[46] The TRC went on to state:

> The first-order involvement of the mining houses and the Chamber of Mines in shaping the migrant labour system is the clearest example of business working closely with the minority (white) government to create the conditions for capital accumulation based on cheap African labour. The evidence shows that, rather than relying simply on the forces of supply and demand, the mining industry harnessed the services of the state to shape labour supply conditions to their advantage. Thus, the mining industry bears a great deal of moral responsibility for the migrant labour system and its associated hardships.[47]

The TRC also found that the mining industry had neglected its obligations regarding workers' health and safety and noted that they had not been forthcoming on the true state of health and safety in the mines during apartheid:

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45 Christopher Gevers, 'Prosecuting the Crime Against Humanity of Apartheid: Never, Again,' *African Yearbook of International Humanitarian Law*, 2018, accessed 14 July 2021, https://www.academia.edu/39736593/Prosecuting_the_Crime_Against_Humanity_of_Apartheid_Never_Again, https://hdl.handle.net/10520/EJC-16b8c59195.

46 TRC *Final Report*, Vol. 4, Chapter 2, 24.

47 TRC *Final Report*, Vol. 4, Chapter 2, 33.

> ... there appears to be some evidence that profitability ranked higher than people's lives – as evidenced by the asbestos scandal and the continued use of polyurethane in mines long after the dangers had become known. It is regrettable that more details were not forthcoming on health and safety issues from the Chamber of Mines or the Anglo-American Corporation.[48]

It can also be argued that there was a broad involvement of whites as direct perpetrators, at least in engaging in military support through participation in the SADF and the police. As pointed out by historian Gary Baines,

> Between 1967 and 1992, approximately 600,000 young white males were conscripted by the SADF to defend apartheid. These national servicemen were initially deployed in Namibia and Angola, but from the mid-1980s were called up to police the black townships.[49]

While there is a strong understanding of the need to address the victims of apartheid, the question of who the perpetrators of apartheid were and what needs to be done to hold them accountable is not a prominent question in popular debates. While the crime of apartheid has become part of international law, it has not been pursued through criminal cases and remains unclear in jurisprudence. Framing responsibility for the crime of apartheid could include both the political authors of apartheid policies and those who committed human rights abuses in support of the maintaining the apartheid system. Civil society in South Africa has urged prosecutors involved in apartheid-era cases to include the crime of apartheid in the charges levelled against state agents accused of the murder and torture of anti-apartheid activists. Yet within the international community there has never been much appetite for pursuing accountability for such systemic violations that too closely resemble colonial-era violations or that implicate international corporate actors from the West.[50]

1.7 Places of Persecution

Torture occurred in police stations across the country, but was particularly prevalent in regional police headquarters where security police were stationed. As noted by Coleman, certain police interrogation centres gained a reputation for being the sites of multiple deaths. These include:

- John Vorster Square police station in Johannesburg – seven deaths
- Johannesburg Fort Prison[51] – four deaths

48 TRC *Final Report*, Vol. 4, Chapter 2, 36.

49 Gary Baines, 'Site of Struggle: The Freedom Park Fracas and the Divisive Legacy of South Africa's Border War/Liberation Struggle,' *Social Dynamics* 35(2) (September 1, 2009): 330 – 344, accessed 14 July 2021, https://doi.org/10.1080/02533950903076428.

50 Gevers, 'Prosecuting the Crime Against Humanity of Apartheid."

51 Subsequently turned into a museum, it now houses the Constitutional Court and has been renamed Constitution Hill.

- Pretoria Prison – five deaths
- Police station at Sanlam Buildings in Port Elizabeth – four deaths[52]

Security police also operated a number of sites specifically for detaining political opponents, which served as torture centres where numerous opponents were also killed and disappeared.[53] The most notorious of these sites is Vlakplaas, where at least ten apartheid opponents were tortured and killed by the police intelligence unit under the command of Dirk Coetzee and Eugene de Kock.

The gallows at Pretoria Central prison (since renamed Kgosi Mampuru II Management Area) is where most of those convicted and sentenced to death for their political acts against the state were executed. In total, 4,300 were hanged on the gallows between 1960 and 1989, of whom 130 were political prisoners.[54]

Robben Island, the most infamous of the South African prisons, established a maximum security wing for political prisoners from 1961 to 1991 and housed most of the imprisoned leaders of the ANC and PAC along with many other long-term prisoners found guilty of political offences. It gained the reputation of a prison where political prisoners were subjected to hard labour, torture and severe ill-treatment. There are, however, no records of prisoners being killed while detained at Robben Island.

1.8 The Form in which the Regime was Overcome

Resistance to the apartheid government involved pressure from a range of sources. After the military victories and repression of armed rebellion (ending in 1906), resistance against the government from the black population mainly took the form of non-violent resistance. This occurred largely under the leadership of the ANC, which came to particular prominence for its Defiance Campaign, launched in 1952, that specifically targeted the pass laws. Over 8,000 protesters were arrested for destroying their passes or defying the conditions of their passes.[55] The campaign was designed as a series of non-violent protests, but at times they became violent. Police responded violently, often beating protestors while carrying out arrests.

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52 Coleman, *A Crime Against Humanity.*

53 The exact number of those killed remains unknown, as contradictory accounts have emerged from former operatives. In addition to political abductions and assassinations, the unit was also implicated in non-political crimes and murders, operations to arm anti-ANC forces and operations targeting the ANC in neighbouring countries. Eugene de Kock was only found guilty of six cases of murder. For more details see: Mandy de Waal, 'Jacques Pauw on Vlakplaas' Apartheid Assassin, Dirk Coetzee,' *Daily Maverick*, March 8, 2013, accessed 14 July 2021, https://www.dailymaverick.co.za/article/2013-03-08-jacques-pauw-on-vlakplaas-apartheid-assassin-dirk-coetzee.

54 Accessed 14 July 2021, https://www.iol.co.za/the-star/place-of-the-damned-the-gallows-1194445.

55 Tom Lodge, 'State of Exile: The African National Congress of South Africa, 1976–86,' *Third World Quarterly* 9(1) (1987): 1–27.

After the Sharpeville Massacre and the banning of many political groups in 1960, the ANC and PAC turned to armed struggle. On a military level, the armed struggle was not very effective as a direct challenge to the security forces of the state. Most of its operations targeted buildings and installations to disrupt services such as power supplies and government functions, while relatively few operations directly targeted state security forces. These actions were symbolically very important in demonstrating resistance to the state and created an atmosphere of fear among the white population.

Nelson Mandela joined the ANC in 1943 and rose to prominence as a leader in its Transvaal branch, where he pushed the party to take a more militant stance. He became leader of the ANC Youth Wing in 1950 and became a prominent leader during the Defiance Campaign. After the banning of the ANC in 1960, Mandela and others founded *Umkhonto we Sizwe* ('Spear of the Nation', abbreviated MK) in 1961. Later this would be formally recognized as the military wing of the ANC. Mandela then set about establishing the structure within South Africa and travelled abroad to gain international support. He was arrested several times. In 1962 he was detained again and charged alongside other senior ANC leaders with treason. He was sentenced to five years, and later to life in prison, and was released 1990 after more than 27 years behind bars.

Resistance to the state was also mobilized by a range of trade unions and civil society groups (religious bodies, student and youth groups, etc.). These bodies organized public protests, strikes, rent boycotts, and consumer boycotts which demonstrated the broad support for democratic demands.

In the 1980s many civil society organizations joined in a united movement under the banner of the United Democratic Front, which saw the protests escalate across the country.

Within the parliament elected by whites, representatives of opposition political parties also battled for accountability and democratic reform. This faction was a minority, however, and after the gradual introduction of reforms in the 1980s, the biggest minority party was the more conservative party that opposed such reforms.

International opposition to the apartheid government came initially mainly from the newly independent African states, who provided direct support to the South African liberation movements and campaigned for apartheid to be labelled a crime against humanity. International support gradually increased and became more united, resulting in the declaration of UN sanctions and the subsequent financial crisis hastened by the closing down of international trade.

The transition formally started with the unbanning of political parties and the release of Nelson Mandela and others from jail in February 1990. The new leader of the National Party and South African President F. W. de Klerk, chose to seek a negotiated settlement with the ANC, which had consistently through its history called for negotiations. Tensions remained high, and negotiations were repeatedly suspended over the coming years while political violence escalated.

2 Transitional Justice

2.1 Political and Institutional Changes

One of the initial agreements between the parties during negotiations was on an indemnity which would allow the release of political prisoners (some of whom were required at the negotiation table) and the return of exiles who would otherwise face prosecution in South Africa. In order to implement the indemnity, the government passed Indemnity Act 1990 (No. 35) on 18 May 1990. This was a temporary indemnity that had to be renewed annually until it was replaced by the TRC's ammesty provision. This indemnity was also extended to state perpetrators and right-wing extremists who were then released from prison. The process of reviewing individual applications for indemnity was contested, as it only covered certain crimes and required disclosure by applicants of the crimes they had committed. It thus became one point of contention and a bargaining chip during ongoing negotiations.[56] A second Further Indemnity Act was passed in 1992, specifically aimed at providing the state with greater discretion to indemnify state agents before the transition. This was widely condemned for its wide discretion and lack of public disclosure of offences by applicants, and was considered to have been replaced by the subsequent TRC amnesty requirements.[57]

Multi-party negotiations eventually reached a conclusion with the adoption of an interim constitution in December 1983, which paved the way for free elections, which were held in April 1994. The final sticking point in the negotiations was the demand by the National Party for an amnesty for all political offences committed during the apartheid era. This resulted in the addition of an epilogue to the interim constitution, which provided for amnesty for past offences, negotiated directly between the ANC and NP and presented as a non-negotiable to the rest of the parties.

The interim constitution stated: 'In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.'[58]

The election was won by the ANC, who won over 50 percent of the vote, resulting in the appointment of Nelson Mandela as President. He was formally inaugurated on 10 May 1994.

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56 Louise Malinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa,' *Working Paper No. 2. Beyond Legalism* (Belfast: Institute of Criminology and Criminal Justice, Queens University, 2009).

57 Malinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines.'

58 Parliament of South Africa, 'Constitution of the Republic of South Africa (Act 200 of 1993)' (1993), Accessed 14 July 2021, https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993 and staff from the SADF..

A new constitution was finalized in 1996 which confirmed most of what had already been negotiated in the 1993 interim constitution. The constitution provided a bill of rights, introduced various semi-independent institutions providing oversight of state functions and protecting human rights.[59] While appointed by parliament, these institutions have significant independence in performing their oversight roles. This also confirmed the independence of the judiciary and guarantees the rule of law.

The new democratic government immediately set about reforming military and police structures, introducing civilian oversight procedures, human rights training for police, community-police relations structures, etc. Senior leadership of the military and police were also rapidly transformed by incentives for early retirement and the appointment of new leaders.[60] No formal lustration was instituted, and those implicated in past abuses were able to retain their positions if they applied for amnesty through the TRC (as outlined in section 2.10.1).

The South African military integrated members of the ANC and PAC military wings, and senior military leadership was rapidly transformed. During negotiations it was decided that the new military would be composed of 17,000 MK members, 6,000 APLA cadres, 10,000 personnel from the homeland militaries, and 85,000 soldiers and staff from the SADF. Lower-level soldiers from the liberation movements were unhappy with the process of integration and most left the military in subsequent years and were provided with small pensions.[61]

The institutional reform of the police was seen as a priority, given their central role in apartheid-era abuses. The South African Police was formally renamed the South African Police Service (SAPS), the homeland police were integrated into a centralized national police service, and the approach to policing was fundamentally reconceptualized through a new policing policy[62] and the introduction of the South African Police Service Act (No. 68 of 1995).[63] This Act introduced two key reforms: the establishment of an oversight body, the Independent Police Investigative

59 Chapter 9 of the South African Constitution provides for the establishment of bodies mandated to play an independent oversight role in the operation of the state. These include Public Protector, South African Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality, Auditor-General, Electoral Commission, Independent Authority to Regulate Broadcasting, and Broadcasting Authority.
60 No specific figures could be found regarding the numbers of early retirements relating to these efforts in the various government departments.
61 While at least 6,000 left in 1995, figures are not available for subsequent years. Hugo Van der Merwe and Guy Lamb, 'Transitional Justice and DDR: The Case of South Africa" (International Center for Transitional Justice, 2011), https://www.ictj.org/publication/transitional-justice-and-ddr-case-south-africa-brief.
62 Accessed 14 July 2021, https://www.gov.za/documents/national-crime-prevention-strategy-summary.
63 South African Police Service Act (Act 68 of 1995), accessed 14 July 2021, https://www.saps.gov.za/legislation/acts/act68of1995.pdf.

Directorate (initially called the Independent Complaints Directorate), which investigated all complaints against the police, and the mandatory establishment of community police forums at all police stations to facilitate better relations and accountability. There was, however, no vetting of police, and officers who had received amnesty for committing torture were not barred from continuing their employment.

The creation of a new Constitutional Court at the apex of the judiciary saw the appointment of prominent lawyers and judges with strong reputations as human rights defenders. Other branches of the judiciary were also gradually transformed to become more racially and gender diverse and saw a human rights approach become strongly entrenched. Despite certain constitutional guarantees, the National Prosecuting Authority was subjected to political pressure and viewed as 'captured' by political interests who blocked the prosecution of certain politically-connected individuals.

2.2 Prosecution

During apartheid, crimes were committed by both sides – state authorities and the liberation movements – but only the latter were systematically investigated during the apartheid period. Prosecutions of state perpetrators were the exception during this period, particularly in relation to senior officials.[64] Some lower-level cases were also prosecuted, but, again, no systematic studies of the numbers involved could be found. Over 7,000 amnesty applications were processed by the TRC, both involving perpetrators who had been already convicted by the state (consisting largely of liberation force members), as well as those who feared being prosecuted for cases that had not gone to trial (consisting mostly of state officials).

During apartheid, cases of extra-judicial killings and torture were not investigated or prosecuted except in very unusual situations. Accusations of torture and killing were met with blanket denials, and only when the Goldstone Commission of Enquiry (see chapter 2, section 10 of the TRC Final Report) provided evidence of hit squad activities did the government acknowledge that its officers had played a role. Only one case of direct police involvement in a political killing was prosecuted, namely the Trust Feeds Massacre in which eleven people died and two were seriously injured. Captain Brian Victor Mitchell was convicted for the Trust Feeds Massacre that occured in November 1988. On 30 April 1992, Mitchell was sentenced to death eleven times, which was later commuted to 30 years, imprisonment. His seven police accomplices each received an effective 15 years, imprisonment for their roles in the attack.

64 Ronald Weitzer and Cheryl Beattie, 'Police Killings in South Africa: Criminal Trials 1986–1992,' *Policing and Society* 4(2) (July 1, 1994): 99–117, accessed 14 July 2021, https://doi.org/10.1080/10439463.1994.9964687.

After the transition, further prosecutions were pursued against alleged state perpetrators such as Eugene de Kock, who was found guilty on 89 charges, including six of murder and two of conspiracy to commit murder.[65] In some of these cases, the prosecution was put on hold pending amnesty applications. Given the imminent amnesty process that could overturn the outcome, the state was reluctant to invest in such cases.

In some cases, high-level prosecutions proceeded against those who denied any criminal responsibility. The failures of some of these cases dampened expectations for further accountability. In a review of some of these cases, Human Rights Watch and Amnesty International argued:

> In October 1996, the trial of former defense minister Magnus Malan, former head of military intelligence Gen. Tienie Groenewald, and eighteen others, in connection with a 1987 massacre of fourteen family members of an ANC leader in KwaMakhutha in the former homeland of KwaZulu, now KwaZulu-Natal, ended in acquittal or discharge for all defendants. (...) The collapse of this trial was one of the main reasons why few members of the former army applied to the TRC for amnesty or co-operated seriously with other aspects of the TRC's work, including by handing over documents vital to its investigations.
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> ...
>
> Another important trial linked to the activities of the former Defence Force ended in acquittal in 2002. On April 11, the Pretoria High Court acquitted Dr. Wouter Basson, head of the military's covert biological and chemical warfare program in the apartheid era, of forty-six murder, embezzlement and other charges against him. Among other findings the Court ruled that the state had not proved beyond reasonable doubt that Dr. Basson had been part of a conspiracy to supply deadly drugs to military agents to murder enemies of the government. (...) The trial had been marked by allegations of judicial bias and a number of controversial decisions by the presiding judge.[66]

The amnesty process provided for in the interim constitution and enacted by the TRC provided for indemnification from prosecution (or release from prison for those already convicted) for those who met the conditions in the TRC legislation. This process required that applicants provide full disclosure of the offences, proof of their political motive and proof that the offence was proportional to the objective pursued. Victims were given the opportunity to challenge these applications, and the process was conducted in public hearings that attracted extensive media coverage. Some of the testimonies provided deeply disturbing images of police demonstrating torture techniques and emotional images of victims and perpetrators embracing. The Amnesty Committee, which oversaw more than 1,000 hearings involving 1,626 applicants[67],

65 de Waal, 'Jacques Pauw on Vlakplaas' Apartheid Assassin, Dirk Coetzee.'

66 Human Rights Watch and Amnesty International, 'Truth and Justice: Unfinished Business in South Africa (Amnesty International / Human Rights Watch Briefing Paper,' 2003, accessed 14 July 2021, https://www.hrw.org/legacy/backgrounder/africa/truthandjustice.htm.

67 TRC, *Final Report*, Vol. 6, 36.

was mainly composed of legal professionals, but the decisions granted were widely criticized as being very lenient towards perpetrators and limited in the extent of new information provided.[68]

Amnesty was granted to over 1,000 applicants, the majority of whom were from the liberation forces. Police who applied for amnesty included mainly those who were already implicated (by victim testimonies or past inquiries) or who were worried that their colleagues might implicate them in offences that had been exposed. Most state perpetrators declined this opportunity for amnesty, trusting that they would not be exposed and criminally prosecuted.

The TRC conducted investigations particularly into those cases where identified perpetrators had not applied for amnesty or where amnesty had been refused, as they were judged not to have provided full disclosure. When it concluded all the amnesty hearings and ended its term in 2002, the TRC transferred approximately 400 dockets to the National Prosecutions Office, where they were assigned to the Priority Crimes Litigation Unit, which also oversaw international crimes and organized crime, but this office failed to pursue any of the cases due to political pressure from the Minister of Justice and the Director General in the Department of Justice.[69] Despite assurances that it was investigating TRC cases, only a handful of low-level cases subsequently reached the courts over the next 15 years through the actions of the NPA regional offices. Most of these cases were of low-profile perpetrators and none resulted in heavy sentences.[70] The most prominent case was that of Police Minister Adriaan Vlok and Police chief General Johan van der Merwe. They entered a plea agreement in which they admitted to the attempted murder of the SACC Secretary General and were granted a suspended sentence. They admitted that his name was on a hit list containing other political targets, but claimed that they did not recall who else was on the list or who had provided the list.

In response to regional prosecutors filing cases regarding apartheid-era crimes, the national prosecution office decided that these cases should be centrally managed. After this decision, no further cases were pursued.

In 2007, the National Prosecution Office issued new regulations for the prosecution of apartheid-era abuses, which included provisions for declining to prosecute cases where perpetrators provided information about their abuses to the state.

68 Jeremy Sarkin, 'An Evaluation of the South African Amnesty Process,' in *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, ed. Hugo van der Merwe and Audrey R. Chapman (Pennsylvania: Pennsylvania University Press, 2009), accessed 14 July 2021, https://papers.ssrn.com/abstract=1367167.

69 The decision not to pursue such cases was later admitted by the National Prosecuting Authority in court papers, as discussed later in this report.

70 Hugo Van der Merwe, 'Prosecutions, Pardons and Amnesty: The Trajectory of Transitional Accountability in South Africa,' in *Critical Perspectives in Transitional Justice*, ed. Nicola Palmer, Phil Clark, and Danielle Granville (Intersentia Cambridge, 2012), 443 – 457.

Their regulations were challenged in the High Court by victims and civil society organizations, with the court ruling in 2008 that they were unconstitutional.[71]

Many convicted perpetrators who had not qualified or applied for amnesty also applied for presidential pardons. In 2002, President Mbeki granted individual pardons to 33 members of the liberation forces, some of whom had been denied amnesty by the TRC. Other political parties subsequently pressured the state to also grant pardons to their members who had been convicted of various crimes. Rather than considering hundreds of similar cases individually, the President established a parliamentary committee to review such political pardons. This process covered the apartheid period and extended the time frame to 1999, which thus included various right-wing extremist clashes against black civilians and violent clashes between the ANC and IFP. The process established for this committee to recommend pardons was based on written submissions, a closed-door process involving minimal engagement with victims. Civil society also challenged this process as unconstitutional, and the Constitutional Court confirmed that the process could not proceed without much more public disclosure and substantial engagement with victims.[72] The government chose to drop this process, and no further political pardons were granted.

Between 2008 and 2016, no prosecutions were initiated by the state despite victim demands and civil society pressure. In response, victims and civil society resorted to pursuing cases themselves. In 2015, one victim's sister approached the High Court to force the police to finalize their investigation into her sister's death and the NPA to make a prosecutorial decision.[73] An affidavit filed by previous head of the NPA, Vusi Pikoli, claimed that he had been under political pressure not to pursue these cases.[74] The NPA agreed to file charges, and in 2016 four men were charged with the murder of Nokuthula Similane. This case has still not been finalized. Similar pressure from victims and civil society saw the state reopen inquests relating to the deaths of others in detention, including Ahmed Timol, Neil Aggett, and Hoosen Haffejee. Additional victims' families have since come forward, putting pressure on the NPA to pursue their cases that involve torture, deaths in police custody and targeted assassinations.

In an attempt to address widescale corruption within the state and public concerns about the politicized nature of the public prosecutor, a new, more independent head, Shamila Batohi, was appointed by the newly elected president, Cyril Ramapho-

71 Nkadimeng et al. versus National Director of Public Prosecutions et al., High Court of South Africa, Transvaal Provincial Division, December 2008.

72 Albutt versus Centre for the Study of Violence and Reconciliation and Others, South African Constitutional Court 2010.

73 Till that point the police had simply treated cases as open cases and declined to pursue further investigations.

74 David Forbes, 'Investigation 168: Long Road to No Justice for TRC Victims,' Daily Maverick, November 21, 2020, accessed 14 July 2021, https://www.dailymaverick.co.za/article/2020-11-21-long-road-to-no-justice-for-trc-victims.

sa, in December 2018. While Batohi has made public commitments to pursue apartheid-era cases, little progress has been achieved to date. Victims' families have had to rely on putting pressure on the NPA on a case by case basis with the support of civil society.[75]

The reasons for the ANC's reluctance to pursue the prosecution of apartheid perpetrators appears to stem from a fear that such action will lead to the demands for certain ANC officials also to be indicted for crimes they had committed during apartheid.[76] This speculation is supported by the claim made in court by an apartheid operative that there was a behind-the-scenes agreement on mutual amnesty between the two sides.[77]

Prosecutions of apartheid-era corruption cases have also not been pursued. Particular concern has been raised regarding apartheid-era corruption relating to international investments and arms deals at a time when there existed sanctions against the country and international financial transactions required illicit third-party facilitation. The continuity of corruption shortly after the emergence of democratic governance is both seen as a consequence of this lack of accountability and as a reason why the new government did not seek to expose such illicit transactions or to prosecute military deal fixers.[78]

2.3 The Replacement of the Elites

The replacement of officials in public institutions after the transition in 1994 took place largely in the form of ANC redeployment strategies rather than official policies or public regulations. There was no systematic lustration involving any sanctions relating to past involvement in human rights abuses or involvement in apartheid policy implementation. Through their political dominance of national and (most) provincial governments, the ANC was able to appoint key officials who promoted recruitment and appointment processes that gave preference to those with connections to the ANC. The most fundamental change that was instituted came with the introduction of affirmative action, which ensured a gradual but fundamental shift in the racial composition of the public sector.

75 Over 20 victims' families have approached the Human Rights Foundation, which has provided support in the initial cases.

76 Amnesty granted to 27 ANC leaders was overturned by the court, which makes them liable for potential prosecution. Apartheid era figures have suggested that these cases should also be pursued if any apartheid officials are now to be prosecuted. See Human Rights Watch, 'Decision to Deny ANC Leaders Amnesty Applauded,' Human Rights Watch, 1999, accessed 14 July 2021, https://www.hrw.org/news/1999/03/03/decision-deny-anc-leaders-amnesty-applauded.

77 Forbes, 'Investigation 168.'

78 Hennie van Vuuren, *Apartheid Guns and Money: A Tale of Profit* (London: Hurst, 2018).

The interim constitution (chapter 6, section 88)[79] provided for a 'government of national unity', whereby minority parties that attained a certain number of seats were represented in the composition of the cabinet. Other than the specific formula applied to cabinet positions during the interim phase, the details of this shift were not spelled out in advance and are not subject to monitoring. The only publicly available indicator of this shift is the racial composition of senior staff, a body which was completely white under apartheid and has since become very integrated. No political affiliation can be accurately deduced from such racial composition, however, and political allegiance has retained a clear racial bias.

In addition to the institutional reform of various state bodies, the ANC also proceeded to replace senior leadership figures in the public sector. Senior executive positions in government structures at national, provincial and local levels were replaced, in part to reflect the demographics of the country, but also as a way of ensuring that new government policies would be implemented effectively. The ANC initiated a 'cadre deployment' policy, through which it actively targeted positions that were to be filled by trusted ANC members.[80]

During the negotiations process from 1990 to 1994 the police embarked on a major internal reform process that sought to professionalize the service and other democratic reforms in anticipation of the changes that would be imposed by a future democratic government. The new constitutional provisions and transformation programme were thus not subject to serious contention in the transitional negotiations.[81]

Within the police and military, senior leadership figures were also replaced in a process that transformed the racial composition of senior executives and replaced these with individuals who had ties with the ANC. In an attempt to reassure whites who still had fears regarding their security after the transition, President Nelson Mandela retained General Georg Meiring as head of the South African National Defence Force until 1998. When the various police departments (including those of the homelands) were amalgamated, the first Commissioner of Police appointed by the President was George Fivaz, recruited from the private sector to manage the complex process of restructuring and reform (which involved the integration of all the homeland police forces into a centralized national police). Rather than vetting existing police, the reform process focused on retraining existing police, more careful recruitment of new police, the introduction of oversight mechanisms and the introduction of codes of conduct and legislation and regulations that limited the

79 Promotion of National Unity and Reconciliation Act (Act 34 of 1995), accessed 14 July 2021, https://www.justice.gov.za/legislation/acts/1995-034.pdf.

80 N. Tshishonga, 'Cadre Deployment and Its Implications on Service Delivery in South Africa: A Human Development Capability Approach,' *Journal of Public Administration* 49(3) (2014).

81 Mark Shaw, 'Point of Order: Policing the Compromise,' in *SA Review 7: The Small Miracle: South Africa's Negotiated Settlement*., ed. Steven Friedman and Doreen Atkinson (Johannesburg: Ravan Press, 1994).

scope of the use of force.[82] Even where members of the police admitted to having committed human rights violations during the TRC's amnesty process, the constitutional provision ensured that no sanction, such as dismissal from a job, could be applied. Many police involved in notorious branches, such as the security police, were simply transferred to less sensitive positions. The rise in crime in South Africa after 1994 created public pressure for more effective policing, which the new political elite saw as a call for a more ruthless response, which subsequently undermined many of the human rights reform initiatives, particularly from 2000 onwards.[83]

The new constitution provided a radical new foundation for judicial structures and conduct and an opportunity for the appointment of new judges in the apex courts, particularly the Constitutional Court, convened in October 1994.[84] While the judges initially appointed to the new Constitutional Court had strong ties to the ANC and other liberation groups, these figures were generally seen as strongly committed to human rights values rather than party loyalties. All judicial appointments were to be managed by the Judicial Services Committee and involved a transparent nomination and public interview process. The JSC is composed of representatives of legal professionals, parliamentarians and Department of Justice representatives. After conducting public interviews, they present a shortlist of candidates to the President, who then selects from this list. This selection process has been influenced by various factors, including the drive for greater racial and gender balance and demands for a clear human rights commitment among candidates. The racial and gender composition of judges has seen a dramatic change, with the percentage of white males being reduced from 98 per cent in 1994[85] to 34 per cent in 2016.[86]

The courts have demonstrated their independence through regularly issuing judgements against the government and criticizing state departments for violating human rights guarantees contained in the constitution. Officials within the Department of Justice and particularly the National Directorate of Public Prosecutions were, however, less independent of political interference, as evidenced in the Minister and Director General's involvement in specific decisions regarding whether or not to prosecute apartheid-era cases.

Parastate institutions (electricity, railways, airline, phone and communications services) also underwent changes in executive leadership and board composition

82 Janine Rauch, 'Police Transformation and the South African TRC' (Centre for the Study of Violence and Reconciliation, 2004).

83 Rauch, 'Police Transformation and the South African TRC'.

84 Francois du Bois, 'Judicial Selection in Post-Apartheid South Africa,' SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2006), accessed 14 July 2021, https://doi.org/10.2139/ssrn.2283148.

85 du Bois, 'Judicial Selection in Post-Apartheid South Africa,' 11.

86 'The Make-Up Of South Africa's Judiciary,' *Judges Matter* (blog), 29 March 2017, accessed 14 July 2021, https://www.judgesmatter.co.za/opinions/south-africa-judges/.

through new appointments by ANC government ministers, and affirmative action appointments led to a gradual but dramatic shift in staffing composition.

The establishment of an economic elite was also pursued through a programme of black economic empowerment, which introduced minimum black percentage ownership (along with various gender and other criteria) for all tenders for government goods and services. The government also specified requirements of black equity ownership in key sectors. The transformation of mineral rights governance, for example, allowed the state to introduce a 26 percent black ownership requirement for mines to gain a mining license.[87] When it became clear that a small elite were gaining a disproportionate share of such contracts and licenses, new broadened criteria for inclusion were introduced in the Broad-Based Black Economic Empowerment Act (No. 53 of 2003).

These attempts to diversify the economic elite have had limited success. While a small proportion of blacks have joined the ranks of the most wealthy, disproportionate white ownership of wealth and share of income remain deeply entrenched. Most senior executive positions in large companies in South Africa are still occupied by white men.[88]

2.4 Reparations

There have been two key forms of reparations in South Africa since 1994: those for victims of gross human rights violations and those for victims of land expropriation resulting from apartheid racial land laws and group areas policies.

Part of the TRC mandate was to make recommendations for state reparations for victims/survivors of gross human rights violations (including killing, abduction, torture or severe ill-treatment of any person). The amnesty granted by the TRC covered both civil and political liability for crimes committed during apartheid. Victims were thus denied the right to claim civil damages from perpetrators, and the state was seen as taking over this responsibility. The TRC directly supported victims with Urgent Interim Reparations to assist with immediate short-term needs involving payments of about 3,000 Rand (500 US dollars at the time) each to almost 17,000 victims. Through consultation with various stakeholders, the TRC developed recommendations that were published in its final report, which suggested:

- Individual financial payments to victims of roughly 20,000 Rand (3000 US dollars at the time) per victim per year for six years
- Access to support services for victims, including medical and educational support

87 Accessed 14 July 2021, https://mg.co.za/article/2002-01-01-sa-mine-charter-aims-for-26-black-equity.

88 Accessed 14 July 2021, https://www.thesouthafrican.com/news/finance/percentage-black-south-africans-management-jobs-vs-white-citizens.

- Community reparations to benefit those communities that were most severely affected by the violence
- Symbolic reparations such as the renaming of public spaces, schools, streets, etc.

The state was initially reluctant to act on these recommendations and only took action after victims mobilized through marches and petitions to highlight their plight.[89] In 2003, parliament approved a reparations report[90] that sought to give effect to some of the recommendations, and a budget of 800 million Rand (104 million US dollars) was allocated to the President's Fund to cover these programmes. A key provision in this programme was that individual reparations would be restricted to those victims who were registered by the TRC during its operations. Other victims who fell within the definition of victims of gross human rights violations but who did not register with the TRC would not receive any benefits.

Initial regulations were developed for paying individual victims one-off grants of 30,000 Rand (3,900 US dollars) in 2003.[91] This was about a quarter of the total payment to victims suggested by the TRC.

Regulations were also developed for the provision of educational support for victims and their dependents.[92] Victims or their families have to apply on an annual basis for support under this programme and may not earn more than a certain annual amount (193,952 Rand or 11,000 US dollars) to qualify. Support can be secured for fees, accommodation and transport up to a total of about 60,000 Rand (3,500 US dollars) annually for up to three years. Payments are made to the public education institutions directly rather than individual applicants. A total of 72 million Rand (4.2 million US dollars) has been spent on educational support to date.[93]

The Department of Justice also published regulations for medical support for victims for public comment, but these have still not been implemented, seemingly due

89 Zukiswa Puwana and Rita Kesselring, 'Persistent Injuries, the Law and Politics: The South African Victims' Support Group Khulumani and Its Struggle for Redress,' in *Advocating Transitional Justice in Africa: The Role of Civil Society*, ed. Jasmina Brankovic and Hugo Van der Merwe (Berlin: Springer, 2018).

90 Parliamentary Committee on Reparations, 'Final Report,' 2003, accessed July 14, 2021, https://pmg.org.za/committee-meeting/2624/.

91 Department of Justice and Constitutional Development, 'Regulations Regarding Reparations to Victims. No. R. 1660' (2003), accessed 14 July 2021, https://www.justice.gov.za/trc/legal/20031112-gg25695_nn1660.pdf.

92 Department of Justice, 'Regulations Relating to Assistance to Victims in Respect of Higher Education Ad Traing: Promotion of National Unity and Reconciliation Act of 1995' (2014), accessed 14 July 2021, https://www.justice.gov.za/legislation/notices/2014/20141103-gg38157-gon852-trc.pdf.

93 President's Fund, 'President's Fund Annual Report 2019 – 2020,' 2020, accessed 14 July 2021, https://www.justice.gov.za/reportfiles/other/presfund-anr-2019-20.pdf.

to coordination challenges between the Department of Justice and the Department of Health.[94]

Draft regulations for community rehabilitation were shared for public input in 2018, but in the face of objections from victims and civil society have not been formally adopted. The draft regulations provide for the implementation of community projects intended to promote reconciliation, development and rehabilitation in the over 100 communities classified by the TRC as those that have been worst affected. The regulations stipulate a maximum of 30 million Rand (1.8 million US dollars) per community project.

Land restitution and land redistribution were a key political demand during the liberation struggle, but addressing these challenges involved deep structural issues of ownership and identity. At the end of apartheid, some 60,000 white landowners – less than one percent of the country's population – controlled roughly 82 million hectares – about 86 percent of all farmland in South Africa.[95]

Reparations for land expropriation by the state was implemented under the Restitution of Land Rights Act of 1994[96]. This legislation provided a means for victims of expropriation due to racial discrimination (and their descendants) to lodge claims for the return of their land or to receive compensation for this loss. The Act provided for the establishment of a court (headed by a judge who is appointed by the President) and a commission (headed by a Chief Land Claims Commissioner appointed by the Minister of Rural Development and Land Reform). Since its launch in 1995, the Commission on Restitution of Land Rights and a Land Claims Court reviewed applications for land restitution, assessed the feasibility of returning the land, assessed the value, and sought a resolution involving competing claims among different claimants or between claimant and present owner. Where agreement is reached, an allocation from the state budget is be made for compensation to the claimant and/or the present owner. Where such competing claims are not resolved or the value of the land is disputed, the case is escalated to the Land Claims Court, which functions as a normal court of law.

The Commission and Court faced numerous challenges arising from the difficulty of assessing the validity of claims (over many decades and generations of descendants), assessing the value of the land, and negotiating with present owners and occupants of the land. The pace of resolving these cases was thus much slower than anticipated. The Act was subject to repeated amendments over the next 15 years to extend the time frame for lodging and settling claims.

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94 Department of Justice, 'Draft Regulations for TRC Victims – Education and Medical Assistance" (2011), accessed 14 July 2021, https://static.pmg.org.za/docs/110411regulations-TRC.pdf.

95 Edward Lahiff et al., 'Land Redistribution and Poverty Reduction in South Africa.' (Programme for Land and Agrarian Studies, University of the Western Cape., 2008).

96 Restitution of Land Rights Act (Act 22 of 1994), accessed 17 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/act22of1994.pdf.

Alongside land restitution, the state also initiated a land redistribution programme that sought to make land available for black farmers. The Provision of Land and Assistance Act of 2008[97] (initially passed in 1993 and subsequently amended a number of times) authorized the Minister of Land Affairs to provide funds for purchasing land for redistribution. The constitution empowers the government to expropriate land – only with compensation – 'for a public purpose or in the public interest' Section 25 (2)(a)(b), including land reform (Section 25 (4)(a)).[98]

Between 1994 and 2013 the government spent over 1.2 billion US dollars buying 4.1 million hectares of land for redistribution. It also spent over 1.6 billion US dollars on 1.4 billion hectares for restitution.[99] During this time, 4,860 farms were transferred to black people and communities through the redistribution programme, benefitting almost a quarter of a million people.

2.5 Reconciliation

South Africa's TRC was a bold attempt to openly confront past human rights violations by engaging in a very public process of airing testimonies and investigating abuses to develop an official narrative. In addition to conducting investigations, assessing amnesty applications and making recommendations for reparations and non-recurrence, the TRC convened over 80 public hearings where victims and other stakeholders were given an opportunity to share their experiences and talk about the way forward.

The TRC commissioners set a tone during these hearings that encouraged a discourse of reconciliation and, while seeking accountability, they promoted discussion of dialogue and forgiveness. Similarly in the amnesty hearings, perpetrators were encouraged to express remorse and to apologize for their actions, and most applicants took the opportunity to do so (although often in a fairly cursory manner). The formal amnesty process did not provide space for direct dialogue between victims and perpetrators, and victim engagement was mainly structured as an opportunity to challenge the testimony of perpetrators. Outside the formal process, there were a number of informal interactions that were convened by TRC staff, the media[100] or by non-gov-

97 Parliament of South Africa, 'No. 58 of 2008: Provision of Land and Assistance Amendment Act, 2008.' (2008), accessed 14 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/3178821.pdf.

98 Mercedes Stickler, 'Brief: Land Redistribution in South Africa' (Focus on Land in Africa, no date), accessed 14 July 2021, https://gatesopenresearch.org/documents/3–688 http://www.focusonland.com/fola/en/countries/brief-land-redistribution-in-south-africa.

99 Accessed 14 July 2021, https://reliefweb.int/report/south-africa/why-south-africas-land-reform-agenda-stuck.

100 See for example: Deborah Hoffmann and Frances Reid, *A Long Night's Journey into Day*, 2000.

ernmental organizations (NGOs). Such meetings only occurred in rare instances, however.

Other public hearings included sectoral hearings, such as the business sector hearing in November 1997 and health sector hearing in June 1997. These involved testimonies from different stakeholders presenting their responsibility, victimization and recommendations for how to prevent the recurrence of abuses. These hearings sometimes built on or provided impetus for dialogue within the respective sectors.[101]

The commission sought to develop an integrated official history of the conflict and human rights violations of the apartheid era. Its final report was challenged by all the major conflicting parties (ANC, NP and IFP), who were not happy with the findings against them.

In various public speeches and in his efforts to reach out to different political and cultural groups, the new president, Nelson Mandela, stood out as the embodiment of the spirit of reconciliation, who managed to frame an image of a united country. While reviled by the extreme left and right, he managed to remain popular among a broad cross-section of the population. In his role as chair of the TRC, Desmond Tutu played a similar role by seeking to include extremely divided groups within a common discourse of a 'rainbow nation'.

The new constitution provided for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, which was established in 2002 through an Act of Parliament.[102] This has been a very low-key structure that has not publically engaged in key political debates, except the conflicts that emerged relating to the removal of Afrikaans and the introduction of other languages as the medium of education in schools and institutions of higher education. The present chair of the Commission is Professor Mosoma, former Vice Chancellor at the University of South Africa. Except for the chair and deputy chair, the other 11 commissioners serve on a part-time basis.

Within civil society, numerous initiatives were formed to promote dialogue and understanding. Some initiatives established well before the transition that encouraged labour negotiations or political dialogue between the government and banned political groups were credited with laying the foundation for the eventual formal negotiations. The role of civil society in facilitating such dialogue was also critical during the negotiations process from 1989 to 1994, when violence escalated dramatically. Made possible by the National Peace Accord agreement reached between the ANC, NP, IFP and other political parties, this structure was established and funded by the state, but consisted of dozens of regional and local committees staffed by civil

101 Hugo Van der Merwe, 'Evaluation of the Health Sector Hearing: Conceptualising Human Rights and Reconciliation' (Centre for the Study of Violence and Reconciliation, 2000), accessed 14 July 2021, http://www.csvr.org.za/docs/trc/evaluation.pdf.

102 Parliament of South Africa, 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, Act No. 19 of 2002,' 2002, accessed 14 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/a19-02.pdf.

society practitioners. It generally managed to stabilize local political dynamics during an extended and turbulent negotiations process.[103] These committees consisted of representatives of different local political structures, which met on a regular basis to discuss problems. They were mainly chaired by NGO staff who had experience in negotiation and mediation through engagement with peacebuilding, human rights and labour conflict management projects. This national 'architecture for peace' promoted dialogue and sought to anticipate and address conflict as it emerged in communities where tensions were high. Along with the establishment of the peace committees, the National Peace Accord also provided for the establishment of the Goldstone Commission of Enquiry (see chapter 2.10.) and a code of conduct for police and political parties.[104]

During the TRC process and after its conclusion, various NGOs also actively engaged in facilitating dialogue processes between divided communities or between communities and state institutions. These processes sought to deepen the dialogues initiated by the TRC in order to provide more scope for inclusion and a more sustained dialogue about the future.[105] The TRC had convened over 80 community hearings across the country, where victims were able to tell their stories over a one-to-three day event. While these events attracted great community interest, they only provided for about ten such stories to be shared per day. Civil society responded to the need to extend such opportunities and provide a more facilitated process that would allow for more extended and inclusive dialogues.

A national victims' organization was established during the TRC and continues to operate and challenge the state on its unfulfilled obligations (see chapter 2, section 11). Khulumani Support Group (KSG) managed to establish itself as an organization that drew together members from across the political spectrum, even though its strongest support came from among those victimized by the state. It framed a victims' agenda based on shared rights and grievances and united victims in a common demand for justice, particularly for adequate reparations.

KSG has experienced serious challenges in sustaining its advocacy work, in part due to the organizational challenges of maintaining a membership base and leadership accountability under tight funding conditions.[106]

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103 Andries Odendaal, *A Crucial Link: Local Peace Committees and National Peacebuilding* (Washington, D.C: USIP, 2013), accessed 14 July 2021, https://bookstore.usip.org/browse/book/9781601271815/A%20Crucial%20Link.

104 Phiroshaw Camay and Anne J. Gordon, 'The National Peace Accord and Its Structures' (Johannesburg: Co-operative for Research and Education, 2000), accessed 14 July 2021, https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv03275/05lv03294/06lv03321.htm.

105 See for example the work of the Institute for Justice and Reconciliation at https://www.ijr.org.za/2020/04/02/sustained-dialogues-programme-april-2020-news and the Institute for Healing of Memories at https://www.newtactics.org/conversation/healing-memories-overcoming-wounds-history.

106 KSG is presently split between the board and the director of the organization, who maintains its website, accessed 14 July 2021, https://khulumani.net.

2.6 Laws Relating to Transitional Justice

Processing laws relating to transitional justice included a wide range of laws relating to a complete restructuring of the constitution, political system and transformation of the role of the state, while also seeking to provide accountability and compensation for apartheid-era human rights violations. A discussion of each of these laws is contained in the relevant sections of this report. The fact that each of these laws speaks to a different aspect of transitional justice that extends significantly beyond the TRC legislation (in scope and time) provides some perspective on the complexity and multi-dimensionality of this process in South Africa.

- Indemnity Act (Act 35 of 1990)
- Further Indemnity Act (Act No. 151 of 1992)
- Constitution of the Republic of South Africa (Act 200 of 1993)
- The Public Holidays Act (Act No. 36 of 1994)
- Restitution of Land Rights Act (Act 22 of 1994)
- South African Police Service Act (Act 68 of 1995)
- Promotion of National Unity and Reconciliation Act (Act 34 of 1995)
- Constitution of the Republic of South Africa (Act 108 of 1996)
- The National Archives and Records Service of South Africa Act (Act. 43 of 1996)
- National Heritage Resources Act (Act of 1999)
- Promotion of Access to Information Act (Act 2 of 2000)
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act (Act No. 19 of 2002)
- Regulations relating to Reparations to Victims (GN R1660 in GG 25695 of 12 November 2003)
- Broad-Based Black Economic Empowerment Act (No. 53 of 2003)
- Regulations on Exhumations, reburials and symbolic burials of deceased victims, (Notice 1540 OF 2008 – Department of Justice and Constitutional Development)
- Prevention and Combating of Torture of Persons (Act 13 of 2013)

2.7 Access to Files

The long period of negotiations preceding the transition (from 1989 to 1994) provided extensive opportunity for state security forces to destroy any documentary evidence of its activities. Much of these archives was thus destroyed before the advent of democracy. The TRC Final Report states:

> The tragedy is that the former government deliberately and systematically destroyed a huge body of state records and documentation in an attempt to remove incriminating evidence and thereby sanitise the history of oppressive rule. As this chapter will demonstrate, the urge to destroy gained momentum in the 1980s and widened into a co-ordinated endeavour, sanctioned by

> the Cabinet and designed to deny the new democratic government access to the secrets of the former state.[107]

The TRC Final Report goes on to document the scale and nature of the destruction of security force records during the apartheid era and the escalation of this process during the extended negotiations.[108] The TRC assessed the process of record destruction and found that the National Intelligence Agency (NIA) was involved in a carefully orchestrated and systematic process of purging sensitive information that extended to the police (including homeland police), the military, the prison services and intelligence services. The TRC report (volume 1) details the various regulations and systems established during the transition years to destroy any incriminating records held by various branches of government. In some cases, such as the National Intelligence Agency's centralization of various intelligence files, these internal processes oversaw the destruction of more than 95 percent of the records of homeland intelligence services.[109] The TRC was given extensive powers to enter premises and seize relevant documents required for its investigations. It was, however, hampered by lack of collaboration from security forces in its attempt to identify relevant materials and was ultimately not very successful in collecting documents that provided records of human rights abuses by the state.

The new constitution adopted in 1996 provided strong guarantees of the right to access information which needed to be facilitated through legislation by the new government.[110] The key legislation enacted, the Promotion of Access to Information Act of 2000, stipulated the procedures and conditions for accessing information, but also the conditions under which such access could be denied. The TRC handed over extensive documentation to the National Archives, which is the official government repository of current and historical documents. It houses state records for all government departments that are considered of any significance. It provides a centralized resource (and space to control access) to state records for the apartheid era.

The TRC also provided recommendations on how these should be managed by the National Archive and how they should be made accessible. Such management and access has not been achieved. Historical records relating to the apartheid era

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107 TRC, *Truth and Reconciliation Commission Final Report*, 1998. See particularly Chapter 8 of Volume 1.

108 Part of the TRC's legislated remit was in fact to 'determine what articles have been destroyed by any person in order to conceal violations of human rights or acts associated with a political objective.'

109 TRC, *Truth and Reconciliation Commission of South Africa Final Report*, Vol. 1, 1998, 221, accessed 14 July 2021, http://choicereviews.org/review/10.5860/CHOICE.37-1803.

110 Section 32 of the South African Constitution of 1996: Access to information.

1. Everyone has the right of access to a. any information held by the state; and b. any information that is held by another person and that is required for the exercise or protection of any rights.

2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

are mainly held by the National Archives, but this archive has been criticized for lacking the basic ability and capacity to adhere to their record-keeping and oversight functions. It is also claimed that

> Documents which sometimes function as weapons in the ongoing political party conflicts are being withheld or even removed. Adding to this problem, government departments often over-classify records, such as reports, which remain inaccessible until they are declassified, for which neither the National Archives and Record Services Act of South Africa (Act 43 of 1996), nor the poorly capacitated government archives, makes provision.[111]

The state archives have not been helpful in clarifying what records they do contain and how these can be accessed. NGOs have sought to assess what files are available and provide support to individual victims of state repression to access files on them that are held by the archives.[112] They have, for example, published a list of names of individuals covered by the security files on record and then offered support for victims and relatives to access these files.[113] The South African History Archive (SAHA), an NGO based at University of the Witwatersrand, also gained access to transcripts of the Section 29 inquiries (hearings held by the TRC behind closed doors):

> Over a decade of requests for these transcripts, directed to the Department of Justice, finally bore fruit in December 2014, when the Department settled out of court to avoid legal action. SAHA's Freedom of Information Programme had persisted with their application in terms of the Promotion of Access to Information Act 2000 – and over 15,000 pages of text were delivered to SAHA, in four large cardboard boxes.[114]

These documents have since been analyzed and shared through media reports.

2.8 Memorial Sites

In the lead-up to the transition, the ANC had started to formulate strategies for developing and transforming memory sites and was engaged in consultation processes. The ANC's Arts and Culture Desk set up a Commission for Museums, Monuments and Heraldry (CMMH) in 1991 as a vehicle for the formulation of a national policy on museums, monuments, archives, heraldry and national symbols. The objective of the CMMH was to work towards 'a common integrated and integrating cultural

111 Gabi Mohale, 'A People's Guide to Archives and Democracy,' *Daily Maverick*, September 21, 2020.
112 Key NGOs involved in such work were the South African History Archives and the Open Democracy Advice Centre (which has since closed).
113 See, for example, SAHA support to victims to access security files: http://foip.saha.org.za/static/apartheid-era-security-files.
114 Accessed 14 July 2021, https://www.dailymaverick.co.za/article/2015-05-28-the-grenade-the-murder-and-the-truth-the-trcs-section-29-inquiry-for-rownan-fernandes.

framework that [would help] to promote the shared cultural identity and to put such identity at the centre of the development paradigm'.[115]

State memorial sites in South Africa are managed by the South African Heritage Resource Agency, which falls under the Department of Arts and Culture. Some memorial sites are, however, managed by provincial heritage resource authorities. While funded by this body, the operation of key sites is managed by semi-autonomous governing bodies appointed by the Ministry of Arts and Culture.

The most prominent of the memorial sites is Robben Island, which has also been declared a world heritage site. It is most commonly known as the prison where many of the most prominent political prisoners were held, including Nelson Mandela. It is run by the Robben Island Museum Council, which is appointed by the national ministry. The museum has been a prominent tourist site (attracting over 300,000 South African and international visitors per year). The archival records relating to the prison are housed by the Mayibuye Archives, a collaboration between the Museum and the University of Western Cape.[116] These archives contain the prison records and interviews with former prisoners. It operates on a budget of over 200 million Rand (12 million US dollars) per year.[117] Many ex-prisoners are employed at the museum, sometimes as guides. Yet the museum has been plagued by allegations of corruption and regular protests by the Ex-Political Prisoners' Association, which has raised concerns about the lack of support from the museum for ex-prisoners.[118]

Another prominent post-apartheid initiative that sought to address the conflict legacy was Freedom Park, which was established by the Department of Arts and Culture in 2000 specifically as

> a memorial to honour those who sacrificed their lives to win freedom. ... Freedom Park was established as the South African government's response to the Truth and Reconciliation Commission. It took into account the public's need for a memorial to fittingly honour those who sacrificed their lives to win freedom.[119]

115 Geraldine Frieslaar, 'Education and Preservation of Sites of Conscience,' in *Memory of Nations. Democratic Transition Guide: The South African Experience* (CEVRO, 2020), accessed 17 July 2021, http://www.cevro.cz/web_files/soubory/democracy-guide/democracy-guide-2019/MN-DTG%202019%20-%20(12)%20The%20South%20African%20Experience.pdf.

116 Details about the archives are available at, accessed 14 July 2021, https://mayibuyearchives.org.

117 Robben Island Museum, '2019 Robben Island Museum Annual Report,' 2020, accessed 14 July 2021, https://nationalgovernment.co.za/entity_annual/1936/2019-robben-island-museum-annual-report.pdf.

118 Nicola Daniels, 'Ex-Prisoners' Association Upset over Robben Island Council "Meeting Snub,"' *Independent Online*, January 27, 2020, accessed 14 July 2021, https://www.iol.co.za/capetimes/news/ex-prisoners-association-upset-over-robben-island-council-meeting-snub-41497561.

119 Freedom Park, 'The History of the Park,' n.d., accessed 14 July 2021, https://www.sahistory.org.za/place/freedom-park.

The site hosts various memorial events, ceremonies of healing and reconciliation and educational activities to create awareness of South Africa's history and the liberation struggle in particular. It occupies 52 hectares a short distance from Pretoria, almost adjacent to the Afrikaner memorial site, the Voortrekker Monument. It receives over 90,000 visitors per year, largely due to its hosting various cultural and education events.[120] It houses a museum dedicated to South African history (from pre-colonial times to the present) and garden of remembrance that includes sculptures reflecting the historical culture and values of the new democracy.

The way that the park has selected whom to honour and how to do so has proven controversial. One of its key structures, the Wall of Names, seeks to honour those who died during the conflicts that shaped the country (stretching back to colonial-era conflicts). The decision to exclude fallen SADF soldiers from the memorial elicited heated response from conservative Afrikaner groups, who saw this as a betrayal of the goal of reconciliation.[121] Ordinary victims have also voiced concerns about being excluded from this process.[122] The questions of how to define heroes, victims, and perpetrators, and whether these are mutually exclusive categories, has also proven difficult to resolve.[123] The park consequently decided to leave this question open by leaving space for additional names to be added at a future date.

A site that has great historical importance and is now centrally placed in the present-day debates and advocacy efforts relating to human rights is Constitution Hill in Johannesburg. It previously served as an infamous prison but now houses the Constitutional Court as well as other human rights projects and serves educational functions as well. Its management falls under the Gauteng Provincial Government's Arts and Culture Department. It occupies an 80-hectare space in the centre of the city, receives over 50,000 visitors per year and operates with a budget of 60 million Rand (3.5 million US dollars) per year.[124]

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120 Freedom Park, 'Freedom Park Annual Report 2018–2019,' 2019, accessed 14 July 2021, https://www.freedompark.co.za/index.php/corporate/annual-reports/107–2019-freedom-park-annual-report.

121 It is also interesting to note that, 'on 13 December 2018 the Unveiling of the Russian section of the Wall of Names took place at Freedom Park (....) The section comprises inscriptions with the names of 67 Soviet/Russian soldiers who sacrificed their lives to assist the liberation struggle in the region of Southern Africa, including the anti-apartheid struggle in South Africa." Embassy of the Russian Federation in the Republic of South Africa, 'On the Solemn Unveiling of the Soviet/Russian Section of the Wall of Names Freedom Park, – Press Releases,' December 13, 2018, accessed 14 July 2021, https://russianembassyza.mid.ru/ru_RU/-/on-the-solemn-unveiling-of-the-soviet-russian-section-of-the-wall-of-names-freedom-park-13-december-2018?inheritRedirect=true&redirect=%2Fru_RU.

122 'Clouds over Attempts to Reconcile with the Past,' *The New Humanitarian*, December 15, 2006, accessed 14 July 2021, https://www.thenewhumanitarian.org/fr/node/229198.

123 Baines, 'Site of Struggle: The Freedom Park Fracas and the Divisive Legacy of South Africa's Border War/Liberation Struggle."

124 Gauteng Provincial Government, 'Gauteng Provincial Government Annual Report 2017–2018,' 2018, accessed 14 July 2021, https://provincialgovernment.co.za/entity_annual/400/2018-gauteng-gauteng-growth-and-development-agency-(ggda)-annual-report.pdf.

The Director of the South African History Archive, Geraldine Frieslaar, explains the historical significance of the site:

> Constitution Hill came into existence in the very same space that once was a punitive symbol of the apartheid regime, and was occupied by the Old Fort Prison, which at different points in time held Mahatma Gandhi and Nelson Mandela for opposition against discrimination. Functioning as a multi-purpose urban space which includes prison buildings, a museum, the Constitutional Court and various non-governmental organizations primarily focused on social justice and human rights, Constitution Hill became one of the foremost sights in Johannesburg to commemorate the past through its guided tours, education programmes and exhibition strategies of engaging the audience through accounts of witness memory or special guided tours by ex-political prisoners, specifically those that were held in the Women's Jail. In as much as Constitution Hill serves as a sacred space for commemorating the injustices of apartheid, the precinct has also been charged with the responsibility of reinvigorating the surrounding area through its urban renewal priorities. This in itself presents a daunting challenge in the way Constitution Hill will have to navigate the demands of heritage tourism juxtaposed with preserving the sanctity of the space as a site of conscience.[125]

The most comprehensive museum engagement with the apartheid period is that of the Apartheid Museum, which was established as a private independent entity in 2001 on the outskirts of Johannesburg. It was initiated as part of a casino licence application to demonstrate how the company (Gold Reef City) would attract tourism and thereby grow the economy and stimulate job creation. Consequently, Gold Reef City Casino was built and an adjacent piece of land provided for the museum. The museum is registered as a not-for-profit organization with an independent board of trustees. The museum relies on donations, contributions and sponsorships to sustain its growth.[126] Since it is a non-profit organization, information regarding its budget and number of visitors is not publicly available.

It has become a popular destination for tourists and school outings. The museum and its exhibits have been praised by some academics for its comprehensive and inclusive approach,[127] while others have criticized its imposition of a unifying reconciliation narrative.[128]

Memorialization has generally taken on a more inclusive participatory approach in South Africa. Frieslaar suggests that,

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125 Frieslaar, 'Education and Preservation of Sites of Conscience.'

126 South African History Online, 'Apartheid Museum – Johannesburg,' accessed 27 November 2020, https://www.sahistory.org.za/place/apartheid-museum-johannesburg.

127 Pieter Labuschagne, 'Balancing the Past and the Future in South Africa: A Spatial Analysis of the Apartheid Museum as an Instrument for Dealing with a Contested Past,' *South African Journal of Art History* 27 (2012).

128 Chana Teeger and Vered Vinitzky-Seroussi, 'Controlling for Consensus: Commemorating Apartheid in South Africa,' *Symbolic Interaction* 30(1) (January 1, 2007): 57–78, accessed 14 July 2021, https://doi.org/10.1525/si.2007.30.1.57.

> Given the apartheid legacy of exclusion, post-apartheid sites of memory were also tasked with the responsibility of giving voice to the hidden and marginalized voices of society by focusing on an inclusive approach to heritage. More importantly, as "theatres of memory", sites of memory affirm the humanity of those that suffered as a result of apartheid's atrocities and as result the heritage landscape of post-apartheid South Africa are dotted with memorials, monuments, museums and heritage sites.[129]

Some memorial sites function as ongoing projects of advocacy in relation to ongoing injustices. The District Six museum in Cape Town serves as both a testimony to a community and its inhabitants – who were forcefully removed from an inner-city neighbourhood – but also as a rallying point for the unresolved issues of land return and community-building.

Several museums and memorial sites have also been established (or are still in the process of being developed) to commemorate particular places where abuses had occurred. In November 2011, the Department of Correctional Services announced that the gallows at Pretoria Central Prison would be restored and converted into a museum. Subsequent to this announcement, on 15 December 2011, President Jacob Zuma officially opened the memorial museum and paid tribute to those who were executed for political offences.[130] Due to the location of the museum inside a prison, the museum is only accessible through appointment, as it is awaiting the construction of a separate entrance.[131] Vlakplaas, where a police hit squad tortured and killed numerous liberation force members, has been also suggested as a potential site for a centre to conduct research into plants used in traditional medicine, thereby reconciling South Africa's traditions with modern medicine.[132] It is located on a farm 20 km west of Pretoria.

2.9 Commemorative Events

National holidays have been declared to commemorate a number of days with direct relevance to the conflict period. The selection of days and their official names were determined via negotiations with the Government of National Unity in the first months after elections.[133] While it has sought to include days considered important

129 Frieslaar, 'Education and Preservation of Sites of Conscience.'

130 Accessed 14 July 2021, https://www.sahistory.org.za/article/political-executions-south-africa-apartheid-government-1961-1989.

131 James Mahlokwane, 'Gallows Museum Still Not Open to Public for Safety Reasons,' *Independent Online*, 2018, accessed 14 July 2021, (https://www.iol.co.za/pretoria-news/gallows-museum-still-not-open-to-public-for-safety-reasons-14419781).

132 South African Parliamentary Portfolio Committee of Arts, Culture, Science and Technology, 'Visit to Vlakplaas from 14 to 16 December 2001,' 2002.

133 The Public Holidays Act (Act No. 36 of 1994), accessed 14 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/act36of1994.pdf.

to different groups, the naming of these has proven somewhat controversial, as some names are seen as erasing the particular meaning associated with a historic event and reframing them with more generic, less political meaning.

16 December was declared National Reconciliation Day. Previously this day was celebrated by the apartheid government as the Day of the Covenant, in memory of their victory over the Zulu at the Battle of Blood River in 1838. In 1961 the ANC chose this day for founding their armed wing, *Umkhonto we Sizwe* ('Spear of the Nation,' or MK). After 1994, it was decided to keep this as a national holiday, which would focus on reconciliation.

21 March is celebrated as Human Rights Day, in remembrance of the Sharpeville Massacre, which occurred on that day in 1960. This has proved controversial, as the Pan Africanist Congress, which had organized the march, felt that the meaning of this memory was usurped and distorted by the ANC and the state.

27 April was declared Freedom Day, commemorating the date of the first democratic elections in South Africa, 16 June as Youth Day in commemoration of the Soweto Uprising, and 24 September as National Heritage Day to acknowledge the diversity of cultural backgrounds that comprise the country.

Women's Day commemorates 9 August 1956, when women participating in a national march petitioned against the above-mentioned pass laws.

Government events on these days are viewed by many as partisan and political, with the result that whites generally do not participate and criticism comes from other political parties as well, particularly the PAC, regarding their historical heritage being usurped by the ANC. These events thus sometimes serve more as reminders of the divisions that still face the country.

2.10 Transitional Justice Institutions

While previous sections of this report discussed certain aspects of the South African TRC (amnesty, reparations, reform recommendations, and informal dialogues), this section will focus on its work specifically relating to investigation and truth finding. First though, other more narrowly focused investigative commissions were established that preceded the TRC.

During the negotiation period and before the establishment of the TRC, both the apartheid government and the ANC had initiated investigations into abuses committed by their own members. On the side of the ANC, two commissions had been established to look into allegations of torture and extrajudicial executions that had occurred in their training camps in southern Africa.

Following the unbanning of the ANC in 1990, it came under increasing pressure to account for various allegations of human rights abuses. While it had previously conducted internal inquiries, it also responded by constituting to public bodies that published their findings. The first of these was the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees

(Skweyiya Commission)[134] in 1992 in response to increasing pressure to account for the human rights violations that had occurred at its detention centres in exile. The Skweyiya Commission was novel in that it constituted an inquiry into human rights violations initiated by a liberation movement, specifically one that made its findings publicly available. It was, however, criticized for its narrow mandate and powers and was soon followed by the Commission of Inquiry into Certain Allegations of Cruelty and Human Rights Abuse against ANC Prisoners and Detainees by ANC Members (Motsuenyane Commission). It operated for seven months and published its report on 20 August 1993.[135] The commission found that serious violations had occurred and recommended disciplinary action against ANC members. The ANC deferred, however, arguing that a more inclusive process that included accountability for all sides of the conflict should be pursued before any decisions about potential sanctions were made.

During this same period, the state also established an official commission of enquiry, the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, popularly known as the Goldstone Commission (as it was chaired by Justice Richard Goldstone). It was established to investigate political violence between July 1991 and the 1994 general election. The Goldstone Commission was set up as a result of the National Peace Accord, a negotiated agreement between the government, the ANC and other parties.

Commissioners were appointed for a statutory period of three years. The commission submitted 47 reports, which presented findings on violence in particular communities and particular forms of violence.[136] These reports named individuals responsible and confirmed the role of the state as a 'third force' that was fuelling violence. It also held the ANC and IFP responsible for their roles in the internecine conflict in the Natal province.

Truth and Reconciliation Commission

The TRC built on the work of all of these enquiries. The TRC legislation[137] was developed to give effect to the amnesty provision of the interim constitution while attempt-

134 Skweyiya Commission, 'Report of the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees.'

135 The report is not available in electronic form.

136 These reports do not appear to be available electronically, but copies are held at university archives such as, accessed 14 July 2021, http://www.historicalpapers.wits.ac.za/?inventory/U/collections&c=AK3342/R/9077 and https://www.saha.org.za/news/2017/February/three_new_donated_collections_start_off_the_sfjp_year_with_a_bang.htm.

137 Parliament of South Africa, 'Promotion of National Unity and Reconciliation Act (Act 34 of 1995)' (1995), accessed 14 July 2021, https://www.gov.za/sites/default/files/gcis_document/201409/act34of1995.pdf.

ing to balance this by exposing the truth and seeking accountability. The TRC was composed of three committees that worked in collaboration with each other. The Amnesty Committee, which was responsible for hearing and making findings on amnesty applications, the Human Rights Violations Committee, which was to hold public hearings for victims to share their stories, and the Reparations and Rehabilitation Committee, which was to support victims and develop recommendations for reparations. They were supported by a Research Department and an Investigations Unit, which had extensive powers to access information and call on witnesses to provide evidence.

The commission was headed by 15 commissioners selected by public nomination and an interview process and ultimately appointed by President Nelson Mandela, who chose Archbishop Desmond Tutu as its chair. The background of the committee members was mixed, consisting of scholars, lawyers, professionals and religious figures. The commission also sought to reflect some degree of political diversity. Bishop Tutu played a significant role as the chair, setting a tone of reconciliation, forgiveness and empathy with victims.[138]

The TRC was established in 1995 through the Promotion of National Unity and Reconciliation Act (Act 34 of 1995). The commission combined various functions, including the granting of amnesty, the investigation of abuses, the convening of hearings to allow victims to tell their stories, and the publication of a report containing its findings and recommendations for preventing future abuses and providing reparations to victims. The period covered by the commission extended from 1960 (the Sharpeville Massacre) until the day that Nelson Mandela was inaugurated as president of the country (10 May 1994).[139]

Its powers to investigate abuses and make known findings regarding those responsible for human rights violations were extensive. It was able to conduct searches and seize documents, summon suspects and witnesses to testify, and it was able to name those identified in its final report. Its remit was not just to find out the details of such abuses but also to provide an analysis of institutional and organizational responsibility for these acts:

(a) facilitate, and where necessary initiate or coordinate, inquiries into –
(i) gross violations of human rights, including violations which were part of a systematic pattern of abuse;

138 Archbishop Desmond Tutu had played a high-profile role during the anti-apartheid struggle as Archbishop of the Anglican Church, Secretary General of the South African Council of Churches and patron of the UDF. While standing up to the apartheid government, he also preached a vision of reconciliation and non-racial unity. He was awarded the Nobel Peace Prize in 1984 and was recognized as a champion of justice and peace on the international stage.

139 The time frame initially went up to the date of the adoption of the interim constitution in December 1993, but subsequent extension was legislated in order to provide amnesty for violence in the lead-up to the elections in April 1994.

(ii) the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations;
(iii) the identity of all persons, authorities, institutions and organizations involved in such violations;
(iv) the question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs, or of any political organization, liberation movement or other group or individual; and
(v) accountability, political or otherwise, for any such violation;

The scope of abuses investigated by the TRC was quite narrow relative to the nature of abuses committed by the apartheid government. It covered only violations of bodily integrity or acts of direct physical violence. It excluded acts of discrimination, systemic racism and mass violations of social and economic rights. The denial of education, employment or health care, and the forced removal and imprisonment of those without passes were thus not included in the ambit of the TRC. These would be considered contextual considerations that were taken into consideration in the analysis of the abuses, but would not be a target of specific investigations in terms of allocating responsibility or identifying victims.

The TRC had an Investigative Unit headed by one of the Commissioners. It consisted of approximately 50 members including: a civilian component (consisting of investigative journalists, researchers, human rights lawyers and members of NGOs); a trained police personnel component consisting of secondments from the South African Police Service (SAPS) and the National Intelligence Agency (NIA); and international secondments consisting of trained police personnel, information technology specialists and human rights lawyers from other countries.

The TRC had a budget of 250 million Rand (about 50 million US dollars in terms of the exchange rate at the time). The staff totalled around 250 when it was in full operation. Most of the budget came directly from the South African government, with only limited additional funding from foreign sources in response to the TRC's requests for support for specific projects.

The TRC started work at the beginning of 1996 and was supposed to finish within two years. But it only managed to finalize the report presented to the President on 29 October 1998 and made public on the same day. The large volume of amnesty cases and the slow pace of processing meant that the amnesty process continued for a further five years. The final report of the TRC, which integrated the findings of the amnesty process, was thus only published in 2003. The website of the TRC with the full final report is still available online.[140]

The TRC brought out a seven-volume Final Report with its findings regarding the facts regarding human rights abuses during the period of its mandate. The first five

140 Accessed 14 July 2021, https://www.justice.gov.za/trc/.

volumes presented the findings emerging from the hearings and investigations, while volume six presented the findings of the amnesty and volume seven provided a list of all those who were found to be victims (along with brief details of each case).[141]

Even before its release, political parties including the ANC, IFP and NP sought to prevent the publication of certain findings. Specifically in response to a court application to prevent the publication of the report, the TRC decided to black out certain pages containing its findings regarding certain individuals' direct culpability for violations in order to avoid the delay of the report's release. The IFP also objected strongly to particular findings of culpability, while the ANC raised broader objections to the TRC's 'criminalization' of resistance to apartheid. Some corrections and retractions were subsequently published as an appendix to the 2003 report.

The main interest in the TRC was not focused on the final report and its findings. The hearings process, both that involving victim testimonies and perpetrators' amnesty applictions, was the focus of public attention both in South Africa and internationally.

Significantly, the human rights violations hearings provided 1818 victims with an opportunity to recount their experiences of abuse.[142] These testimonies occurred in public venues, often with hundreds of people in attendance. The hearings were covered live on radio and featured regularly in television news and weekly reports on new revelations. From 1996 to 1997, the TRC process featured prominently in South Africa's media. Public engagement with this testimony was racially divided, both in terms of the composition of the audience at public hearings and in the television viewership. Public interest in the TRC was evident in the extensive daily media coverage it received, although the level of interest was also racially skewed, with the proportion of black television viewers being three times higher than that of whites.[143]

2.11 Victims' Associations

Various support structures were set up to provide advocacy and legal and psychological support to detainees and prisoners during apartheid. Victims and their families were most directly represented by their own political organizations, however, as they were generally targeted for their activities on behalf of these organizations.

Victims only started organizing collectively outside of political structures in the lead-up to the TRC. NGOs that provided support to victims during this period also

141 The TRC did not publish a popular or summarized version of the report, and most South Africans did not have access to the full report.

142 Audrey R. Chapman and Patrick Ball, 'The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala,' *Human Rights Quarterly* 23(1) (2001): 1–43.

143 Gunnar Theissen, 'Object of Trust and Hatred: Public Attitudes toward the TRC,' in *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, ed. Audrey R. Chapman and Hugo van der Merwe (Pennsylvania: Pennsylvania University Press, 2009), 202.

facilitated their development of an independent structure and voice. Two such groups (emerging from the services of CSVR and Trauma Centre for Victims of Torture and Violence) emerged to form the Khulumani Support Group (KSG), which established itself as an independent body representing victims from across the political spectrum. It established numerous branches and boasted a membership of over 100,000. The KSG became a key lobby group pushing the TRC for more effective support to victims and pressuring the government to implement the recommendations of the TRC (see https://khulumani.net, last accessed 14. 07. 2021). The KSG worked in collaboration with other NGOs that formed the South African Coalition for Transitional Justice in 2007 in order to lobby for various unfinished tasks of the TRC, including the implementation of full reparations, extending reparations to victims who had not appeared before the TRC, and prosecutions of those who had not received amnesty, among other things.

A smaller network comprised mainly of the families of those killed in detention or assassinated by the apartheid government emerged in 2018, when some cases started to gain attention by the re-opening of inquests and the renewed investigations by the National Prosecuting Authority. These efforts to pursue justice have been supported by the South African Foundation for Human Rights.[144]

2.12 Measures in the Educational System

Shortly after the transition in April 1994, the new government undertook short-term action to revise the curriculum, which, according the educationalist Jonathan Jansen,

> ...was presented as an attempt to alter in the short term the most glaring racist, sexist and outdated content inherited from the apartheid syllabi, which were still widely used in the aftermath of the first post-apartheid elections in April of the same year.[145]

This first period of reform also occurred during the Government of National Unity, where the politics of compromise limited the introduction of more radical curriculum reform. A second phase of more serious reform began after the 1999 elections. Initially, the subject of History was considered too difficult to navigate and did not receive much attention from the Education Department. The history of apartheid was covered only in secondary school education at grade 12, and as an elective that was

144 Accessed 14 July 2021, https://mg.co.za/article/2019-08-08-00-npa-reopens-apartheid-cases.
145 Jonathan Jansen, 'Rethinking Education Policy Making in South Africa: Symbols of Change, Signals of Conflict,' in *Educational in Retrospect: Policy and Implantation 1990 – 2000*, ed. An Kraak and Michael Young (Pretoria: HSRC Press, 2001), 40 – 57.

not available in all schools. Once a clearer history teaching agenda was established, specific themes became the focus of grade 12 history curriculum in 2008[146]

- The impact of the Cold War in forming the world as it was in the 1960s;
- The realization of *uhuru*[147] in Africa, 1960s–1970s;
- Forms of civil society, 1960s–1990s;
- The impact of the collapse of the USSR in 1989;
- The emergence of South Africa as a democracy from the crisis of the 1990s;
- Globalization: meaning and trends; and
- Ideologies and debates around the constructed heritage icons from the period and today.

At the same time, twelve history textbooks were approved for use in schools, which were left with much discretion on which texts to use. The teaching of apartheid history proved very difficult for many teachers who had themselves lived through this period and who were given little support in how to present a very emotional and contested period in a professional manner. Some NGOs, such as Shikaya in the Western Cape, sought to fill this gap by training history teachers to teach history in a way that was sensitive to the diversity of perspectives but was also guided by certain values regarding human rights and democracy.[148]

In 2018, the Minister of Education appointed a new History Ministerial Task Team to look at overhauling the history curriculum and explore the possibility of making it a compulsory subject for all students. It was due to report back in 2020.[149]

2.13 Coming to Terms with the Past through the Media

The work of the TRC was extensively covered by the media. This included direct radio broadcasts of its victims' hearings and amnesty hearings. Coverage of these hearings was also regularly featured in the evening state television news bulletins and daily independent newspapers. A weekly television show ('TRC Special Report') on the activities of the TRC proved particularly popular, at one point being the most popular show on South African television.[150]

Viewership of this coverage was very divided, with black South Africans being much more inclined to follow news coverage and white South Africans being

146 Elize S. van Eeden, 'South Africa's Revised History Curriculum on Globalism and National Narratives in Grade 12 Textbooks,' *Historia* 55(1) (2010): 110 – 124.

147 Uhuru is Swahili for 'freedom', in reference to independence from colonial rule.

148 Accessed 14 July 2021, https://www.thesouthafrican.com/news/teaching-apartheid-history-south-africa-challenges/.

149 Accessed 14 July 2021, https://www.gov.za/speeches/history-curriculum-18-dec-2018-0000.

150 A more detailed analysis of this viewership is provided in the concluding section.

much less interested. The political slant of the media was also very different in Afrikaans and English newspapers, reflecting clear anti- and pro-TRC angles.

During and after the TRC, a number of video documentaries explored particular events and individual stories that emerged due to the TRC hearings. These documentaries gained extensive coverage. They include

- 'Where Truth Lies' (directed by Mark Kaplan) 1999
- 'Prime Evil' (directed by Jaques Pauw) 2000
- 'Between Joyce and Rememberance' (directed by Mark Kaplan) 2004
- 'Black Christmas' (directed by Mark Kaplan) 2016

Since the end of the TRC, media coverage of stories of the apartheid era have significantly declined. There has been a dearth of any further investigative journalism into apartheid-era abuses, and further revelations of the truth about this period have come through the work of NGOs and academics. Where new information has been released or new judicial proceedings have been brought forward, the media have, however, given these events significant coverage.

2.14 Coming to Terms with the Past through Art

The abuses of the apartheid era feature in numerous films, plays, books and works of art. These are, however, mostly not in the mainstream or popular realm. While the theatre and the arts were critical media for public engagement in resistance to apartheid, coverage of this era has given way to more contemporary themes of ongoing injustices, intolerance and public education regarding violence, AIDS and other social challenges.

The dramatic dynamics involved in personal storytelling and confrontation between victims and perpetrators provided a rich foundation for theatre, and many productions drew on this to frame theatre productions that explored the personal and political dynamics of the post-transition period. These plays were widely acclaimed for their ability to engage audiences and communicate the complexity and moral ambiguity of these processes. The most prominent theatre productions included:

- 'Ubu and the Truth Commission' (1997)
- 'The Story I Am About to Tell', created in collaboration with the Khulumani Support Group (1997)
- 'Nothing but the Truth' (2002)
- 'The Dead Wait' (2002)
- 'Truth in Translation' (2006)
- 'Truth and Reconciliation' (2011)

A number of novels, both by already prominent authors and new voices, have also used the backdrop of the TRC as inspiration. These novels have also been welcomed as a way of

> providing the TRC and people's testimonies with a productive afterlife, for challenging definitions of trauma, truth and reconciliation, for inviting readers to keep the dialogue about the past open, and to think actively about the strategies adopted in addressing that past and their implications in the present.[151]

Not only have South African authors used the TRC as a backdrop for their stories, they also treat it as an inspiration to dig more deeply into the complex issues that surfaced. Paul Gready notes that the 'outcome of the presence of the past has been an outpouring of autobiographical and historical fiction, autobiographies and memoirs, and generically hybrid texts; and one key trigger was the TRC'.[152] He argues that novels have not simply 'duplicated the TRC's dominant discourse of 'speaking truth to reconciliation,' but also unpacked the silences and 'unfinished business' of apartheid and the TRC and 'have also shone a light on issues such as the enduring appeal of revenge and retribution, the prevalence of informing and betrayal on both sides of the political divide, the complicity of white beneficiaries in apartheid's crimes, and the complexity of certain black identities (e. g., those designated "colored" who "played white")."[153]

Some of the most critically praised novels include:

- Nadine Gordimer, 1998, 'The House Gun', Routledge
- J.M. Coetzee, 1999. 'Disgrace', Penguin (awarded the Booker Prize)
- Gillian Slovo 2000. 'Red Dust'. Virago
- Sindiwe Magona, 2000. 'Mother to Mother'. Beacon Press
- Achmat Dangor, 2001. 'Bitter Fruit'. Kwela Books
- Njabulo Ndebele's, 2003. 'The Cry of Winnie Mandela', Picador
- Zoe Wicomb. 2006. Playing in the Light. The New Press
- Patrick Flanery. 2012 Absolution. Penguin Random House

A number of films were also inspired by the stories that emerged through the TRC. These ranged from local to Hollywood productions with international film stars. None of these films were viewed as successful in capturing the complex politics or difficult personal journeys undertaken by the characters. As one critic noted, 'the Truth and Reconciliation Commission – although it possesses all the intrigue,

151 Francesca Mussi, 'The South African TRC and Its Narrative Legacies,' 2020, 1–39, accessed 14 July 2021, https://doi.org/10.1007/978-3-030-43055-9_1.

152 Paul Gready, 'Novel Truths: Literature and Truth Commissions,' *Comparative Literature Studies* 46(1) (2009): 156–176.

153 Gready, 'Novel Truths: Literature and Truth Commissions'.

power and excitement of a courtroom-style drama like '12 Angry Men' – has invariably been sensationalized into a showcase of trauma-as-entertainment.'[154]

The most prominent productions include:

- 'Red Dust' (2004)
- 'In My Country' (2004)
- 'Zulu Love Letter' (2004)
- 'Forgiveness' (2004)
- 'The Forgiven' (2017)

3 Stocktaking: Successes and Failures of Transitional Justice in South Africa

3.1 Successes in Coming to Terms with the Past and their Causes

The transitional justice process in South Africa was hailed by international commentators as a success and a model for other countries to follow. Internally, though, the legacy of the transition and the transitional justice process have been hotly debated. Where successes are noted, they come with caveats about the costs of attaining these and their limitations in relation to the ultimate goals being pursued. This section covers the impact on victims and public perception, as these things do mark significant successes despite shortcomings.

3.1.1 Impact on Victims

While highly contested, the provision of amnesty for perpetrators in exchange for disclosing the truth, alongside the state's commitment to investigate and provide reparations for past abuses, was accepted by most victims. The TRC process of focusing on victim testimonies and acknowledging their suffering was also experienced as very affirming. Still, the TRC process did not result in sufficient new information or adequate reparations for victims and left most dissatisfied and their suffering unacknowledged. The failure of the state to act on TRC recommendations by pursuing prosecutions and provide adequate reparations was seen as a betrayal.[155] The TRC

154 Accessed 14 July 2021, https://africasacountry.com/2012/02/south-africas-trc-on-film.

155 See specifically David Backer, 'Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa,' *International Journal of Transitional Justice* 4(3) (November 1, 2010): 443 – 456, accessed 14 July 2021 https://doi.org/10.1093/ijtj/ijq015; Sizwe Phakathi and Hugo Van der Merwe, 'The Impact of the TRC's Amnesty Process on Survivors of Human

process also failed to reach the majority of victims affected by human rights violations during apartheid.

The transitional justice processes set in place to address victims' needs were appropriate and legitimate. But they were not effectively implemented and the state ultimately failed to carry through on its implicit commitment to justice and reparations for victims.

Key factors explaining the successes are the strong human rights advocacy faction within the ANC, which worked with human rights advocates in civil society and a broad network of victims to establish a victim-centred TRC and to campaign for the implementation of its recommendations.

3.1.2 Public Responses to the TRC Process and Perceptions about the Past

The TRC process was one that was deemed necessary and legitimate by the majority of South Africans, and its contribution to truth and reconciliation was perceived as positive. These views are deeply divided along racial lines, however. Whites opposed the TRC (along with other reforms undertaken by the new government) and blacks supported it before, during and after its conclusion.[156]

Due to the highly politicized nature of the TRC, it was unable to directly build public consensus about the violations that had occurred during apartheid. Due to its transparent operation and the credibility of its work among most scholars and the media, it was able to provide an authoritative account of this period that has become a key reference point for history texts and cultural engagement. It also appears that younger generations of whites are more open to this account of their history.[157]

Attitudes towards reconciliation across racial lines are no longer directly related to resentment regarding gross human rights violations. While the TRC appears to have ameliorated this source of mistrust, the bigger question of continued inequality and the failure of reparative measures for socio-economic injustices now present the main causes of racial mistrust and conflict.[158]

Rights Violations,' in *Truth and Reconciliation. Did the TRC Deliver?*, ed. Audrey R. Chapman and Hugo van der Merwe (Pennsylvania: Pennsylvania University Press, 2009).

156 Hugo Van der Merwe and Kathleen Sensabaugh, 'Truth, Redress and Reconciliation: Evaluating Transitional Justice from Below,' in *Rethinking Reconciliation: Evidene from South Africa*, ed. Kate Lefko-Everett, Rajen Govender, and Donald Foster (Cape Town: HSRC Press, 2016), 25–44.

157 One common understanding established by the TRC about apartheid history was that the apartheid government committed terrible crimes against those struggling against the system. According to the IJR's 2013 Reconciliation Barometer Survey, over a decade since the conclusion of the TRC, 79 percent of black South Africans still believe this TRC-established finding to be true, but only 59 percent of white South Africans believe this statement.

158 IJR, 'SA Reconciliation Barometer Report' (Cape Town: Institute for Justice and Reconciliation, 2019), accessed 14 July 2021, http://www.ijr.org.za/home/wp-content/uploads/2019/12/800108-IJR-Barometer-Report-2019-final-web.pdf.

3.2 Failures in Coming to Terms with the Past and their Causes

3.2.1 The Persistence of Poverty and Inequality

The persistence of socio-economic inequalities has been as a critical failure of the transition process as a whole. While a range of transitional justice processes have been utilized to address the range of apartheid legacies relating to cultural, social, economic and political rights, the fundamental economic system and its related racial inequalities have not been significantly transformed. Benefits provided to improve living conditions for most South Africans have been very mixed. While there have been dramatic improvements in the provision of certain basic services such as electricity and water, levels of poverty have remained persistently high, and the gap between rich and poor has increased since 1994, making South Africa one of the most unequal societies in the world in 2015, with a Gini coefficient of 0.63.[159] Ownership of land and other economic resources has not been effectively addressed, which presents the most serious challenge to reconciliation.

This failure is a result of, among other factors, the compromises made during the negotiated transition, the self-interest pursued by the new political elites, and the failure of the new government to root out corruption and implement development policies that would benefit the majority of citizens.

3.2.2 Democratic and Human Rights Culture

Human rights are strongly entrenched in the South African constitution, in its judicial institutions and in various laws introduced since the end of apartheid. And yet a culture of human rights and democracy has not replaced the authoritarianism rooted in various state institutions and the political parties. Given the long history of colonialism, repression and armed conflict, shifting such a culture is a major challenge.

While the TRC's approach of preaching empathy and reconciliation was generally welcomed, it failed to contribute significantly to building human rights awareness and contributing to human rights institutions. The transitional justice process provided an opportunity to demonstrate and operationalize key aspects of democratic citizenship, such as the way it engaged citizens in policy development, framing victims' needs in terms of rights and state obligations, holding senior officials accountable, facilitating access to information and facilitating democratic dialogue. These opportunities were largely wasted, as the transition was treated as an exceptional, tempo-

159 'The World Bank in South Africa: Overview,' Text/HTML, World Bank, 2019, accessed 14 July 2021, https://www.worldbank.org/en/country/southafrica/overview.

rary process focused more on building empathy and framing a moral discourse than shaping accountability processes and a discourse of rights.[160]

3.2.3 Prosecutions of Perpetrators

As noted in earlier sections, there have been very few prosecutions of perpetrators who were implicated in human rights violations and who had not applied for amnesty. Due to political interference, the judicial process has been compromised. While prosecutions are now being resuscitated due mainly to victims and civil society efforts, the prospects of justice for most victims are remote after so much time has passed. A key element of this political lack of will is the fact that ANC leaders and combatants also face potential prosecution for cases from that era, and prosecutions of apartheid state officials will create pressure for a more balanced approach to addressing past abuses. This impunity for apartheid-era human rights abuses has contributed to a broader climate of impunity for those who are politically connected and who are seen as operating above the law, whether this relates to corruption or to other forms of abuse of office.

3.2.4 Corporate Accountability

While the TRC raised awareness of corporate complicity in apartheid-era abuses, its engagement with the need for accountability and transformation of this sector was quite superficial. The significance of this shortfall only became apparent at a later point, when the scope of suffering was fully revealed and new information about corruption surfaced.

The failure of effective transformation of the business sector in South Africa means that corporate accountability for past or ongoing violations remains remote. The narrow focus of transitional justice on the state's responsibility for abuses meant that the opportunity for pursuing corporate responsibility and reparations for victims was lost. The increased alignment of interests between corporate actors and new political elites has reduced the prospect of justice in this regard.

160 Hugo Van der Merwe, 'What Did the TRC Teach South Africa about Democratic Citizenship?,' in *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years On*, ed. Mia Swart (Brill Nijhoff, 2017), 169–185.

3.2.5 Institutional Reform

Institutional reform was pursued with an agenda of both introducing new democratic values and promoting greater representivity of the population. While this was very successful in relation to certain institutions (e. g. judiciary), many state institutions failed to undergo a shift in culture. Some state institutions have also become mired in corruption and have failed to fulfil their role in promoting development. This can partially be attributed to the lack of a sufficient skills base in South Africa (particularly due to the apartheid education system and the exclusion of black professionals from key positions during apartheid), but is also a result of the appointment of politically connected figures to executive and oversight positions in various state bodies that play a critical role in economic development, such as providing electricity, water, and transport.

Police reform has failed to fundamentally shift the culture from an authoritarian oppressive force to one of service delivery and accountability. In part, the lack of effective accountability or vetting in the transitional justice process undermined efforts to rid the institution of its worst elements. Additional factors, such as the recruitment and training process for new members being more focused on transforming the racial composition, the appointment of trusted political allies to key positions, and the public pressure to get crime under control meant that human rights did not remain a key focus of reform processes. The extent of abuses committed by the police thus remains a serious concern.

3.3 Summary Reflections

The transition process in South Africa was the product of a negotiated settlement which sought to resolve legacies of deep structural challenges and serious human rights violations. The transitional justice process was a very ambitious initiative that introduced innovative approaches and sought broad participatory engagement with victims and affected groups. It played a significant role in shaping a new culture of confronting the past, but fell short particularly in carrying through on its ambitious mandate to provide effective accountability and reparative justice. 25 years after the transition, the legacy of apartheid remains only partially addressed.

Europe

Jonila Godole

Albania: Coming to Terms with the Communist Dictatorship

1 The Experience of Dictatorship

The Republic of Albania[1], a small country with 2.8 million inhabitants bordering Greece to the south, North Macedonia to the east and Kosovo and Montenegro to the north, experienced one of the most repressive communist dictatorships in Central and Eastern Europe from November 1944 to March 1991. The Albanian dictator Enver Hoxha ruled the country with an iron fist until his death in April 1985, repeatedly breaking off relations and agreements with his allies from the communist camp and isolating the country from the rest of the world. After his death, this policy was continued by his successor Ramiz Alia until the Iron Curtain fell and the transition from dictatorship to democracy was negotiated.

This was not an easy transition. The planned economy and isolationist policies had led Albania into the economic abyss. There was a lack of democratic political culture in the country even before the dictatorship was established. Elites and dissident groups were systematically eliminated through executions and imprisonment. There was no independent civil society. A tradition of independent media was absent, and paranoia, xenophobia and mistrust had left deep traces in Albanian society.

The conflicts and disputes from the time of the class struggle were transferred to the two most important political parties. These were the Democratic Party (DP), founded in December 1990 and calling itself conservative, Albania's first opposition party, and the Socialist Party (SP) as the successor the Communist Party. A strong polarization still characterizes the political culture and public discourse in Albania today.

1.1 Relevant Period

The communist dictatorship was established immediately after the withdrawal of German troops from Albania on 29 November 1944 and ended with the first pluralist elections on 31 March 1991. The downfall of the dictatorship did not occur through its overthrow, but as a result of a domino effect following the fall of the Berlin Wall and the bloody events in Romania. Political pluralism was only permitted by Alia's gov-

1 The Republic of Albania (Republika e Shqipërisë) emerged from the People's Socialist Republic of Albania in 1991.

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ernment in December 1990. Therefore, the newly formed opposition parties had little time to prepare for the upcoming elections, and the former communists won them with a two-thirds majority. A year later, due to massive protests, President Alia was forced to resign from office and call new elections, from which the conservative Democrats emerged as clear winners on 22 March 1992.

1.2 Political Background

In order to understand the Albanian dictatorship, which managed to survive for almost half a century, it is necessary to analyse the conditions under which the communists came to power and the repressive structures and means they used to maintain it.

Starting during the war, significantly after the Mukje Conference on 23 August 1943,[2] the Albanian communists, led by Enver Hoxha, began a bloody civil war against other liberatory organizations in the country. They dealt the greatest blow to the so-called nationalists and legalists, who had organized themselves respectively in the National Front and the Legality Party. This internal struggle proved to be an important breeding ground for the later myth of socialist historiography, according to which the communists alone had fought against the fascist occupiers and liberated the country from them. Hoxha also later concealed the central role of the Yugoslav communists, under whose influence his party had existed from its foundation until 1948.[3]

As early as October 1944, the communists transformed the 'Anti-Fascist National Liberation Committee', which they dominated, into a provisional government under Enver Hoxha as Prime Minister.[4] Up to the first elections on 2 December 1945, they took numerous measures to consolidate their power. In order to win the confidence of the population, propaganda focused on rebuilding the country, strengthening the economy and implementing agrarian reform, through which the large inherited landholdings were expropriated without compensation and distributed to landless peasants in the summer of 1945. According to the provisional government, the damage caused by the war was great, with an alleged 28,000 dead and thousands wounded, 10,000 imprisoned and interned in concentration camps in Italy and Germany, over 46,000 houses destroyed, etc. These highly manipulated figures were – as historians

2 Uran Butka, *Lufta civile në Shqipër 1943–1945* [*Civil War in Albania 1943–1945*] (Tiranë: ISKK, 2015).

3 Arshi Pipa, *Stalinizmi Shqiptar: Anatomia e një patologjie politike* [*Albanian Stalinism: Ideo-Political Aspects*] (Tirana: ISKK &Princi, 2007), 13. For further information see also: Çelo Hoxha, *Krimet e komunistëve gjatë luftës 1941–1945 [Communist Crimes during the War]* (Tiranë: ISKK, 2014).

4 Butka, *Lufta civile në Shqipëri*.

now admit[5] – used by the regime to gain legitimacy and justify repressive means in the suppression of its opponents.

The coalition of the anti-communist opposition, formed shortly before the elections in 1945, opposed the policy of the dictatorial exercise of power by military structures that had existed since the war. The opposition consisted of three political groups: The Social Democrats, the Monarchists and the Resistance (Nationalists). Despite efforts to make the population and foreign allies alike aware of Hoxha's authoritarian regime, the opposition failed, and the communists won the election in December 1945 with 90 percent of the vote.[6] On 11 January 1946, Hoxha declared Albania a People's Republic on the model of the USSR and Yugoslavia. At the same time, he began to isolate the country from the West. The 1976 Constitution changed it to the Socialist People's Republic of Albania, which was the official name of the country from 1976 to 1991.

Over the following decades, Hoxha also gradually severed ties with all other communist countries. First he fell out with Yugoslavia, whose communist partisans under Josip Broz Tito had exercised a kind of wardship over their Albanian comrades for years (1941–1948). This was followed by a period of Soviet patronage (1948–1961), then a period of close cooperation with China (1961–1978) and, finally, after the break with the Chinese communists, the complete isolation of the country, which lasted until the fall of the communist regime. This capricious foreign policy served Hoxha mainly to legitimize his power, but also to obtain economic help in overcoming the major problems that racked the country.

In order to justify the respective course in foreign policy, state propaganda criticized all countries that had allegedly left the path of pure Marxist-Leninist doctrine. In the end, Hoxha claimed that only Albania had succeeded in building true socialism. Every breach of relations was also used as an opportunity for purges within the party leadership and for the persecution of alleged 'enemy groups' in other areas of society, such as the military or the economy. The most frequent accusations were 'being in the service of enemy intelligence services', 'weakening the class struggle' or 'collaborating with the Catholic clergy'.[7] In this way, Albania developed into a bizarre dictatorship in which not only innocent citizens were killed, imprisoned, deported and the country's economy destroyed, but in which active supporters of the regime were likewise ground up by the mills of terror.[8] The country's isolation and

5 Beqir Meta and Ermal Frashëri, *Mbi sistemin e burgjeve, internimit dhe punës së detyruar gjatë regjimit komunist në Shqipëri* [*On the System of Imprisonment, Internment and Forced Labour during the Communist Regime in Albania*] (Tiranë: AIDSSH, 2018), 10.

6 Bernd J. Fischer, 'Albania at War, 1939–1945', Central European Studies (West Lafayette, Indiana: Purdue University Press, 1999), 252.

7 Pipa, *Stalinizmi shqiptar,* 86.

8 Hoxha, *Krimet e komunistëve gjatë luftës,* 26.

Enver Hoxha's paranoia culminated in the construction of some 170,000 bunkers in Albania, the remains of which can still be seen in many places today.[9]

1.3 Ideological Justification

Ideologically, the communist regime in Albania had both strong nationalist and distinctly Stalinist elements. Hoxha imposed his autocracy by using the purge and repression methods already tried and tested in the Soviet Union – also and especially within his own party and against opponents who could have been dangerous to him. He also followed the Stalinist model of creating a new socialist identity that would bind the population to the regime and mobilize them to increased performance. However, he combined this with a nationalism that was not possible to the same extent in the Soviet Union with its many distinct nations.

This ideology of nationalistic socialism was facilitated by the victory of the partisans in the Second World War. The partisans who had joined the Communist Party of Albania (*Partia Komuniste e Shqipërisë*; PKSh) during or after the war knew little about communist ideology. Nonetheless, their experiences in the struggle against the fascist occupiers made it easier for them to identify with Hoxha's national communism. The myth of liberation formed an essential basis of his system of power.

Hoxha's transformation from an internationalist to a nationalist served to maintain his power in several ways. On the one hand, nationalism gave him legitimacy among the population. To further this, his regime invoked not only Marx or Lenin, but historical figures from the times of the Illyrians and Skanderbeg to nationalists of the late nineteenth and early twentieth centuries as 'champions of a free Albania'.[10] According to the American historian Bernd Fischer, in order to maintain his power, Hoxha wanted to create a monolithic nation-state of Albanians, which had existed in the preceding centuries only during the short period of independence between 1919 and 1939.[11]

Hoxha's national socialism also served the purpose of shielding and isolating society from external influences, making it easier to manipulate. Finally, it allowed him to strengthen his own regime by dividing society into 'friend' and 'foe', fuelling the 'class struggle' between his supporters and opponents, banning the practice of faith and deepening the cultural-religious conflict between the north and south of the country.

Under Ahmet Zogu, who had declared himself king after a three-year presidency, Albania had been ruled from 1925 to 1939 by a representative of the *Gheg*-inhabited north. This changed when the communists came to power and, with Enver Hoxha a

9 The small, hemispherically-shaped concrete bunkers were designed in the 1960s and completed by 1985. According to the regime, they served to protect the country.

10 Marie-Janine Calic, *Südosteuropa: Weltgeschichte einer Region* (Munich: bpb, 2016), 511.

11 Fischer, 'Albania at War', 274.

representative of the *Tosks* living in the south, ruled the country. The partisan army also consisted mainly of representatives of the southern, Tosk population, while the Ghegs were considered 'enemies' and were systematically persecuted, especially after the anti-communist uprising of Postribë in September 1946. This policy of division culminated in the designation of Tosk as the official standard dialect of the Albanian language, which ignored the long Gheg tradition in Albanian culture. This cultural domination also strengthened Hoxha's position.[12]

Last but not least, the fight against religion played a special role. This gradually intensified after Hoxha's seizure of power and culminated in the ban on religion in 1967. In Hoxha's propaganda and speeches, religion was castigated as an element of possible foreign influence, which the enemy could use to divide the Albanian people.[13] Massive repressive measures were taken against the Catholic clergy in particular, which had influence mainly in the north of the country and adopted a recognisably anti-communist stance.

While the Soviet Union propagated 'peaceful coexistence' between capitalist and socialist states from 1955 onwards, the martial rhetoric under Hoxha's leadership continued to intensify. Albanian nationalism finally culminated in a self-isolation that was unparalleled worldwide and which was accompanied by a veritable paranoia regarding a 'foreign attack by Albania's enemies'. Children were taught from pre-school age that they had to defend the regime at gunpoint. They learned partisan songs in pre-school institutions, followed in secondary school by basic military training, which was a compulsory subject.[14] Students and workers, men or women, also regularly took part in military exercises. At the same time, there was an increased disruption of foreign media, television and radio stations, which could be received mainly in the coastal areas near Italy and Greece or the north-eastern border region with Yugoslavia.

1.4 Structures of Persecution

In many ways, Hoxha copied Stalin's path to a dictatorship from which no-one was safe. The Albanian model of dictatorship can be understood by applying the definition of Stalinism developed by the German historian Jörg Baberowski as a 'dictatorship of subjugation that overstepped all boundaries in the war against its own peo-

12 Pipa, *Stalinizmi shqiptar*, 98.

13 In the keeping with the spirit of the national renaissance, the entire population was called upon to put aside cultural and religious divisions and unite for independence against the Ottoman Empire under the motto: 'Albanianism is the religion of the Albanians!'.

14 Idrit Idrizi, *Herrschaft und Alltag im albanischen Spätsozialismus 1976–1985* (Berlin and Boston: De Gruyter Oldenbourg, 2019), 44.

ple. However, its violence was not brought about by ideas, but by situations and their opportunities'.[15]

In order to intimidate and subjugate the population, the communist regime incessantly propagated the struggle against the internal and external enemy and developed a system of terror in which new purges constantly took place. The 'show trials' against Hoxha's alleged opponents or the system of camps for the numerous prisoners resembled the model of the Soviet Union. The Albanian Ministry of the Interior played a key role in this respect, controlling not only the secret police, the judiciary and the penal system, but also the army.[16]

Hoxha realized early on that he needed an effective secret service to stay in power. The State Security Service of Albania, the *Sigurimi*, had been founded early on, in December 1945, with the help of the Yugoslav secret service (*Uprava državne bezbednosti*; UDB).[17] The first tasks of the *Sigurimi* included the persecution of so-called reactionary elements and the Catholic clergy, as well as intensified action against opponents of the regime (so-called agents and saboteurs, in addition to former Nazi collaborators) through (special) people's courts. Documents from this period testify that the *Sigurimi* was used to carry out the 'dirty work' of the PKSh, such as night-time kidnappings of people from their homes or extrajudicial shootings. In countless cases, the families of these victims never learned of the further fate which befell their loved ones. On 22 October 1949, a resolution passed by the Council of Ministers finally transferred the *Sigurimi* to the structures of the Ministry of the Interior. By 1990, it had an estimated 10,000 full-time staff and an extensive network of informants.[18]

In addition to the *Sigurimi*, the structures of the Ministry of the Interior also included the police and the border guard. Leaving Albania without permission was considered 'treason' under Article 47 of the 1976 constitution[19] and was punishable by 10 to 25 years in prison, and in some cases even by the death penalty.[20] Article

15 Jörg Baberowski, *Verbrannte Erde: Stalins Herrschaft der Gewalt* ²(Munich: Fischer, 2019), 131.
16 Georgia Kretsi, *Verfolgung und Gedächtnis in Albanien: Eine Analyse postsozialistischer Erinnerungsstrategien* (Wiesbaden: Harrassowitz Verlag, 2007), 127.
17 The organizational structure of the *Sigurimi* was based on the Yugoslav model. Of its initial staff, 22 percent were illiterate, 64 percent had a primary school education and only 14 percent had completed secondary education. For more information on the founding and work of the *Sigurimi* see Kastriot Dervishi, *Sigurimi i Shtetit 1944 – 1991. Historia e policisë politike të regjimit komunist* [*History of the State Security Service Sigurimi*] (Tiranë: Shtëpia Botuese 55, 2012).
18 Robert C. Austin and Jonathan Ellison, 'Post-Communist Transitional Justice in Albania', *East European Politics and Societies*, vol. 22, no. 2 (2008), 376 – 377.
19 Online publication of the Albanian Constitution of 1976, accessed 14 December 2020, http://eudocitizenship.eu/NationalDB/docs/ALB%20Kushtetuta%20e%20Republikes%20Socialiste%20Popullore%20e%20Shqiperise%201976.pdf.
20 'The soldier on the border warns you once, twice – and the third time he kills you. The soldier is not joking, he will kill you!' Speech by Ramiz Alia on 26 July 1990 at the plenary session of the Central Committee, quoted in Qemal Lame, *Kur shembeshin themelet* [*Collapse of the Foundations*] (Tiranë: Onufri, 2014).

146 also sanctioned punitive measures of up to 15 years imprisonment against border guards for negligent carelessness. Such punitive measures also affected the relatives of those who had escaped abroad or people who had merely planned to flee the country. They ranged from dismissals to detention or internment. Despite the threat of punitive measures, which frequently extended into the third generation, many Albanians risked their lives to cross the border.[21]

The extent of the persecutions in Albania has not yet been adequately researched. One of the reasons for this is that after 1991 not all of those affected applied for the status of politically persecuted person. Between 1945 and 1956 alone, when the terror assumed its greatest proportions, an estimated 15,234 people were arrested for political reasons and 1,049 of them sentenced to death out of a population of less than two million.[22]

The example of the Catholic city of Shkodra in northern Albania gives an idea of the extent of the terror, especially in the early period of the communist regime. After the war, units of the police and the *Sigurimi* occupied 26 buildings used by believers, as well as several cellars, which they converted into makeshift dungeons for the interrogation and torture of opponents of the regime. The net result of reprisals in Shkodra from 1944 to 1960 amounted to 2,890 prisoners, 1,924 internees and 601 shooting victims, including 61 members of the clergy.[23]

The following numbers of victims are assumed for the entire communist era:

- Political imprisonments: approximately 24,000 to 34,000 people;
- Politically motivated executions: 6,027 people (of whom approximately 300 were women);
- Imprisonment: 34,135 people (of which approximately 7,000 women);
- Died in custody: approximately 1,000 people;
- Severely psychologically damaged by violence, torture and imprisonment: 308 people;
- Interned: 60,000 people (or 20,000 families), of whom 7,000 died.[24]

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21 Jonila Godole and Valbona Bezati, 'Në shërbim të popullit – Politikat kufitare në Shqipërinë komuniste' [In Service of the People. Border policy in Communist Albania], in *Profile të armikut të popullit në diktaturë [Profiles of People's Enemy during Dictatorship], publication of the conference papers from 17–18 May 2019,* 13–32, (Tiranë: Onufri, 2021), accessed 03 November 2022, https://issuu.com/aidssh/docs/profilet_e_armikut_t_popullit.

22 IDMC, *Non-rehabilitation of formerly persecuted individuals and transitional justice 1991–2018* (Tiranë: IDMC, 2019).

23 IDMC, *Non-rehabilitation*, 77, and the map of memorial sites in the museum 'Site of Witnesses and Memory' in Shkodra.

24 The figures from two of the most important institutions for transitional justice have added together here. Namely, those of the Institute for the Integration of the Formerly Politically Persecuted (IIP), accessed 10 October 2020, http://ishperndjekurit.gov.al/al/statistika/ and the Institute for the Studies of Communist Crimes and Consequences in Albania (ISKK), www.iskk.gov.al. These figures may differ slightly in other publications. Cf. Idrizi, *Herrschaft und Alltag*, 52; Kretsi, *Verfolgung und Gedächtnis*, 125–126; IDMC 2019.

However, these figures are incomplete. For example, there are no exact figures regarding the killings on the Albanian border in relation to 'illegal border crossings'. According to internal data from the end of the communist regime, about 1,000 people were killed. On 20 November 1990, Interior Minister Hekuran Isai stated in a report to Ramiz Alia that the number of border crossings had increased massively. According to him, '13,692 persons of adult age [had] fled Albania since the liberation, 998 of whom [had] died'.[25]

In 1990 alone, 54 people are thought to have died at the border, including women and children.[26] Even after a change in the law in May 1990, according to which fleeing was no longer considered 'treason' but only 'illegal border crossing' punishable by up to five years in prison, the border regime did not change. On the contrary, the crackdown on those attempting to leave the country was also used to intimidate the population and deter people from fleeing. For example, it is documented that as late as August 1989, when two young men were killed while attempting to flee at Albania's northern border, their bodies were subsequently tied to a truck with barbed wire and dragged through the streets and villages of the area surrounding Shkodra. There, the corpses were put on public display.[27]

1.5 Victim Groups

Despite the incomplete state of research, the victims of the Albanian dictatorship can be divided into three main categories: Opponents of the regime, persecuted communists and non-conformists.

The first group includes oppositionists and other political opponents of the regime who were mainly persecuted in the initial years following the communist seizure of power. Representatives of the Catholic clergy in the north, social democrats, monarchists and large landowners who opposed the agrarian reform can likewise be regarded as belonging to this group. It further includes disgraced state cadres who fell from grace during the first phase of the consolidation of power.

The second group includes people who initially participated in the communist dictatorship themselves but later became 'caught up in the gears of a lawless criminal justice system through a superordinate party manoeuvre'.[28] Many of them were sentenced to long prison terms or even death. However, the sentences for these peo-

25 Accessed 11 January 2021, https://www.balkanweb.com/raporti-per-ramiz-aline-ne-46-vjet-jane-arratisur-13 – 692-vete-988-jane-ekzekutuar/; http://www.panorama.com.al/simon-stefani-ne-1990-denim-kapital-per-ata-qe-nuk-u-binden-kufitareve/; http://www.nacionalalbania.al/2013/05/cfare-permban-albumi-terrori-komunist-ne-shqiperi/25/.

26 Kastriot Dervishi, *Vrasjet në kufi në vitin 1990* [*Border Killings in 1990*] (Tiranë: ISKK, 2016b), 131–134.

27 Dervishi, *Vrasjet në kufi në vitin.*

28 Kretsi, *Verfolgung und Gedächtnis*, 123.

ple and their families were often more lenient than for other groups of victims. Members of anti-communist victims' organizations therefore attach importance to the distinction between themselves as victims of the dictatorship and disgraced 'former communists'.

A third category is formed by people who were not necessarily opponents of the regime but nevertheless became victims of persecution. These include, for example, peasants who resisted collectivization, young people who dressed in a non-conformist manner, or people who used special antennas to receive foreign radio or television stations illegally.

The persecutions in Albania were not only directed against groups and individuals who had been declared 'enemies of the people', but often against their families as well. Thus, the rhetoric of the class enemy led to society being divided into people with 'good' or 'bad' biographies – depending on their social background. Although Hoxha himself came from a wealthy Muslim family and had studied in France and Belgium, he ensured that people with a 'bad biography' were placed under tighter control, as they could supposedly become enemies at any time.

In addition to the actual victims of persecution, the children and relatives of political prisoners or indeed their entire families, 'who lived in miserable conditions in internment camps", were often affected.[29] Conversely, the relatives of partisans, war veterans or communists were automatically counted among the families with a 'good biography'. However, they too – as in the case of the Albanian Prime Minister Mehmet Shehu – could be downgraded to 'enemies' at any time. As a rule, stigmatization as an enemy was irreversible and later rehabilitation virtually impossible.[30]

The religious communities in Albania were hit particularly hard. Over a period of decades, clergy and believers alike were persecuted, arrested or executed, with the constitution finally banning all religions in 1967. The approximately 2,037 houses of worship[31] were either misused – for example, as cattle sheds, warehouses or gymnasiums – or destroyed on the orders of the party as so-called 'voluntary contributions'.

The fight against the clergy had already begun prior to the end of the war, in 1944. At that time, the Provisional Government closed Catholic schools in Shkodra in northern Albania because 'reactionaries, subversives and anti-nationalists, each of whom represented foreign interests' were allegedly active in those institutions.[32]

29 Idrizi, *Herrschaft und Alltag*, 157.

30 Kretsi, *Verfolgung und Gedächtnis*, 34.

31 Among which were 740 mosques, 609 Orthodox churches, 158 Catholic churches, 530 tekkes. Cf. Site of Witness and Memory in Shkodra, Permanent exhibition 'Light Beyond Darkness' on the banishment of religion and the persecution of the clergy. Accessed 14 December 2020, https://www.obervatorikujteses.al/ekspozita-drite-pertej-erresires/.

32 Fischer, *Albania at War*, 255.

Another accusation levelled at the clergy was that they were agents of the Vatican and 'other imperialist centres'.[33]

The Catholic clergy traditionally provided education for young people in northern Albania. However, in the course of the agrarian reform of 1945/46, all monasteries were dissolved and confiscated. Soon after the communist takeover, Dom Lazër Shantoja became the first high-ranking clergyman to be arrested and executed. He was killed by firing squad in Tirana on 5 March 1945.

The struggle against the clergy continued in the following two decades on two main fronts. On the one hand, the regime took brutal action against the clergy. On the other, it unleashed massive anti-religious propaganda, declaring practising believers to be 'enemies of the people'. The press of the time – including the newspapers *Bashkimi* and *Zeri i Popullit* – regularly published texts accusing Jesuits and Catholics of, among other things, planning a coup or being connected to 'Anglo-American agents'.[34]

Dom Lazër Shantoja's fate was to be shared by dozens more clerics up to 1948.

The Orthodox Church was also exposed to communist repression. The Archbishop of Tirana, Kristofor Kisi, was arrested as a 'fascist collaborator' in 1948 and died in prison in 1958 in unexplained circumstances (presumably by poisoning). The regime also cracked down on Muslim communities with arrests and internments. The fight against religious communities reached its climax on 6 February 1967, when Albania proclaimed itself the world's first atheist state and legally banned religious practices. The constitution was amended accordingly.[35]

The most complete statistics so far on the number of clergy persecuted by the communist regime can be found in the 'Place of Testimony and Remembrance' Museum housed in a building in Shkodra, which in the first years of the communist regime served as a prison and office of investigators. According to the data published in the permanent exhibition 'Light Beyond Darkness'[36] regarding the persecution of the Catholic clergy, there were: 32 priests executed; 19 who died in prisons and forced labour camps; 13 who died during torture; 88 priests as political prisoners; three nuns imprisoned, of whom one died during torture; and three clerics who were disappeared without a trace by the *Sigurimi*.

The data for the clergy of other faiths are as follows:

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33 Wojciech Roszkowski, *Communist Crimes: A Legal and Historical Study* (Radom: Polish Institute of National Remembrance, 2016), 234.

34 Godole and Bezati, "Në shërbim të popullit – Politikat kufitare në Shqipërinë komuniste", 26–27.

35 According to a speech by Enver Hoxha to the Central Committee of the Party, 6 February 1967. Cf. Azem Qazimi, *Procesi i asgjësimit të fesë në komunizëm* [*The Process of the Destruction of Religion in Communist Albania*] (Tiranë: ISKK, 2012).

36 The exhibition consists of 18 posters, which deal with the persecution of religion and its representatives during the communist regime. Also, the exhibition through photographic and historical materials provides detailed information on the strategy followed by the Albanian state of that time in the fight against religion. The exhibition can be accessed on the Memory Observatory website. Accessed 13 July 2022, https://www.observatorikujteses.al/ekspozita-drite-pertej-erresires/.

Muslim clergy: six executed; 20 political prisoners. Orthodox clergy: two executed; four political prisoners; one died during imprisonment. Bektashi clergy: seven executed; four died during imprisonment; six suicides; 24 political prisoners; four were put in internment camps. Alevite clergy: three executed; one died during imprisonment.

Of the 240 clergy sentenced to death or imprisoned, more than two-thirds were Catholic. Only 26 Catholic priests survived communist prisons and served as clerics after the communist regime.

1.6 Those Responsible

The repression in Albania was organized by the Communist Party under the leadership of Enver Hoxha and a small group of sub-leaders. The implementation of the measures was delegated to various institutions, which party leader Hoxha strictly controlled. These included, in particular:

- The General National Liberation Council (*Këshilli i Përgjithshëm Nacional-Çlirimtar*): Between 28 May 1944 and 10 January 1946, the leadership of the Council issued several acts that were initially called decisions and then 'laws'. Through these decisions, the opponents of the liberation war were threatened with life imprisonment, death or confiscation of their property.[37]
- The Special Court for Major War Criminals (*Gjykata Speciale për Kriminelët e Luftës*): The criminal court established in December 1944 not only convicted collaborators during the occupation, but also political opponents of the communist regime. Such people were punished, their property confiscated and their families expelled or deported.
- The Directorate for the Protection of the People (*Drejtoria e Mbrojtjes së Popullit*): Founded on 14 December 1944 within the Ministry of Defence as a predecessor structure of the State Security Service (*Sigurimi*). It collected information on the work of the Catholic clergy and other opposition groups. However, its activities, including decisions on arrests and convictions, were controlled by the Politburo.[38] The Directorate of the *Sigurimi* was established in April 1946.

37 Meta and Frashëri, *Mbisistemin e burgjeve*, 11.

38 In May 1947, the Politburo decided to arrest a group of opposition MPs (16 people). They were sentenced to death by hanging or shooting a few months later. There was no court decision on this; the sentence was based only on a handwritten note and even the minutes of the Bureau meeting were missing. Cf. Meta and Frashëri, *Mbisistemin e burgjeve*, 15, and Leka Ndoja and Alvin Saraçi, *Akte gjyqësore politike gjatë komunizmit në Shqipëri: Bashkimi Demokratik Shqiptar 1946, Vëllimi 1* [*Political Trials During Communism in Albania: The Case of the 'Democratic Union' 1946, vol. 1*] (Tiranë: ISKK, 2015), 8.

At the political level, the party leader Enver Hoxha and the members of the Politburo were primarily responsible for the crimes of the communist dictatorship. The Ministers of the Interior, who led the *Sigurimi* and other organs of repression and were directly involved in deportation and internment decisions, also played a decisive role. Among the main culprits were:

Enver Hoxha (1908 – 1985): Prime Minister of Albania (1944 – 1954), head of the PKSh (1944 – 1948) and the PPSh (1948 – 1985).

Koçi Xoxe (1911 – 1949): Minister of the Interior (1946 – 1948); Director of the People's Defence Bureau (predecessor institution of *SIGURIMI* 1944 – 1946). Declared an enemy and shot in 1949 after receiving the death sentence.

Mehmet Shehu (1913 – 1981): Prime Minister of Albania (1954 – 1981), Minister of the Interior (1948 – 1954). The exact circumstances of his death from unnatural causes in 1981 could not be explained.

Kadri Hazbiu (1922 – 1983): Minister of the Interior (1954 – 1980), Director of State Security (1950 – 1954). Declared an enemy and shot after being sentenced to death in 1983.

Feçor Shehu (1926 – 1983): Director of State Security *SIGURIMI* (1967 – 1969; 1974 – 1980). Minister of the Interior (1980 – 1982). Declared an enemy and shot after being sentenced to death in 1983.

Ramiz Alia (1924 – 2011): President of Albania (1991 – 1992); Chairman of the Committee of the People's Assembly (1982 – 1991); First Secretary of the PPSH (1985 – 1991).

Hekuran Isai (1933 – 2008): Minister of the Interior (1982 – 1989; 1990 – 1991).

With the exception of Ramiz Alia and Hekuran Isai, all of the above were executed in the course of Hoxha's political purges.

1.7 Places of Persecution

The repressive apparatus of the Hoxha dictatorship included a network of prisons, labour camps and places of internal exile or internment. They were established to punish political opponents, their families and descendants over several generations.

During the years 1945 to 1949, the deportations ordered by the leadership were carried out without any legal basis.[39] Written orders from high-ranking regime officials such as Mehmet Shehu or the former Minister of the Interior Koçi Xoxe were sufficient. The exiles were isolated in so-called 'barbed wire camps', which they were not allowed to leave, and had to appear daily for roll call. Candidates for banishment to barbed wire camps on political grounds were also proposed by the *Sigurimi*, while internal exile for other offences was handled by the police. Following the models of

39 Kastriot Dervishi, *Internimi dhe burgimi komunist në Shqipëri* [*Internment Camps and Prisons in Communist Albania*] (Tiranë: Shtëpia Botuese 55, 2016), 7 – 30.

Yugoslavia and the Soviet Union, the barbed wire camps were increasingly replaced by permanent prisons and labour camps where the detainees had to perform forced labour including mining, construction, draining swamps and other tasks.[40]

According to some historians, the network of prisons and labour camps in Albania did not differ significantly from the Soviet Gulags, which is why the Albanian penal system is also referred to as the 'Mediterranean Gulag'.[41]

1.7.1 Barbed Wire Camps (1945 – 1953)

Provisional camps were set up immediately after the communists came to power, initially in Kruja and Berat. These were fenced in with barbed wire and guarded by armed soldiers. The internees were mainly elderly people, women and children who were considered class enemies because members of their families had fled or were in prison. Barracks that had previously been used to keep livestock or that had been built by the Italian occupiers during the war served as accommodation.[42]

- **The Kruja camp (March 1945–September 1947)** in the north of the country was built on a military site within the city. It housed 'reactionary, enemy elements' from the south of the country. The internees were used for various types of work near the city. A total of around 900 people are said to have been interned there.[43]
- **The Berat camp (March 1945–May 1949)** housed 1,275 internees from the northern provinces, including Shkodra, Kukës or Peshkop as of March 1946. Due to the catastrophic conditions there, the camp was closed in 1949 and the internees were transported to the Tepelena camp.
- **The Tepelena camp (1949 – 1953)** is the most notorious of the 'barbed wire camps'. Here, six run-down military barracks built by the Italian army during World War II were converted into barracks which could house 200 internees each. The families of Albanian politicians who had been part of the state administration during the Italian or German occupation, but also leaders of the nationalist movements National Front and Legality, were interned in this camp.[44]

As of August 1950, there were a total of 1,405 internees housed this camp, including 547 women, 368 men and 550 children. For two years, the number of internees was

40 Dervishi, *Internimi dhe burgimi komunist*, 5 – 6.

41 Kretsi, *Verfolgung und Gedächtnis*, 130.

42 The miserable hygienic conditions in these camps are documented in the autobiographies of many survivors. See, for example, At Zef Pllumi, *Rrno për me tregue* (Tiranë: Shtëpia Botuese 55, 2006, botimi 2); Fatos Lubonja, *Ridënimi* (Tiranë: Jjala Fq. 276, 1996); Fatbardha Mulleti, *Saga e dhimbjes* [*The Saga of Pain*] (Tiranë: ISKK, 2018).

43 Dervishi, *Internimi dhe burgimi komunist*, 15.

44 Meta and Frashëri, *Mbi sistemin e burgjeve*, 22.

'only' 590 (240 women, 240 men and 110 children). It is not known how many people died in this camp. However, the horrors of the camp and its high infant mortality rate became the subject of a US government report submitted to the United Nations in February 1955.[45] Reportedly, mothers were forced to bury their deceased children outside the camp on the riverbank. During the winter, the river often washed away the remains and the children's graves disappeared.[46]

The US government's report led to the closure of the camp. The other barbed wire camps spread across the country were also closed. The internees were not released, however, but were moved to camps specially set up for them near populated areas, where they lived and worked from then on. Segregated from the rest of the population and stigmatized as 'enemies', they remained there until the end of the communist regime.

1.7.2 Prisons (1944 – 1991)

Most of the communist regime's prisons were built in 1944 – 1953. They were intended as places where prisoners would serve their sentences in solitary confinement without doing forced labour. The most notorious among them were *Prison 313-Tirana* and prison *321-Burrel (1946 – 1991)*, where well-known anti-communist intellectuals, politicians and clergymen were imprisoned. Later, many of the prisoners were sent to forced labour camps and were used, among other things, to drain swamp and marsh areas. By Kretsi's reckoning, there were more than 30 prisons and 50 internment camps in Albania.[47] According to the Albanian archive expert and author Kastriot Dervishi, 15 prisons, 65 forced labour camps and 15 barbed wire camps were established during the communist dictatorship.[48]

1.7.3 Forced Labour Camps (1950 – 1991)

In the 1950s, the Ministry of the Interior began to establish forced labour camps to exploit the working capacities of prisoners. The camps were surrounded by barbed wire fences and guarded by police and, later, by conscripts. They were run by a commissar (at the political level), a commander (at the military level) and several (sub) officers. In addition, a member of the *Sigurimi* worked in each camp, collecting information about the prisoners. Dervishi estimates that 4,000 to 6,000 political and or-

45 Dervishi, I*nternimi dhe burgimi komunist*, 18.
46 Mulleti, *Saga e dhimbjes*, 240 – 244.
47 Kretsi, *Verfolgung und Gedächtnis*, 125.
48 Dervishi, *Internimi dhe burgimi komunist*. The total number was confirmed again in a personal conversation with the author during the course of this study on 02 December 2020.

dinary prisoners were used for forced labour.[49] Forced labour camps were established in almost all districts of Albania, three of which were particularly notorious:

- **The Spaç camp (1968 – 1990)** was established in a remote area in northern Albania, from which escape attempts were almost impossible. The prisoners were forced to work in the Spaç mine, where they had to mine pyrites and copper. In this way, production costs were kept low on the one hand, and, on the other, political prisoners remained far away from Tirana, Elbasan and other large cities. The annual reports of the camp commanders proudly proclaimed the achievement of the 95 percent quota, which meant that the prisoners had extracted about 13,000 tonnes of copper with primitive tools.

Initially, the prisoners were housed in seven temporary barracks of 100 persons each. Later, however, permanent stone buildings were erected.[50] In 1985 there were 1,345 prisoners in the Spaç camp, 470 of whom were imprisoned for political reasons. Working conditions were harsh, and a strict regime prevailed in the camp. On 21 May 1973, a group of prisoners revolted against their 'enslavement' by the communist regime. The Spaç revolt is considered the biggest uprising in the 45 years of the Albanian dictatorship. It was brutally put down, with four people shot dead and dozens subsequently sentenced to further imprisonment.

- **The Ballsh prison camp (1972 – 1983)** was built to exploit the inmates as labour in an oil refinery planned nearby. However, prisoners were also used for forced labour in housing construction or agriculture. The camp combined elements of a forced labour camp with those of a prison. The prisoners held here were considered to be an 'enemy unit of the first degree'.[51] In 1976, there were 900 convicts in the camp, including 550 political prisoners.
- **The camp of Qafë-Bari (1982 – 1990)** was located not far from the one in Spaç, near another copper mine in a hard-to-reach area of the province of Puka. Initially, 200 to 300 prisoners were detained here to be 're-educated through work'. However, the mine was run under such primitive conditions that the Qafë-Bari camp acquired the reputation of an 'extermination camp'. In 1985 – 1986, 391 prisoners worked there, all of them political prisoners. Many of them were reconvicted from the Spaç or Burrel camps. A camp commanders' report states that 180,181 tonnes of copper had been extracted, meaning that the target was exceeded by 143 percent.[52] After their release in 1990, former convicts reported that non-compliance with labour standards was punished with beatings and torture.

49 Dervishi, *Internimi dhe burgimi komunist*, 151.
50 Dervishi, *Internimi dhe burgimikomunist*, 172 – 173.
51 Dervishi, *Internimi dhe burgimi komunist*, 198.
52 Dervishi, *Internimi dhe burgimi komunist*, 204.

An impression of the conditions in the Albanian camps is given in a report by the Danish journalist, human rights activist and Balkan expert Christine von Kohl, who visited several places of detention with a delegation of the 'International Helsinki Federation for Human Rights' even before the release of the political prisoners. She describes her impressions as follows:

> The picture that presented itself to us when the gates of the camps opened and we came face to face with the prisoners was almost indescribable. Perhaps it can be compared with the images of hell and purgatory imagined by the Dutch Masters of the Renaissance: Emaciated bodies, one-legged people with the most primitive crutches and unhealed stumps, open wounds on arms and hands, blind and one-eyed people, eyes half hanging out, people with scabies with mites hanging from their necks like swarms of bees, mutes, paraplegics who were cared for and nursed by their fellow sufferers. Some of the injuries were the result of torture or disease, others of self-mutilation. We saw dormitories with broken windows and bunk beds, almost no mattresses or blankets, an unsegregated ward for the severe cases of tuberculosis. All this without any medical care. Drinking water was fetched from huge cisterns and was so dark and dirty that only unbearable thirst could tempt one to consume it.[53]

1.8 The Form in which the Regime was Overcome

Albania was the last country in Europe in which the communist regime toppled after the fall of the Iron Curtain. Following the death of the dictator Hoxha in 1985, there had initially been hopes that his successor Ramiz Alia would introduce reforms. However, no significant changes took place. Even after the democratization of the Eastern Bloc, Albania's external borders were still strictly guarded. In fact, because a growing number of Albanians were trying to leave the country, border controls were tightened even further.[54] The *Sigurimi* also continued to persecute dissidents, even though state propaganda was now talking about reforms.

In 1990, though, various intellectuals demanded a modernization of politics. This caused conflicts to break out within the Party of Labour of Albania (*Partia e Punës së Shqipërisë*, PPSh). In view of the far-reaching political changes in neighbouring countries and the deep economic crisis, many Albanians also expected reforms in their own country. On 12 June 1990, Ramiz Alia therefore issued *Decree 7393* 'On the Issuance of Passports and Visas'.[55] However, instead of easing tensions, open protests broke out. More than 6,000 Albanians stormed several Western embassies

53 Christine von Kohl, *Albanien* (Munich: C.H.Beck, 2003), 96–97. On the living and working conditions as well as the forms of punishment in the Spaç prison, see also Amnesty International, *Albania: Political Imprisonment and the Law* (London: Shadowdean Limited, 1984), 37–43.

54 Elez Biberaj, *Albania in Transition: The Rocky Road to Democracy* (Boulder Colorado: Westview Press, 1998), 49.

55 Accessed 7 January 2021, https://punetejashtme.gov.al/ngjarjet-e-2-korrikut-dhe-procesi-i-hapjes-se-shqiperise-drejt-proceseve-integruese-evropiane/.

in Tirana in early July, demanding permission to leave the country.[56] Tens of thousands of demonstrators supported them at a public gathering, which was eventually dispersed by force of arms. To calm the situation, Alia issued *Decree 7397* on 7 July, stating that Albanian citizens who had entered foreign embassies would not be prosecuted. In August, he met with intellectuals, most of whom condemned the human rights violations,[57] lack of media freedom and the privileges of the communist nomenclature, and called for political pluralism.[58]

In November 1990, Alia was still hoping to overcome the crisis via cosmetic reforms. He did not advocate political pluralism, but only a 'pluralism of ideas'. However, the electoral law passed by parliament on 13 November allowed independent candidates to stand in elections for the first time if they were supported by at least 300 registered voters. November also saw demonstrations break out again in Tirana, mainly by students. The religious ban was lifted and the first public Catholic service since 1967 took place in Shkodra. Under the impact of the protests, Ali was forced on 11 December 1990 to accept a list of demands drawn up by students. The following day, the first opposition party since 1945, the Democratic Party (DP), was founded.

The struggle to oust the PPSh lasted for more than a year. Despite a new law that was supposed to protect the numerous Hoxha monuments in Albania from protests, demonstrators toppled the dictator's statue in the central Skanderbeg Square in Tirana on 20 February 1991. For many Albanians, this was an act of considerable symbolic power. Nevertheless, the PPSh won the first democratic election on 31 March 1991, as the new opposition parties had just emerged and had few resources. Alia resigned all his posts in the party and had himself elected state president. Nevertheless, as soon as June 1991, the communist government had to step down under the impact of a general strike after four demonstrators were killed by the police in Shkodra. A government of national unity was formed in its place, in which the opposition DP under Sali Berisha also participated. In the March 1992 elections, the DP won almost 62 percent of the vote (92 out of 140 seats). The former communists, on the other hand, received only 25 percent, and Alia resigned from the office of president on 3 April 1992.

56 Biberaj, *Albania in Transition*, 50 – 51.

57 The head of a delegation of the Helsinki Commission, Dennis DeConcini, expressed concerns about human rights violations, the large number of political prisoners, the ban on religion and religious practices as well as the control of the media during his visit to Albania from 19 to 21 August 1990. See Biberaj, *Albania in Transition*, 56.

58 Biberaj, *Albania in Transition*, 55.

2 Transitional Justice

2.1 Political and Institutional Changes

The change in the political system in Albania was gradual, with the ruling PPSh ceding power only reluctantly. In many areas, little more than cosmetic changes occurred initially. On 13 June 1991, at the Tenth Party Congress, the PPSh changed its name to the Socialist Party (SP).[59] Ideologically, the party also adopted a new, less dogmatic course. Former members of the Politburo were now no longer allowed to run for office. However, the party remained the dominant force in Albania until the elections in March 1992.

The removal from power of the feared state security service was similarly slow. As late as spring 1990, Ramiz Alia urged intellectuals to support the *Sigurimi*.[60] After the elections in March 1991, the police, the border guard and the *Sigurimi*, which until that point had been part of the Ministry of the Interior, were institutionally separated. In its draft law 'On the National Intelligence Service', the Council of Ministers called for a complete reformation of the *Sigurimi*, but not its dissolution. In July 1991, the *Sigurimi* changed its name to the 'National Intelligence Service' (*Shërbimi Informativ Kombëtar*, SHIK), but its staff structure remained largely unchanged.[61]

After the elections, Albania received a new interim democratic constitution on 29 April 1991.[62] The references to Marxism-Leninism as the main ideology of the state and the leading role of the PPSh were deleted. The state now defined itself as democratic, committed itself to the protection of human rights, guaranteed private property, and the judiciary was declared to be independent.[63] In practice, however, Albania was still far from implementing these principles.

Law No. 7501 of 31 July 1991 was intended to transfer nationalized or collectivized land into private ownership. However, it provided not for the land to be returned to its former owners, but for it to be transferred to the peasant families living there on a pro-rata basis per person.[64] This form of reprivatization caused great discontent among the former large landowners, who had belonged to the most persecuted class. In contrast to urban residents, who received restitution of their property – al-

59 The congress did not go off without clashes between reformists and conservatives, who stood up and applauded in chorus: 'Party, Enver, we are always ready!'.

60 Dervishi, *Sigurimi i Shtetit*, 213.

61 Dervishi, *Sigurimi i Shtetit*, 217 ff.

62 While the current Constitution of the Republic of Albania would be approved by referendum only on 21 October 1998.

63 Accessed 8 January 2021, https://web.archive.org/web/20061210070437/http://www.oefre.unibe.ch/law/icl/al00000%5F.html#A006.

64 For further information on collectivization and the confiscation of property in Albania, see Alvin Saraçi, *Konfiskimi i pronës dhe grabitja e arit* 1944 – 1955 [*The Confiscation of Property and the Robbery of Gold*], (Tiranë: ISKK, 2012).

beit often only after lengthy proceedings – the former landowners mostly went away empty-handed.

After the victory of the Democratic Party in the March 1992 elections, the Albanian parliament had a fundamentally different composition than in the preceding decades. This was symbolized by the appointment of Pjetër Arbnori as Speaker of the House, a former political prisoner who had spent 28 years in prison and had only been released in 1989. Furthermore, the government was no longer dominated by former communists, even though the new President Berisha had also once been party secretary of the Faculty of Medicine at the University of Tirana. The first two symbolic acts of the new government were the removal of the red star (as a Soviet symbol) from the state flag, as well as from the military cap and the state emblem on 7 April 1992,[65] in addition to the exhumation of Hoxha's remains from the so-called Martyrs' Cemetery on 3 May 1992 and their burial in a public cemetery in the capital.[66]

In the following period, the willingness to come to terms with the past depended strongly on the respective balance of political power. From 1992 onwards, the DP and the SP alternated control of the government, with the former undertaking considerably more initiatives. However, words and deeds often diverged.

For example, on 30 October 2006, at the request of the DP, the Albanian parliament adopted a resolution of the Parliamentary Assembly of the Council of Europe dated January 2006, in which 'the massive human rights violations committed by the totalitarian communist regimes' were condemned in the strongest possible terms. In it, the Council of Europe also called on all communist or post-communist parties to come to terms with the history of communism and their own past and to distance themselves clearly from the crimes committed by those regimes.[67] In this context, the Albanian parliament pledged to open the *Sigurimi* files and to publish all documents testifying to crimes.[68] In addition, a review of school curricula, the erection of monuments, museification and so on was promised.

Likewise at the suggestion of the DP – then in opposition – the Albanian parliament passed a resolution in 2016 'to punish the crimes of communism against the clergy.'[69] The resolution also thanked the clergy for defending democracy and

65 Law No. 7588 'On the flag, state coat of arms, capital of the Republic of Albania and the national anthem' approved on 7.4.1992. Gazeta 55, 14 April 2019. Accessed 5 January 2022, https://www.55news.al/dossier/item/211839 – 1992-si-u-hoq-ylli-i-kuq-sovjetik-nga-flamuri-kombetar-dhe-stema-shteterore.

66 President Berisha's Decree No. 1018 stripped him of all honours and titles on 13 February 1995, and his mortal remains were moved from the 'Mother Teresa' military cemetary to a simple cemetery in Tirana, in Sharra.

67 Resolution 1481 (2006). Accessed 8 January 2021, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17403.

68 Official Bulletin No. 117, 15 November 2006, 4669.

69 Official Bulletin No. 217, 3. November 2016, 22764. Accessed 8 January 2021, http://aku.gov.al/wp-content/uploads/2016/06/217 – 2016.pdfNdryshimet-e-ligjit-per-MB.-e-bimeve.pdf.

human rights. This was triggered on 25 April 2016 by Pope Francis naming as martyrs 38 Albanian clerics who had died due to hatred directed against their faith.[70] However, the role of these resolutions remained largely symbolic. To date, only a few steps have been taken that have contributed to the implementation of these recommendations.

2.2 Prosecution

Attempts to prosecute communist injustice in Albania and to bring those responsible to justice can be divided into different phases, which were respectively strongly influenced by the prevailing balance of political power at the time. Put bluntly, one could phrase this as follows: Whenever the former opposition was in power, progress was made, and whenever the former communists were in government, the corresponding efforts faded away.

2.2.1 The Nomenklatura Trials (1991–1994)

Even before the communists were ousted, their leadership felt compelled to take legal action against certain individuals who were former functionaries within the communist hierarchy itself. The first focus was on the dictator's widow, Nexhmije Hoxha (1921–2020), who was expelled from the party in June 1991. On 4 December 1991, she was arrested for embezzling state funds between 1985 and 1990 and finally sentenced to nine years in prison.[71]

After the change of government in March 1992, the judiciary took action against other high-ranking officials. Between September 1992 and 1993, former party leader Alia[72] and other members of the politburo were arrested for embezzlement. This was triggered by a report given by Genc Ruli, at that time Minister of Finance, in parliament on 29 July 1992. In his report, Ruli described the lavish lifestyles of 26 functionary families from the so-called nomenklatura. He focused on the Hoxha family, the high consumption of food and drink among functionary families in general, their

70 Accessed 8 January 2021, https://cruxnow.com/global-church/2016/07/vatican-sets-nov-5-date-beatification-38-albanian-martyrs/.

71 At a later date, Ramiz Alia wrote that he neither gave the order nor knew about her arrest. See Ramiz Alia, *Shpresa dhe zhgënjime* [*Hopes and Disappointments*] (Tirana: Dituria, 1993), 89.

72 Alia was placed under house arrest in September 1992 and arrested a year later. While still in prison, he was convicted again of crimes against humanity in 1994. First the Court of Appeal, and then the Court of Cassation reduced his sentence to three years. Ramiz Alia was finally released on 7 July 1995.

countless trips abroad and the medical treatments received there.[73] The families had lived in a cordoned-off neighbourhood of the capital, the 'Blloku', which was closely guarded by army forces, the police and 230 *Sigurimi* employees.[74]

On 2 July 1994, Alia was sentenced to nine years in prison for corruption. Former Interior Minister Hekuran Isai received a five-year prison sentence, his successor Simon Stefani eight years. Former Prime Minister Adil Çarçani received a five-year suspended sentence. The former head of the Supreme Court Aranit Çela was also sentenced to seven years' imprisonment in 1994, the last *Sigurimi* director Zylyftar Ramizi to six years and ex-Prosecutor General Rrapi Mino to four years. However, most of the sentences were later overturned. Alia was released as soon as 1995.

Even during these trials, there were public discussions about the criminal proceedings. Many former political prisoners expressed disappointment that the Albanian judiciary used the financial misconduct of the officials as a reason to investigate the nomenklatura, but did not target their responsibility for persecution and repression. DP leader Berisha in turn was fundamentally opposed to criminal trials because they reminded him of the Hoxha era. He took the view that only high-ranking functionaries like Nexhmije Hoxha, who 'fattened themselves on the backs of the people', should be punished.[75]

2.2.2 The Genocide Trials (1995 – 1997)

In the following years, however, efforts to prosecute those responsible for the communist dictatorship initially intensified. On 22 September 1995, three years after the Democrats came to power, the parliament, urged by the conservative wing of the party, passed the so-called Genocide Law No. 8001 'On Genocide and Crimes against Humanity committed in Albania during the Communist Regime due to Political, Ideological or Religious Motives'. The law not only called for harsher sentences for crimes against humanity, but also provided for the exclusion of persons from political life until 2002. On the basis of this law, 24 former high-ranking communist officials were arrested by January 1996, some of whom had already been convicted of embezzlement. In February 1996, former President Alia was likewise arrested again. The charge against him was now no longer abuse of office but 'crimes against humanity', 'ordering the deportation and detention of thousands of citizens before 1991' and 'ordering the murder of people who tried to leave the country in 1990 – 1991. '[76]

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73 Robert C. Austin and Jonathan Ellison, 'Albania', in Lavinia Stan (ed), *Transitional Justice in Eastern Europe and the Former Soviet Union. Reckoning with the Communist Past* (New York: Routledge, 2009), 176 – 200, at 181 – 182.

74 Dervishi, *Sigurimi i Shtetit*, 182 – 184.

75 Biberaj, *Albania in Transition*, 125.

76 Biberaj, *Albania in Transition*, 31.

On the basis of the new law, a number of criminal trials took place. The sentences, most of which were very severe at first, were later mitgated in the appeals process. For example, Aranit Çela, one of the most notorious judges of the communist regime, who had been personally involved in over 650 political trials, was initially sentenced to death for 'crimes against humanity' on 24 July 1996. The last *Sigurimi* director Zylyftar Ramizi and Ex-Prosecutor General Rrapi Mino received the same sentence. In the second instance, the sentences were commuted to 25 years' imprisonment.[77]

In some cases, however, the sentences did not have to be served. For example, in July 1996, the Court of Appeal decided to release Haxhi Lleshi, Chairman of the People's Committee until 1982, and Manush Myftiu, former Prime Minister and head of the Internment and Deportation Commission, on the grounds of age and illness.[78] Their life sentences were commuted to five years' suspended imprisonment.

2.2.3 The Pardoning of Officials (1997 – 2005)

After the socialists' return to power in 1997, the courts reviewed the cases of crimes against humanity mentioned above. On 20 October 1997, the Court of Appeals decided to drop the charges against Ramiz Alia and several other high-ranking officials. According to the court, they 'could not be punished for acts that were not illegal at the time they were committed.'[79] In 1999, the Court of Appeals also acquitted those functionaries who had already been convicted in 1996, including among others Foto Çami (Central Committee Secretary for Propaganda and member of the Central Committee 1971 – 1991), Prokop Murra (Minister of Defence 1982 – 1990), Muho Asllani (Minister of Agriculture 1986 – 1990), Gaqo Nesho (senior party functionary in Pogradec, Vlora and Berat from 1970 until the late 1980s), Zef Loka (director in various positions in the Ministry of the Interior 1976 – 1990) and Dilaver Bengasi (Deputy Prosecutor from 1973, Director of Police from 1985 to 1990).

However, the aforementioned officials were already out of prison when the court acquitted them. Indeed, after the collapse of the pyramid schemes, prisons were opened throughout Albania on 13 March 1997, with all imprisoned functionaries released. In total, with Hoxha's widow and his successor Alia, 36 leading functionaries were convicted in Albania, none of whom served their full sentences. It is not known how many of them applied for compensation for imprisonment after their acquittals, but it is reported that this was granted in many cases.

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77 'Albania: Judge in Albania revokes death sentences on three former communist officials convicted of crimes against humanity', accessed 17 March 2021, https://reuters.screenocean.com/record/566071.

78 Austin and Ellison, *Albania*, 186.

79 Bledar Abdurrahmani, 'Transitional Justice in Albania: The Lustration Reform and Information on Communism Files', *Interdisciplinary Journal of Research and Development*, Vol. 5, no. 3 (Durrës: Aleksandër Moisiu, 2018), 123. See also Austin (2009), 192 – 193.

While in other transitional societies criminal justice was partly linked to the fact that those responsible publicly apologized for their actions, in Albania only two cases of repentance are known. One case is that of Liri Belishova, a former member of the Politburo and the Central Committee, who publicly apologized after 1990. The second case is that of Bashkim Shehu, son of the former Prime Minister and most powerful man at Hoxha's side, Mehmet Shehu. Bashkim Shehu not only publicly distanced himself from his father's actions, but to this day is involved in coming to terms with the regime through literature. However, his father fell out of favour prior to his death, which was presented as suicide by the regime, and the son himself was subsequently imprisoned from 1982 to 1991.

2.3 The (Non-)Replacement of the Elites

As with most regime changes, the question arose in Albania after the end of the communist dictatorship as to what extent, apart from the top rulers, the functional elites below should and could be replaced. In his 1991 book *The Third Wave*, the political scientist Samuel Huntington had already come to the conclusion that the approach of new governments against the old apparatuses of leadership decisively determines the type of transition in such societies. In this 'mode of exit', the elites at the top of these societies would play a special role.[80]

The situation in Albania during the change of regime in 1991/1992 was characterized by the fact that there were practically no independent counter-elites. For 45 years, the Stalinist system had not even informally allowed the emergence of dissident groups, liberal networks or religious communities. Almost all political opponents had been eliminated or imprisoned.[81] Albania was also extremely shielded from the outside world, so that there was virtually no communication with like-minded people in other countries. Even inter-state relations with other nations or an international exchange of goods had only developed very slowly in the very last years of the regime.

Under these conditions, there was an exchange of individuals after the fall of the dictatorship, but not a change of elites. Former political prisoners played hardly any role in shaping the process of transformation. Only very few of them were able to influence the decisions made at the time, and they were usually only represented symbolically. In contrast, functionaries of the former Communist Party, who had worked with Alia for years, held leadership positions in the new parties. For example, Fatos Nano, an employee of the Institute for Marxist-Leninist Studies headed by Hoxha's widow, was elected chairman of the SP. The head of the newly-founded DP, Sali Be-

80 Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (London: University of Oklahoma Press, 1991), 214–216.

81 Krasniqi, *Trajtimi i të kaluarës*, 270.

risha, was also a former party secretary at the University of Tirana who had negotiated with the protesting students on Alia's behalf in 1991, but then adopted their demands.[82]

It was not until 1995, more than three and a half years after the DP's electoral victory, that a law was passed providing for the verification of management personnel in public institutions, from public service media to universities. Law No. 8043 'On the Verification of Civil Servants and Other Persons Associated with the Protection of the Democratic State' (Verification Law) of 30 November 1995 stipulated that persons who had been members of the Politburo, the Central Committee, the People's Committee, the military, the judiciary, the police or the *Sigurimi* between 28 November 1944 and 31 March 1991 could no longer hold leadership positions.[83] The law also prohibited certain former functionaries from running for public office. The commission set up specifically to implement the law in practice decided to exclude 139 people from the elections scheduled for 1996. 45 of them belonged to the SP, including its leader, Fatos Nano, while 23 were members of the DP.

The law was rejected by the SP, which was in opposition at the time. It accused Berisha of using the instrument of lustration as a political weapon. The Court of Cassation and the Constitutional Court did, in fact, soon repeal the law, so that those excluded were able to stand in the elections on 26 May 1996 after all.[84] Nevertheless, the DP was able to win a three-quarters majority at the time, with the SP accusing it of massive electoral fraud.

At the beginning of 1997, Albania experienced a serious domestic political crisis. So-called pyramid schemes had led to the destruction of a large part of private savings. In the so-called lottery uprising that followed, the power of the state largely collapsed. This development prompted the Albanian parties to form a transitional government of national reconciliation in March 1997. Only with the help of foreign troops was it possible to restore order in the country and hold new elections in June 1997. During this time, the Verification Law was also modified. The new, toned-down version of 13 May 1997 stipulated that only former members of the Politburo, employees of the *Sigurimi* and persons convicted of human rights violations could be excluded from standing in the elections.[85]

The victory of the former communists in the early elections in June/July 1997 led to the political rehabilitation of many key figures of the old regime. For example, the former 1991 Minister of Health, Sabit Brokaj, became Minister of Defence in the new government. Another former 1991 minister, Ylli Bufi, was appointed Minister for Eco-

82 Biberaj, *Albania in Transition*.

83 Jonila Godole, 'Das Erbe der kommunistischen Diktatur in Albanien', in Jörg Baberowski et al (eds.), *Disziplinieren und Strafen* (Berlin: Campus Verlag, 2021)., S. 293 – 311.

84 Walter Glos and Jonila Godole, 'Albanien: Aufarbeitung der kommunistischen Vergangenheit, Dezember 2017'. *Konrad-Adenauer-Stiftung*, accessed 12 January 2021, https://www.kas.de/c/document_library/get_file?uuid=21700176-c5c0-ecc8 – 0c12 – 66e59964e5a0&groupId=252038.

85 IDMC, (Non)rehabilitation of Political Persecuted, 36 – 37.

nomic Affairs and Privatization. The communist regime's last Minister of the Interior, Gramoz Ruçi, still holds the post of parliamentary speaker today.

Representatives of the old elite were also re-appointed to leadership positions in many institutions, such as the state-owned media, the scientific academies or the universities. Former employees of the *Sigurimi* or military officers were also given high state positions. Even in independent media, human rights and civil society organizations, former communist cadres played an important role. The new Minister of Defence, Sabit Brokaj, and the former Minister of the Interior of 1991, Gramoz Ruçi, even began to organize former military and *Sigurimi* personnel in Sarande, Tepelene and Vlore in the south of the country.[86] Elez Biberaj, one of the pioneers in research on the Albanian transition, has the following to say about this process of restoration:

> Most of the new appointees in senior posts were sons and daughters of the old Communist nomenklatura, and many had close family or personal ties with the powerful clan of Hysni Kapo, Hoxha's closest associate. In addition, the Socialists restricted the authority of the predominantly Democratic Party-controlled local governments. More than 400 local officials were summarily dismissed and replaced with Socialist supporters. Such retribution could not but undermine national reconciliation.[87]

2.4 Reparations

In a similar fashion to the (non-)change of elites, the rehabilitation and compensation of the victims of the communist dictatorship was a lengthy and ultimately unsatisfactory process. Here, too, it became apparent that it was primarily the respective political balance of power that decided whether victims received reparations or not.

Although the state party had declared its commitment to pluralism in November 1990, the penal provisions to suppress oppositional aspirations were still in force at that time, and Albanian prisons were still filled with political prisoners. Some of them had even been arrested only a short time previously, during the protests in Tirana and Shkodra during January and February 1990, others for attempting to cross the border or enter foreign embassies in July 1990.[88] Only two days before the first pluralist elections on 31 March 1991, all political prisoners were released through an amnesty by decree of the Committee of the People's Assembly.[89] After the elections, the parliament launched a so-called 'National Reconciliation Programme' by condemning the communist system and proclaiming the innocence of all political

86 Biberaj, *Albania in Transition*, 337 and 339.

87 Biberaj, *Albania in Transition*, 353.

88 Krasniqi, Afrim, 'Trajtimi i të kaluarës në raport krahasues: Shqipëria dhe Evropa Lindore', in *Të mohuar nga regjimi* ['Treatment of the Past in a Comparative Report: Albania and Eastern Europe', in *Denied by the Regime*] (Tirana: AIDSSH, 2020), 64.

89 Dervishi, *Internimi dhe burgimi komunist*, 224–225.

prisoners. Then, on 30 September 1991, it passed Law No. 7514 'On the Innocence, Amnesty and Rehabilitation of Formerly Convicted and Politically Persecuted Persons'.[90] The government also promised to take all possible measures to compensate and rehabilitate those who had been wrongfully accused, tried, convicted, imprisoned, interned or persecuted for political offences.[91]

Following the opposition DP's election victory in March 1992, the new government sought to implement financial compensation for the victims of the communist dictatorship. To this end, it formed a Committee for Former Political Prisoners and Persecutees (KIDPP), which was active from January 1993 to December 1994. It had about 120 specialists in all districts to collect data on and from the politically persecuted.

On 29 July 1993, Parliament passed Law No. 7748 'On the Status of Political Prisoners and Persons Formerly Persecuted by the Communist System'. The law determined the basic criteria according to which a person would be considered convicted or politically persecuted and the amount of material compensation to which they would be entitled. Political persecution was considered to be 'any act or omission on the part of state structures that resulted in the loss of life, liberty, civil rights and other restrictions by order or decision of the party organs from 8.11.1941 to 22.3.1992.'[92] Furthermore, a number of accompanying social measures were introduced, such as granting student scholarships to children from persecuted families, providing social housing or enabling politically persecuted people to receive an education regardless of age.[93]

However, the new legal provisions were only partially implemented. In April 1994, 180 former political prisoners therefore protested that they should receive financial compensation under Law No. 7748. Following the recommendations of the KIDPP, the Council of Ministers subsequently passed Resolution No. 184 on 4 May 1994, which stipulated that politically persecuted prisoners should be compensated with 120,000 ALL (approximately 1,200 US dollars) for each year that they had spent in prison.[94] The years in prison were also counted as years of work for pension purposes, being recognized as so-called 'hard working time', so that one year in prison counted as two years of ordinary work.

Nonetheless, more than 50 percent of the capital compensation was paid out in the form of vouchers, with which those affected could preferentially purchase state

90 Accessed 13 January 2021, http://www.ikub.al/ligje/109300001/Article_Per-pafajesine-amnistine-dhe-rehabilitimin-e-ish-te-denuarve-dhe-te-perndjekurve-politike-.aspx?cookiesEnabled=false.

91 IDMC, *(Non)rehabilitation of Political Persecuted in the Process of Transitional Justice in Albania (1991–2018)*. (Tirana: IDMC, 2019).

92 IDMC, *(Non)rehabilitation of Political Persecuted*, 10.

93 Kretsi, *Verfolgung und Gedächtnis*, 149; see also Law No. 7748, accessed 13 January 2021, http://ishperndjekurit.gov.al/al/wp-content/uploads/2015/03/Ligj-stat.-e-te-perndjekurve-politike-7748-DT-04.08.1993.pdf.

94 IDMC, *(Non)rehabilitation of Political Persecuted*, 11.

property. For most, this form of compensation was practically worthless because many privatizations had taken place long before and former political prisoners usually lacked the capital to make major investments. According to the Supreme Audit Institution (*Kontrolli i Lartë i Shtetit*, KLSH), the democratic government distributed about 2.2 billion ALL (about 17.5 million Euros) to former political prisoners between 1993 and 1997.[95]

As a result of the government's refusal to negotiate further compensation, August 1994 saw renewed protests and a hunger strike by former persecutees. However, the protests were forcibly ended on 12 August at the behest of the then President Berisha. The Ministry of the Interior subsequently claimed that the 287 hunger strikers had included 65 former *Sigurimi* informers and 35 common criminals.[96] The strikers rejected these allegations, but felt compelled to suspend their strike after the aforementioned police intervention.

When the socialists returned to power in 1997, they founded a new institution, the Institute for the Integration of the Formerly Politically Persecuted (*Instituti për Integrimin e ish-të Përndjekurve*, IIP). Its main purpose was to push for the restructuring of compensation benefits.[97] Five categories of recognized 'political persecutees' were established. These were those who had suffered

- Imprisonment;
- Death during imprisonment;
- Time in labour camps;
- Execution; and
- Mental injury.

For imprisonment and time in labour camps, those affected were only entitled to very little financial compensation.

According to the IIP, there were a total of 42,772 beneficiaries who were entitled to compensation. However, during the period 1998 to 2006 the payment of compensation was delayed until it finally did not take place at all. The socialist Minister for Economic Affairs Arben Malaj explained that the Albanian state was simply too poor to compensate the politically persecuted.[98] In 2004, protests broke out once again. They were also violently suppressed, this time by the socialist government. As a result of the protests, compensation for imprisonment was officially increased in July 2004 from 0.49 US dollars per day to 1.49 US dollars. However, no payment was

95 KLSH, *Raport Auditimi i Performancës Rehabilitimi i ish-përndjekurve politikë në periudhën e tranzicionit, 06/2016*, 15.

96 Biberaj, *Albania in Transition*, 161.

97 IIP, accessed 16 December 2020, http://ishperndjekurit.gov.al/al/wp-content/uploads/2015/03/Ligj_8246_01.10.1997.pdf.

98 Matt Prodger, 'Albania Seeks to Compensate Political Prisoners', BBC News, 23 July 2004. Accessed 11 January 2021, http://news.bbc.co.uk/2/hi/europe/3917293.stm.

made.[99] After the elections of 2005, which brought the DP back to power, the efforts to implement reparations were intensified once again. Thus, on 12 November 2007, the Albanian parliament passed Law No. 9831, which provided for former political prisoners to be compensated with 2,000 ALL (20 US dollars) for each day in prison and internees from the barbed wire camps that existed until 1954 with 1,000 ALL per day (10 US dollars).[100] The compensation was to be paid in eight instalments and, if the persons concerned were no longer alive, their family members were to receive the remuneration. Payments began a good two years later.

The DP government also established an Institute for the Studies of Communist Crimes and Consequences in Albania (*Instituti i Studimeve të Krimeve dhe Pasojave të Komunizmit*, ISKK) on 25 February 2010.[101] According to its figures, the number of people persecuted was around 100,000. This was three times higher than the figure given by the ISKK's predecessor institution, the IIP.[102] In 2011–2012, compensation payments were again interrupted. This time, the government argued that the global economic crisis had reached Albania. In response, from September to October 2012, about 20 politically persecuted people again protested with a sit-in. In order to calm the situation, Prime Minister Berisha declared that people over 65 would receive the compensation to which they were entitled. In protest, two of the strikers then set themselves on fire. While one survived with severe burns, the second succumbed to his injuries in hospital a few weeks later.[103]

In 2013, there was another change of government in Albania, which, as in previous years, also had an impact on reparations policy. The socialist government under the new Prime Minister Edi Rama promised a review of the previous compensation procedures and categories. On 24 July 2014, the Compensation Law No. 9831 was amended again, and those affected were now divided into two categories: primary victims (those still alive at the time of payment) and non-primary (relatives). The politically persecuted welcomed the law, as it now also benefited women or the sick. However, they did not believe that the new categorization would speed up the payment process.

In September 2018, the law was amended again, removing the payment in instalments, and 430 persecutees received the full amount of their compensation. Later that same month, a new Law No.57/2018 revoked the right to compensation for grandchildren in cases where close family members and the persecuted themselves were no longer alive.

99 Kretsi, *Verfolgung und Gedächtnis*, 151.

100 IDMC, *(Non)rehabilitation of Political Persecuted*, 15.

101 ISKK, accessed 11 January 2021, http://www.iskk.gov.al/wp-content/uploads/2015/01/LIGJ.pdf

102 Raporti (Bericht), Online-Panorama, 28 March 2016, accessed 11 January 2021, http://www.panorama.com.al/raporti-6-mije-te-vrare-gjate-diktatures-34-mije-te-burgosur/, 16–17.

103 Idrizi, 'Zwischen politischer Instrumentalisierung und Verdrängung', 93; IDMC, *(Non)rehabilitation of Political Persecuted*, 19.

2.5 Reconciliation

The term 'reconciliation' (Albanian: *pajtim*) is not entirely clear in the Albanian context. It is still used today in connection with the reconciliation of families in cases of blood feuds in northern Albania and Kosovo. In this type of reconciliation, the parties forgive each other for the blood spilt in order to live together peacefully in the future. In a religious context, the concept of reconciliation was less known, as religions were banned in communist Albania.

Attempts by international institutions to bring the actors in Albania to mutual understanding and reconciliation were rarely welcomed. They were even seen by former persecutees as disguised attempts to make the communist terror fade into obscurity. The fact that the question of guilt was hardly addressed following the change of regime further contributed to this.[104] The argument that the communists had also been persecuted and that, consequently, all Albanians had suffered persecution and were therefore equally 'victims and accomplices' or 'co-sufferers and accomplices' is still widely accepted in society today. Berisha, who was the first to use these terms in 1992,[105] was even suspected of having made a corresponding agreement with the previous regime and therefore of not being interested in exposing its crimes and bringing those responsible to justice.[106]

On the other hand, the spirit of class struggle continues to persist in Albanian society to some extent. Although this is no longer an ideological confrontation between communists and anti-communists, political affiliation with the two major parties, the SP and DP, still divides society into two hostile camps. In any case, a process of reconciliation – which for many victims presupposes an admission of guilt – has not taken place in Albania.

2.6 Laws Relating to Transitional Justice

From 1991 onwards, the process of coming to terms with the past in Albania concentrated mainly on two points: the passing of lustration laws and the material compensation of victims. The most important laws relating to transitional justice are listed

104 On the question of guilt in post-communist Albania according to Karl Jaspers' categorization (1945), see Jonila Godole, 'Das Erbe der kommunistischen Diktatur in Albanien', in Jörg Baberowski et al. (eds.), *Disziplinieren und Strafen* (Berlin: Campus Verlag, 2021), 293 – 311.

105 Possibly influenced by the Czech President, Vaclav Havel, who spoke in his first New Year's address about the common legacy of totalitarianism: '*We are, therefore, all responsible, although of course to differing degrees, for the functioning of the totalitarian apparatus. None of us was only a victim. We are all, at the same time, its creators*'. See Vaclav Havel, 'New Years' Address to the Nation', in *The Art of the Impossible* (New York, 1984), 4.

106 Biberaj, *Albania in Transition,* 156.

below (Tab. 1) and will be described in more detail in the relevant chapters of this study.

Tab. 1: Albanian laws relating to transitional justice.

Legal Norm	Date	Content
Law No. 7514	30.9. 1991	On the Innocence, Amnesty and Rehabilitation of Formerly Convicted and Politically Persecuted Persons. This law was amended three times under the DP government, first on 14 January 1993, Law No. 7660; on 8 June 1993, Law No. 7719; and on 7 December 1993, Law No. 7772.
CMD No. 445[107]	13.12. 1991	To Determine the Time of Serving the Administrative Sentence by Former Internees and Deportees for Political Issues when Official Documents are Missing
Law No. 7598	1.9. 1992	On the Creation of a Special Fund for Former Prisoners and Politically Persecuted Persons
Law No. 7660	14.1. 1993	For some changes in Law No. 7514, dated 30. 9.1991 'On the Innocence, Amnesty and Rehabilitation of Formerly Convicted and Persons Politically Persecuted'
CMD No. 40	29.1. 1993	On Economic Support for Former Prisoners and Politically Persecuted Persons
CMD No. 42	29.1. 1993	For a change in CMD No. 445, dated 13.12.1991 'To Determine the Time of Serving the Administrative Sentence by Former Internees and Deportees for Political Issues when Official Documents are Missing'.
Law No. 7698	15.4. 1993	On the Restitution and Compensation of Property to Former Owners.
CMD No. 230	19.5. 1993	For an addition to CMD No. 445, dated 13.12.1991 'To Determine the Time of Serving the Administrative Sentence by Former Internees and Deportees for Political Issues when Official Documents are Missing'.
Law No. 7719	8.6. 1993	For some additions to Law No. 7760, dated 14.1.1993 'On some changes in Law No. 7514, dated 30.9.1991 On the Innocence, Amnesty and Rehabilitation of Formerly Convicted and Politically Persecuted Persons'.
Law No. 7748	29.7. 1993	On the Status of Political Prisoners and Persons Formerly Persecuted by the Communist System.
Order of the Council of Ministers No. 12	16.9. 1993	On the Procedure for Granting the Status of Ex-convicts and Persons Politically Persecuted by the Communist System.

107 CMD, The Council of Ministers Decision (*Vendimi i Këshillit të Ministrave*).

Tab. 1: Albanian laws relating to transitional justice. *(Continued)*

Legal Norm	Date	Content
CMD No. 491	18. 9. 1993	For a change in CMD No. 445, dated 13. 12. 1991 'To Determine the Time of Serving the Administrative Sentence by Former Internees and Deportees for Political Issues when Official Documents are Missing'.
CMD No. 504	18. 10. 1993	On the Issuance of State Obligations for the Compensation of Former Owners and Politically Persecuted.
CMD No. 9	17. 1. 1994	For some changes in the decision of the Council of Ministers, No. 504, dated 18. 10. 1993 'On the Issuance of State Obligations for the Compensation of Former Owners and Politically Persecuted'.[108]
CMD No. 86	7. 3. 1994	For a change in CMD No. 445, dated 13. 12. 1991 'To Determine the Time of Serving the Administrative Sentence by Former Internees and Deportees for Political Issues when Official Documents are Missing'.
CMD No. 184	4. 5. 1994	On the Provision of Property Compensation to Former Political Prisoners and Persons Persecuted by the Communist System.
CMD No. 264	6. 6. 1994	For a change in CMD No. 184, dated 4. 5. 1994 'On the Provision of Property Compensation to Former Convicts and Politically Persecuted by the Communist System'.
Order of the Council of Ministers No. 1	6. 6. 1994	On the procedure of opening and using accounts with the savings bank, on providing property compensation to former persecuted and politically convicted Persons.
CMD No. 454	12. 9. 1994	On the Criteria for Determining the Persons of the High Communist Nomenclature, for the Effect of the Status of Former Convicts and Politically Persecuted Persons.
CMD No. 476	10. 10. 1994	On the Accommodation Procedures for Former Prisoners and Those Politically Persecuted by the Communist System.
Decision of the Constitutional Court No. 5	28. 6. 1995	With the object: 'Is it anti-constitutional or not?' Law No. 7748, dated 29. 7. 1993 'On the Status of Political Prisoners and Persons Politically Persecuted by the Communist System', as well as, in particular, CMD No. 454, dated 12. 09. 1994 'On the Criteria for Determining the Persons of the High Communist Nomenclature, for the Effect of the Status of Former Convicts and Politically Persecuted Persons'.

108 Official Bulletin No.8, 29 July 1994. Accessed 6 January 2022, https://qbz.gov.al/eli/vendim/1994/01/17/9.

Tab. 1: Albanian laws relating to transitional justice. *(Continued)*

Legal Norm	Date	Content
Law No. 8001	22.9. 1995	On Genocide and Crimes against Humanity Committed in Albania during the Communist Regime due to Political, Ideological or Religious Motives (The Genocide Law).
Law No. 8043	30.11. 1995	On the Verification of Civil Servants and Other Persons Associated with the Protection of the Democratic State (The Verification Law).
Law No. 8115	28.3. 1996	For an Exception to the Rules provided in the Legal Inheritance under the Civil Code.
Law No. 8217	13.5. 1997	For a change in the Law No. 7748, dated 29.7.1993 'On the Status of Political Prisoners and Persons Politically Persecuted by the Communist System', amended by Law No. 7771, dated 7.12.1993.
Law No. 8219	13.5. 1997	For a change in the Law No. 8001, dated 22.9.1995 'On Genocide and Crimes against Humanity Committed in Albania during the Communist Regime due to Political, Ideological or Religious Motives'.
Law No. 8220	13.5. 1997	For a change in the Law No. 8043, dated 30.11.1995 'On the Verification of Civil Servants and Other Persons Associated with the Protection of the Democratic State'.
Law No. 8231	19.8. 1997	For a change in the Law No. 8001, dated 22.9.1995 'On Genocide and Crimes against Humanity Committed in Albania during the Communist Regime due to Political, Ideological or Religious Motives', amended by Law No. 8219, dated 13.5. 1997.
Law No. 8232	19.8. 1997	For some changes in the Law No. 8043, dated 30.11.1995 'On the Verification of Civil Servants and Other Persons Associated with the Protection of the Democratic State', amended by Law No. 8151, dated 12.9.1996 and by Law No. 8220, dated 13.5. 1997.
Law No. 8246	1.10. 1997	On the Institute for the Integration of the Formerly Politically Persecuted (IIP).
Law No. 8280	15.1. 1998	For some changes in Law No. 8043, dated 30.11.1995 'On the Verification…' amended by Law No. 8151, dated 12.9.1996; by Law No. 8220, dated 13.5.1997 and by Law No. 8232, dated 19.8.1997.
Law No. 8665	18.9. 2000	For an addition to Law No. 7748, dated 29.7.1993 'On the Status of Political Prisoners and Persons Politically Persecuted by the Communist System'.
Resolution	15.11. 2006	On the Punishment of Crimes Committed by the Communist Regime in Albania.

Tab. 1: Albanian laws relating to transitional justice. *(Continued)*

Legal Norm	Date	Content
Law No. 9831	12. 11. 2007	On the Compensation of Former Political Prisoners of the Communist Regime.[109] The law was further amended on 13. 09. 2018 (Law No. 57/ 2018).
Law No. 10034	22. 12. 2008	On the Impeccable Image of High-Ranking Public Administration Officials and Elected Officials.[110]
Law No. 10242	25. 2. 2010	On the Institute for the Studies of Communist Crimes and Consequences in Albania (ISKK).
Law 45/2015	30. 4. 2015	On the Right to Information on Documents of the former State Security Service of the People's Socialist Republic of Albania.[111] The law was amended on 29. 7. 2020 (No. 114/2020).[112]
Resolution	3. 11. 2016	On the Punishment of the Crimes of Communism against the Clergy, as well as in Special Gratitude for the Role and Activity of the Clergy in the Defence of Democratic Values, Fundamental Freedoms and Human Rights.
Law No. 83/2018	15. 11. 2018	On the Ratification of the Agreement between the Council of Ministers of the Republic of Albania and the International Commission on Missing Persons (ICMP).[113]
CMD No. 297	19. 5. 2021	For the Approval of Financial Compensation for Former Political Prisoners of the Communist Regime.[114]

Note: All laws and regulations listed in this table can also be found online on the websites of various institutions and media portals.[115] The law number and year of enactment suffice as search terms in this context. A reliable source is the website of the IIP, which lists all laws passed with respect to transitional justice from 1991 to 1999.[116] The Official Bulletins of the government (*Fletore Zyrtare*), in which all laws are published after approval by Parliament, can be found online in the archive of the Official Bulletin of the Republic of Albania for the period 2000 – 2016.[117]

109 Official Bulletin No. 160, 3 December 2007, 4669. Accessed 7 January 2021, https://qbz.gov.al/eli/fz/2007/160/8f9b44c7–0db0 – 4fcf-b571 – 98b791d3c408;q=3%20dhjetor%202007.

110 Official Bulletin No. 202, 22 December 2008, 10929. Accessed 7 January 2021, https://qbz.gov.al/eli/fz/2008/202/a6ba8cc7 – 1f26 – 408b-901b-c505ec0e2ec5;q=Ligj%20nr%2010%20034.

111 Official Bulletin No. 88, 28 May 2015, 4671. Accessed 8 January 2021, http://ishti.gov.al/wp-content/uploads/2015/06/FLETORJA-ZYRTARE.pdf.

112 Accessed 12 January 2021, http://autoritetidosjeve.gov.al/wp-content/uploads/2020/09/ligj_45_30042015_perditesuar_QBZ-blu-i-ri.pdf.

113 http://www.parlament.al/Files/Akte/20181120112454ligj%20nr.%2083,%20dt.%2015.11.2018.pdf.

114 Official Bulletin No. 78, 25 May 2021, 8043. Accessed 6 January 2022, https://qbz.gov.al/eli/fz/2021/78/b646edae-87f6 – 424b-94f2-bb9aff2cf9af.

When analysing the legislation, it is striking how much transitional justice was determined by current political considerations. The largest legal initiatives occurred between 1992 and 1997, when a number of laws were passed to financially compensate the politically persecuted. These laws, as shown in the table, have been constantly amended and supplemented with CMDs and other legal acts, which led to significant delays in implementation. The reason for the amendments was in most cases related to the amounts of compensation, which were considered insufficient by those affected. On the other hand, the numerous amendments to these laws express the effort of the Albanian state to reduce in various forms the expenses for financial compensation. For this reason, the beneficiary categories in particular, but also the amounts paid out, were changed several times. According to the Supreme Audit Institution (*Kontrolli i Lartë i Shtetit*, KLSH), based on the current compensation system and the speed of its implementation, it will take another 16 years and cost approximately 300 million US dollars to complete the compensation process.[118]

The payment of compensation was also evidently instrumentalized in the election campaign, as the KLSH's 2017 report shows. In the election years of 2009 and 2013, when the DP was in power, 5,837 people were compensated with 21 million US dollars and 24,933 people were compensated with 29 million US dollars respectively. These are strikingly high payments compared to previous years when there were no elections, suggesting that they also served to win over certain voters. From 2014, when the SP was in power, the total number of beneficiaries decreased significantly. At the same time, the focus was now on affected persons who were still alive.[119]

2.7 Access to Files

Albania was the last post-communist country in Europe to have made the files of its former secret police, the *Sigurimi*, accessible. While former political prisoners demanded the opening of the files and a transparent handling of them at an early stage, the government remained indecisive for a long time – regardless of whether it was constituted by the DP or the SP. Thus, after his election victory on 22 March

115 Accessed 6 January 2022, https://telegraf.al/i-pakategorizuar/ja-27-ligjet-qe-piketuan-skenarin-i-mashtrimit-25-vjecar-te-te-perndjekurve-politike/

116 Accessed 20 September 2020, http://ishperndjekurit.gov.al/al/wp-content/uploads/2015/03/Kuadri-ligjor-i-te-perndjekurve-politike.pdf

117 Accessed 20 September 2020, https://qbz.gov.al/eli/fz

118 IDMC, *Non(rehabilitation) of Political Persecuted*, 45.

119 IDMC, *Non(rehabilitation) of Political Persecuted*, 44.

1992, the conservative President Berisha declared in an interview with the magazine *Der Spiegel:* 'The dossiers will not be opened.'[120]

However, the lack of legally regulated access to files meant that individual dossiers were repeatedly misused for political purposes. For example, as mentioned above, the Albanian Ministry of the Interior claimed in August 1994 that there were numerous informers among the participants of a protest action of former political persecutees, without it being possible to verify this from the outside. There is much to suggest that the *Sigurimi* files were also used for political purposes in other cases; for instance, to put pressure on individual politicians.

However, the communists had destroyed a considerable portion of the files during the change of regime. As early as 15 December 1990, Interior Minister Hekuran Isai ordered government branches throughout the country to get rid of certain files, such as secret materials on foreign authorities, etc. Only judicial and investigative files were to remain in the archives of the Ministry of the Interior.[121] On 18 February 1991, another order was issued, ostensibly 'to relieve the archives'. In this second purge alone, in which the personnel files of the Security Service were disposed of, some 50,000 files were destroyed.[122] In 2015, former Prime Minister Alexander Meksi also admitted that numerous files had been destroyed in 1990 – 1991.[123]

It was not until Law No. 45/2015 of 30 April 2015 that official access to the documents of the Albanian secret police *Sigurimi* was granted. A first draft, which also provided for lustration proceedings, had been submitted to parliament months earlier by opposition parties and human rights organizations. However, the socialist majority did not take it into consideration.[124] When the government bill came to the vote, the DP, which was in opposition at the time, did not participate in the vote.

According to the law, the files of the *Sigurimi* should be made accessible for academic and journalistic purposes. Former persecutees, relatives of missing persons, but also former *Sigurimi* employees should also be able to inspect their files.[125]

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120 'Interview mit Albaniens Wahlsieger Sali Berisha über die Aufgabe der neuen Regierung. "Mist aus den Winkeln kehren"', *Der Spiegel* 14 (1992), 201 – 204.

121 Dervishi, *Sigurimi i Shtetit 1944 – 1991*, 222.

122 Interview with Kastriot Dervishi, former Director of the Archives at the Ministry of the Interior, 'Autoriteti po bllokon dosjet, mbron persekutorët e komunizmit' ['The Authorities Block the Files and Side with Those Responsible'], Albania Free Press, 18 July 2017, accessed 28 August 2020, https://gazetaimpakt.com/kastriot-dervishi-autoriteti-po-bllokon-dosjet-mbron-persekutoret-e-komunizmit/.

123 Interview with former Prime Minister Meksi in the Albanian press, accessed 27 August 2020, http://www.panorama.com.al/zbulohen-dokumentet-meksi-si-u-zhduken-me-urdher-29-mije-dosje-te-sigurimit-ne-89 – 92/; http://www.gazetatema.net/2012/03/27/aleksander-dosjet-e-bashkepunetoreve-te-sigurimit-i-kane-zhdukur/.

124 Accessed 16 December 2020, http://illyriapress.com/doda-dhe-idrizi-dorezojne-kuvendin-projektligjin-per-hapjen-e-dosjeve-te-diktatures-komuniste. Likewise in January 2015, a group of intellectuals, writers and professors at home and abroad petitioned the Albanian Parliament to open the *Sigurimi* files. The group included Nobel Laureate Herta Müller and Vice-President of the European Parliament Ulrike Lunacek.

125 Glos, 'Aufarbeitung', 3.

The law also allows for the examination of party functionaries and civil servants in relation to their former cooperation with the *Sigurimi*. However, it only provides for the possibility of providing relevant information, and does not contain any provisions regarding possible measures to be taken. The law does not provide for the removal of politically incriminated members of the civil service.

For critics, this law did not go far enough.[126] Proponents claimed that the law was largely based on the German Stasi Records Act.[127] However, they ignored the fact that the GDR had joined a functioning democratic system and that a change of elites therefore took place automatically. In contrast, the government asserted that it had also used the corresponding Czech law as a model, although the question remained open as to which areas the foreign models had actually been applied.

The 2015 law on the opening of files has so far had little impact on the process of coming to terms with the communist dictatorship in Albania. Although its adoption can be seen as a symbolic step, it has not been able to dispel the mistrust that had built up over the years. The archives had been abused too often before, with incriminating documents being removed or used as leverage against political opponents. Since the law came into force in 2015, there has not been a single case in which an influential person from politics, the judiciary or the police has been convicted of collaborating with the *Sigurimi*.

2.8 Memorial Sites

There are over 700 memorials in Albania commemorating the exploits of the partisans in World War II (*lapidarë*), as well as thousands of bunkers built under Hoxha. By contrast, there are still no memorials or monuments financed by the central state to commemorate communist repression and its numerous victims. The few museums dealing with the dictatorship that have opened in recent years are mostly the result of local initiatives. They can be divided into two groups: firstly, memorials and museums built in former repressive facilities, such as prisons or internment and forced labour camps; secondly, artistically orientated exhibitions or museums.

Of particular concern is the situation in museums and pavilions built during the communist period, most of which have not been reconceptualized and continue in the same spirit. For example, some of the exhibits housed in the National Art Gallery as well as in local museums date from the time of the dictatorship in Albania and contain propagandistic elements. These works should definitely be provided with explanatory notes.

126 Agron Tufa, '"Dosjet", çfarë do të sjellë për shoqëri në ligji i miratuar në Parlament?', *Top Channel*, 1 May 2015, accessed 16 December 2020, http://top-channel.tv/2015/05/01/dosjet-cfare-do-te-sjelle-per-shoqerine-ligji-i-miratuar-ne-parlament/.

127 Glos, 'Aufarbeitung'.

2.8.1 Memorials in Former Repressive Facilities

In September 2014, the Site of Witness and Memory Museum opened in Shkodra. It is the first professionally run museum focused on coming to terms with the communist past. It is located in a building that originally belonged to the Franciscan Order of monks. After the communist takeover in 1944, the building was confiscated and served as an inner-city prison for the Internal Affairs Department of the city of Shkodra.

In 2014, the building was converted into a museum where former cells, torture chambers and objects belonging to erstwhile inmates or their families can be viewed. In addition, visitors have the opportunity to look at original documents recording communist persecution in Shkodra, especially of the Catholic clergy (internment, detention and orders for executions by firing squad signed by Enver Hoxha, among others). The museum receives very little funding from the local government and is dependent on support from domestic and foreign institutions in the field of transitional justice.

This was followed on 5 September 2016 by the inauguration of a monument commemorating the suffering of over 33,000 people who were detained in one of the 14 internment camps in the region around Lushnja (Savra, Gradishta, Grabjani, etc.) between 1954 and 1991. The monument was erected in Lushnja on the initiative of the IIP.

A monument honouring the resistance against communism was inaugurated in Shkodra on 20 May 2019. The 5.8 metre high monument aims to commemorate the suffering of intellectuals, clergy, men, women, mothers, youths and families from northern Albania who were tortured, murdered or interned. The memorial was erected with the support of former political persecutees, foreign (mainly German) institutions and the municipality of Shkodra.

Thus far, various initiatives to turn notorious former prisons and penal camps such as those in Spaç, Tepelena or Qafë-Bari into memorials have failed. These places are therefore increasingly falling into disrepair.[128] Nevertheless, the National Historical Museum in Tirana at least has a room dedicated to communist repression. The rest of the museum's exhibitions on the period, however, continue essentially to follow the communist narrative that Albania was liberated in 1944.

2.8.2 Artistically Orientated Exhibitions or Museums

Under the socialist government in office as of June 2013 until the time of writing, three museums or artistically orientated exhibitions were established, which in a broader sense can also be attributed to coming to terms with the past. However,

128 Idrizi, *Herrschaft und Alltag*, 39.

their establishment has been the subject of heated debate.[129] For critics, they tend to fuel nostalgia for communism under the guise of remembrance. History is not reappraised through them, but made into an attraction.

In the centre of Tirana, the National Museum of Secret Surveillance, known as The House of Leaves, was inaugurated on 23 May 2017. Its founding is based on Resolution No. 208 of the Council of Ministers. The building had originally been a maternity hospital in the 1930s. After the establishment of the communist regime, it served as a listening centre for the *Sigurimi* from 1944 to 1991. Since ordinary citizens were not permitted telephones, mainly diplomats and prominent persons were bugged from here. The artistically laid-out museum offers information about the history of the house, the *Sigurimi*'s bugging devices and some examples of people who were wiretapped. The House of Leaves, which was awarded the Council of Europe Museum Prize in 2020, is funded by the Ministry of Culture.

The Checkpoint Monument (*Postbllok*), likewise in Tirana, was opened to the public on 26 March 2013. The installation is the work of the publicist Fatos Lubonja and the artist Ardian Isufi. The memorial is meant to symbolize the atrocities of the communist regime and is located in the garden of the former house of Mehmet Shehu, the long-time Prime Minister under Hoxha. The monument includes a bunker, concrete beams from the Spaç prison where Lubonja was imprisoned for a time, and a fragment of the Berlin Wall donated to the city of Tirana by the Berlin state government.

Enver Hoxha's former villa is located not far from this memorial. The house and its luxurious interior have remained largely unchanged. The government kitchen in the basement is still in use. However, the house is only occasionally used for exhibitions or state receptions. Appeals by former political persecutees such as Gëzim Peshkëpia or Agron Tufa to turn the villa into a memorial commemorating the crimes of communism have so far been to no avail.[130]

Moreover, 2014 and 2016 saw the opening of the artistic exhibitions *Bunk'art 1* and *Bunk'art 2* respectively. These underground galleries are housed in two bunkers. One of the bunkers (*Bunk'art 1*) is located on the outskirts of Tirana and was intended to house Hoxha and select members of the Central Committee in the event of nuclear war. By contrast, a new bunker was built in the centre of Tirana to house *Bunk'art 2*. At the time, former political prisoners were angered by the construction of another bunker in addition to the hundreds of thousands already existing and tried to demolish the entrance to the exhibition.

129 Sabine Adler, 'Umstrittene Erinnerungskultur. Erste Museen zur Hoxha-Diktatur in Albanien', *Deutschlandfunk*, 16 August 2017, accessed 14 January 2021, https://www.deutschlandfunk.de/umstrittene-erinnerungskultur-erste-museen-zur-hoxha.691.de.html?dram:article_id=393639.

130 Gëzim Peshkëpia and Agron Tufa, 'Vila e Hoxhës, Muze për krimet e komunizmit!', *Panorama*, 6 September 2013 , accessed 30 January 2021, http://www.panorama.com.al/vila-e-enver-hoxhes-muze-per-krimet-e-komunizmit.

2.9 Commemorative Events

Albania commemorates four dates related to totalitarian regimes and its own experience during the dictatorship: 27 January – International Holocaust Remembrance Day is not a national holiday, but activities are held in schools; 20 February – the day of the collapse of the communist regime associated with the violent toppling of the dictator's statue in Tirana, confirmed by Law No. 10241, is not celebrated, nor even recognized, by the public; 23 August – International Day of Remembrance for the Victims of Totalitarian Regimes, commemorated in recent years by some public institutions, yet due to summer holidays schools and educational institutions are not engaged; 8 December – Youth Day or Day of Democracy marks the start of political pluralism following the 1990 student protests.

Due to the great repression of the communist regime in Albania, the associations of the politically persecuted and civil society organizations engaged in the field of memory have proposed other commemorative dates:

- 23 May 1973 as the 'Day of Resistance to the Totalitarian Regime' in commemoration of the Spaç Revolt. On this day, a revolt broke out in Spaç prison which is considered to have been the largest uprising against the communist regime.
- 26 February 1951 as 'Day of Remembrance of the Martyrs of the Totalitarian Regime' in memory of 22 opposition intellectuals who were shot after allegedly throwing a bomb (dynamite) in the courtyard of the Soviet embassy.
- 29 November 1944 as the 'Day of the Installation of the Communist Dictatorship'. This day has prompted substantial debate because it is ironically celebrated by official history as the date of the liberation of Albania and the symbol of freedom. However, post-1990 studies have shown that terror began as early as 1943 and then took official form after the communists came to power, that is, on 29 November 1944.

None of these proposals has yet led to the legal establishment of a day of remembrance for the victims of communism.

The international event 'Memory Days', which has been organized by the Institute for Democracy, Media and Culture (IDMC) with the support of the Konrad Adenauer Foundation since 2016, commemorates important dates and events of oppression which took place during the communist dictatorship. It also facilitates debates in the context of the politics of memory. In connection with this, there have been discussions on a decommunization law or the introduction of special provisions in the penal code, such as the prohibition of communist propaganda, communist symbols (the red star, hammer and sickle) or the public display of photographs of leading functionaries, etc. There was a concrete proposal from the DP in 2018 for a legal package on decommunization, repeated again from 29 November 2021 onwards, but the work is still in progress.

2.10 Transitional Justice Institutions

In contrast to other countries, Albania did not establish a truth commission or a committee of enquiry into the crimes of communism. The institutions that have dealt with the issue directly or indirectly from 1991 to the present can be divided into three groups:

- Constitutional bodies;
- Central government institutions and;
- Civil society institutions.

2.10.1 Constitutional Bodies

The Albanian Parliament (*Kuvendi i Shqipërisë*), which has a total of 140 members, naturally played a central role in the process of transitional justice, since it is responsible for national legislation. However, its decisions were heavily dependent on which party was in power at the time. Laws on lustration or prosecution came about through majority votes on the part of the DP. Verification Law No. 8043 to check civil servants for possible collaboration with the *Sigurimi*, mentioned earlier, also led to the establishment of the so-called Bezhani Commission in 1995. This commission decided which persons were not allowed to run for public office after carrying out corresponding checks.

The successor party to the communists, on the other hand, passed several laws to compensate former political prisoners. However, these also served as recompense for increased compensation granted to former war veterans. In 2015, the socialist majority further passed the law on opening the *Sigurimi* files, likewise mentioned above. It was rejected by the opposition because it did not contain elements of lustration.

The Constitutional Court played a significant role in the lustration process, as well. It was responsible for overturning the so-called Lustration Law No. 10034 of 2008 one year after it was passed. The law provided for purging the executive, legislative and judicial organs of former *Sigurimi* employees and high-ranking representatives of the Central Committee. However, it was rejected by the Constitutional Court as unconstitutional and a violation of international conventions.

2.10.2 Central Government Institutions

The Committee for Formerly Convicted Political Prisoners and Persecuted People was established by the Albanian Parliament in 1993 to collect data on the persecuted. It existed until the end of 1994 and was placed under the control of the Council of Ministers. Mainly due to pressure from this committee, the first laws on the status of po-

litical prisoners (Law No. 7748) and on property compensation (Resolution 184) were passed.[131]

In January 1995, the Committee was transformed into the Institute for the Integration of the Formerly Politically Persecuted (IIP). Initially, it was subordinate to the Ministry of Social, Welfare and Youth (MMSR). From 1998 to 2013, it was placed under the control of the Ministry of Justice. Since January 2014, the IIP, which currently has 24 employees, has again been made subordinate to the MMSR.

The Institute for the Studies of Communist Crimes and Consequences in Albania (ISKK) was established after the adoption of Law No. 10242 on 25 February 2010 and has the status of a public institution. The Institute's role is to collect and analyse documents and facts about the communist period in Albania. It has issued over 100 publications to date, including many biographies of political prisoners as well as specific studies. In particular, the eight-volume *Encyclopædic Dictionary of the Victims of Communist Terror* contains meticulously researched information on all persons who fell victim to the communist regime.

From 2017 onwards considerable pressure was exerted on the work of the ISKK, culminating in threats by socialist MPs to close the Institute in early 2019. The root cause was an ISKK study published in 2014 entitled *War Criminals*, which negatively highlighted the role of communist leaders of the National Liberation Front who held high political positions during the dictatorship. The attacks lasted for several months and centred on the director of the ISKK, Agron Tufa, who was finally forced to seek political asylum in Switzerland in November 2019 due to defamation and death threats.[132]

The Authority for Information on Former State Security Documents (AIDSSH) started its work in December 2016, a year and a half after the corresponding law was passed. The adoption of the German model of making the Stasi files accessible but not requiring lustration had been received with disappointment by associations of former political prisoners. On the other hand, the director of the archives of the

131 Officiall IIP website, accessed 11 December 2020, http://ishperndjekurit.gov.al/al/historiku/.

132 In April 2019, Tufa stated that 519 former security officers had been members of the state police. In his position as the director of the ISKK, he had requested information from all the institutions that had recruited them, but had received no response from them. Accessed 14 January 2021, https://www.faktor.al/2019/04/08/agron-tufa-519-oficere-te-sigurimit-jane-ne-policine-e-shtetit-tetjeret-ne-administrate-ja-pse-me-sulmoi-braho/. Moreover, in September 2020, Tufa published a list of important personalities from the realm of politics, culture, etc. who had worked with the *Sigurimi* on his personal Facebook page. Among them was the name of the current Speaker of Parliament, Gramoz Ruçi. According to Tufa, the list was compiled by the commission that was supposed to implement Verification Law No. 8043. The list was originally intended to prevent many people associated with the old communist regime from standing in the 1996 elections. Tufa's document was published on some social networks and online media, including the following, accessed 14 January 2021, https://www.faxweb.al/gramos-ruci-dhe-agron-tufa-pseodonimi/; https://shekulli.com.al/agron-tufa-nxjerr-dokumentin-dhe-akuzon-ja-pseudonimi-i-gramoz-rrucit-si-spiun-i-sigurimit/.

Ministry of the Interior, Kastriot Dervishi, criticized the fact that the establishment of the new authority was not only a violation of the law regulating archives,[133] but also unnecessary. According to him, the German model cannot be transferred to the reality of the situation in Albania.

Unlike the GDR State Security Service, which had the status of an independent ministry, the *Sigurimi* was but one of three departments within the Ministry of the Interior responsible for implementing repressive policies. As a result of the law, the relevant archival holdings are now being split up. Dervishi therefore argued that Albania should have invested in the existing archives first. Handing over information on *Sigurimi* files would also have been possible within the existing archival structures.[134]

How many records the *Sigurimi* left behind remains unclear. According to the authorities, 212,000 *Sigurimi* files, 250,000 index cards, 15,000 judicial investigation files and 21,000 files on politically persecuted persons have survived, plus several thousand registers, minutes and normative documents. This collection of data thereby comprises around 32 million pages.[135] However, the latter figure may be somewhat inflated, as it also takes into account the court and investigation files that are not part of the former *Sigurimi* archive.

2.10.3 Civil Society Institutions

The Institute for Democracy, Media and Culture (IDMC) is an independent institution that aims to better educate Albanian youth about the consequences of communism and totalitarian regimes. It trains teachers, organizes eyewitness talks with former political prisoners in schools and plans visits to memorial sites. In addition, it organizes national and regional events, competitions, academic conferences, film screenings and the like. The IDMC also publishes archival material to be used in teaching.[136]

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133 Dervishi argues that according to the archives legislation (No. 7726 of 29 June 1993, which is superseded by the current Law No. 9154 of 6 November 2003), the only authority responsible for the management of post-1944 documents is the Archive of the Ministry of the Interior. Any division of archival files would violate the principles of archival science. According to him, the establishment of the AIDSSH could become a precedent. In the same way, proposals could be made to establish, for example, other authorities for information on the documents of the PPSh, the Democratic Front, etc. See Dervishi, 'Autoriteti po bllokon dosjet', accessed 6 December 2020, http://www.afp.al/news/2017/07/kastriot-dervishi-autoriteti-po-bllokon-dosjet-mbron-persekutoret-e-komunizmit-36084/.

134 Dervishi, 'Autoriteti po bllokon dosjet'.

135 'Dosjet e ish-Sigurimit të Shtetit / 32 milionë faqe dokumente në katër dekada', 1 March 2019. Accessed 6 December 2020, http://www.respublica.al/2019/03/01/dosjet-e-ish-sigurimit-të-shtetit32-milionë-faqe-dokumente-në-katër-dekada.

136 Accessed 6 December 2020, www.idmc.al/en; www.observatorikujteses.al.

The Online Archive of the Victims of Communism is an initiative of the 'Kujto' Foundation, which collects documents and data on the victims of the communist regime, as well as on its prisons and internment camps.

As a rule, civil society institutions are dependent on the support of foreign partners. In Albania, the following are particularly relevant: The Konrad Adenauer Foundation (KAS) in Tirana has supported the associations of politically persecuted individuals since 2010, as well as a number of research projects on Albanian communism. The most important of these is the aforementioned *Encyclopædic Dictionary of Victims*, published by the ISKK. The Foundation also supports the IDMC in its educational work on the communist past. The Organization for Security and Cooperation in Europe (OSCE) has also been involved in promoting a national dialogue on Albania's communist past for several years. In concert with the University of Tirana, it initiated the establishment of a Centre for Justice and Transformation in September 2020, which aims to strengthen academic teaching and research capacities in the field of transitional justice in Albania.

In June 2018, the International Commission on Missing Persons (ICMP) signed an agreement with the Albanian government in to locate over 5,000 people killed or dead in the prisons of the dictatorship whose remains have not been found. As was the case in some Latin American countries, the victims were killed with or without trial and their bodies never handed over to their families. However, unlike Latin America, the families were informed about the death of their relatives. Consequently, from the terminological point of view, in the case of Albania, one cannot talk about 'missing people' as long as the place, time and details of their death are known. According to Law No. 83/2018, the ICMP is to carry out DNA analyses of the remains found and match them with the DNA of possible family members. However, this agreement has been viewed with scepticism, since doubts arose as to whether the Albanian government would support the identification process with the necessary resources.[137] After two years of searching, the ICMP did not only not find any graves or identify the DNA of any remains, but also did not make public a complete list of burial sites or the number of families searching for the remains of their relatives. Based on eyewitness testimony and documents, 29 possible burial sites of murdered people have been identified so far.

2.11 Victims' Associations

The first national Association of Former Political Persecutees (*Shoqata Kombëtare e ish-të Përndjekurve dhe të Burgosurve politikë të Shqipërisë*) was founded in Tirana in

137 Jonila Godole, 'Të zhdukurit gjatë komunizmit dhe dilemat e marrëveshjeve', *Panorama*, 9 June 2018, accessed 16 December 2020, http://www.panorama.com.al/te-zhdukurit-gjate-komunizmit-dhe-dilemat-e-marreveshjeve.

mid-1991. In a very short time, it had amassed hundreds of thousands of members.[138] Soon afterwards, other victims' associations emerged, such as the Union of Albanian Trade Unions or the Association of Imprisoned and Persecuted Women. The persecuted were initially united by the desire to put pressure on the government to improve their material situation. After their release, they usually found themselves in a precarious position without financial reserves or higher vocational training. They were also not entitled to housing after their houses or flats had been confiscated in connection with their convictions.

Following the passing of a series of laws, the situation of the formerly persecuted improved somewhat.[139] From the point of view of those affected, however, the compensation was inadequate. Resulting disputes with the DP government led to a split among the persecuted between supporters and critics of the government. After a hunger strike in 1994, members of the aforementioned association were accused of collaborating with the former communists. As a result, another organization was founded, which calls itself 'anti-communist'. This is the Anti-Communist Association of the Politically Persecuted in Albania.[140] This association claims to 'represent the interests of the politically persecuted at the national level'. It is exceedingly active and has a broad network throughout the country at its disposal.

In addition, there are other associations such as the National Union for the Integration of the Persecuted, the Association of Political Prisoners, the Heirs of the Politically Executed or the Association of Deported and Interned Persons, among others. All these associations seek support from the IIP. However, according to their various representatives, cooperation among them is minimal or non-existent.[141]

2.12 Measures in the Educational System

During the transitional period in Albania, the History curriculum changed several times, mainly due to pressure from European organizations, such as the European Association of History Educators (EUROCLIO) and the Council of Europe. After the fall of communism, numerous documents and other data came to light that made it necessary to rewrite various chapters of Albanian history. However, the lack of po-

138 Kretsi, *Verfolgung und Gedächtnis*, 148.

139 Kretsi, *Verfolgung und Gedächtnis*, 151. According to Kretsi, by 2004, 4,162 families had accommodation problems. 370 of them were still living in the places where they had been deported or interned. Only 37 percent of the politically persecuted could get a flat. 1,900 people received loans between 1992–1997 and 12,000 persecuted people were able to make use of their right to study.

140 The official website of the Anti-Communist Association of the Politically Persecuted in Albania can be called-up under, accessed 11 December 2020, https://antikomunistet.al.

141 Tanush Kaso, 'Mbi gjendjen e shoqatave te te perndjekurve politike', 19 April 2019, accessed 11 December 2020, https://www.ballikombetar.info/mbi-gjendjen-e-shoqatave-te-te-perndjekurve-politike/.

litical will on the part of successive governments slowed down the process of absorbing these findings into the school curriculum.

During the first school reform, history curricula changed, especially as regards the presentation of world history, while the history of post-war Albania continued to be presented incorrectly – and still is. Curriculum specialists and textbook authors explain this state of affairs by citing the lack of academic studies in this field, due to there being little interest in it on the part of educational institutions and universities.[142] Added to this were the various changes in political direction, which were also reflected in school textbooks. Under the Democrats in the early 1990s, the communist regime was treated negatively in principle. However, after the former communists took back power in 1997, the authors tended to reinstate the previously eliminated topics of the war of liberation and the communist period in the textbooks.[143]

Many local libraries have more texts published between 1945 and 1990 in their holdings than academic studies on the Albanian dictatorship have been written since its fall. These early publications contain elements of communist propaganda and ideology and are part of the library accessible to any of its members. It could be helpful for these types of books to be placed on special shelves when accessed by younger readers, with relevant explanations to clarify the period in which they were written and their propagandistic nature.

2.12.1 The Communist Dictatorship on the School Curriculum

Albanian pupils are taught about communism from the age of 14 (year 8), with special emphasis placed on the October Revolution of 1917 and the so-called dictatorship of the proletariat (seven lessons in total). In the following year, in 9th grade, students learn more about the nature of this regime through the events that took place in Albania from 1944 to 1991 (11 lessons in total). In year 11, students focus once again on the period of the establishment of the communist regime in Albania (12 lessons in total).

Curriculum specialists are of the opinion that the amount of teaching provided on the communist period is appropriate, but that the quality of its teaching depends strongly on the abilities of the teachers and their use of materials. The quality also depends on whether students are taken to authentic places of persecution, such as prisons or forced labour camps, to make the oppression tangible. Since many teachers do not have access to recent studies and archival documents, they often

142 Fatmiroshe Xhemalaj, 'Kurrikula e historisë dhe ndryshimet e saj në Shqipëri 1990 – 2020' ['School Curricula for History and the Changes in Them from 1990 to 2020'], in *Reflektimi i periudhës komuniste në kurrikulën e historisë* [*The Representation of the Communist Era in Educational Curricula*] (Tiranë: IDMC: 2020).

143 Idrizi, 'Zwischen politischer Instrumentalisierung und Verdrängung', 102.

do not know enough about the era of dictatorship or feel too insecure to analyse it of their own accord.

A recent IDMC survey of history teachers revealed that a quarter of them could not identify the most important dates in the history of the anti-communist resistance.[144] Three-quarters of them could not name the number of people persecuted in Albania. Moreover, a majority confirmed that certain topics relating to the oppression, such as the exclusion of the children of persecuted individuals, the role of women or the anti-communist resistance, were not included on the curriculum. Although most teachers believe that visiting memorial sites, meeting eyewitnesses and involving students in creative projects and competitions contributes to reflection on the past and promotes respect for human rights and democracy, these forms of teaching history are hardly to be found on the curricula.

2.12.2 Further Education for Teachers and Pupils

In view of the low level of knowledge possessed by many teachers, additional training programmes centring on the communist era are of particular importance. However, these are not being organized by the institutions of the Ministry of Education (which should actually be responsible for such programmes), but only by non-governmental institutions. Active in this field are:

- The European Association of History Educators (EUROCLIO), which cooperates in this with the Albanian Association of History Teachers. These teacher training courses focus on the exchange of experience between the countries of the Western Balkans.
- The IDMC, which has been carrying out projects at the regional level in the field of education since 2015. These take the form of training, publications and interviews with former political persecutees. To support history teachers, the institute has also issued works such as the three-volume *Communism through Archival Materials*. Another project is the nationwide competition 'Ask your Grandparents', which is aimed at pupils aged 15 to 19.

2.13 Coming to Terms with the Past Through the Media

The media's examination of communism is mainly determined by two things. On the one hand, young journalists usually know little about the crimes and consequences

144 The study and the results of the survey of 276 Albanian teachers can be accessed under the following address, accessed 12 January 2021, https://idmc.al/assets/idmc-reflektimi-i-periudhes-komuniste-ne-kurrikulen-e-historise-ne-shqiperi.pdf.

of the Hoxha dictatorship. On the other hand, the reporting on it is strongly orientated towards sensationalism.

An example of the blurred portrayal of the dictatorship is the coverage of the death of Hoxha's successor Ramiz Alia on 7 October 2011, who had returned to Albania after fleeing abroad in 1997. Only rarely was the term 'dictator' applied to him, and, when it was, only in a softened form such as 'the last communist leader' or 'vice-dictator'. Only a few commentators asked *expressis verbis* whether Alia was the first pluralist president or the last dictator.[145] At the time, it was mainly political and diplomatic representatives as well as Alia's former fellow combatants and acquaintances who had a chance to speak. His involvement in the crimes committed during the dictatorship was not discussed at all.

In their reporting on central events and key figures of the communist regime, the Albanian media usually use certain frames that are influenced by the respective editorial policy. They thus frequently reinforce the former official narrative instead of deconstructing it. In contrast to this, all kinds of information about the time of the communist dictatorship and the fate of many of its victims can be found on social networking sites. Nonetheless, the authenticity of this information often leaves much to be desired. Even serious online media portals are full of historical speculation, phony documents or context-free information. Interviews with representatives of the nomenklatura outnumber those with political prisoners. Only a few central television channels offer the public authentic stories told by eyewitnesses.

Despite criticism from experts and victims alike, even the quality media continues to publish photos and news focused on the former dictator Hoxha and his family, as well as supposedly sensational revelations about the communist era. On corresponding internet sites, the reader finds statements relating to the communist terror next to photos and reminiscences of the dictator or other functionaries. A similar picture becomes apparent on television, where both critics of the communist dictatorship and those who deny its crimes are given a platform in talk shows.

An example of the latter can be seen in the case of the historian Pëllumb Xhufi, who in spring 2018 described the notorious Tepelena camp as a camp with completely normal living conditions.[146] While survivors of the camp, but also experts in transitional justice, describe this camp as an Albanian Auschwitz, in which hundreds of

145 Jonila Godole and Sonila Danaj, 'Who died? The Role of Journalists in Framing Collective Memory in Albania', in *Media Transformation and Collective Memory in Albania*, ed. Jonalia Godole and Sonlia Danaj (Tirana: IDMC, 2015), 167–180.

146 Idrizi, *Herrschaft und Alltag*, 39, as well as various articles which appeared in the Albanian media on the topic. For instance, accessed 18 December 2020, http://www.observatorikujteses.al/drane-jakja-heroina-e-kampit-famekeq-te-tepelenes. 'Forumet UET, Jonila Godole: Tepelena në mënyrë simbolike mund të ishte Auschwitzi ynë, Mapo', 30 Mai 2018, accessed 18 December 2020, https://gazetamapo.al/forumet-uet-jonila-godole-tepelena-ne-menyre-simbolike-mund-te-ishte-auschwitzi-yne.

women, men and children lost their lives, Pëllumb Xhufi explained on television that the situation was by no means as bad as former internees had portrayed it as being.

2.14 Coming to Terms with the Past through Art

2.14.1 Feature Films and Documentaries

The films *Goodbye Lenin* and *The Lives of Others* were, as elsewhere, also very popular in Albania. However, Albanian film productions that exert a comparable influence on public debate do not exist.

The two most significant Albanian feature films that deal with the communist dictatorship are *Vdekja e Kalit* (*The Death of the Horse*) and *Kolonel Bunker* (*Colonel Bunker*). The former was filmed not too long after the collapse of communism, namely in 1992. The film by director Saimir Kumbaro made the injustices and crimes of the communist regime accessible to a broad Albanian audience for the first time. It is therefore also considered the first anti-communist film produced in Albania. *Colonel Bunker*, directed by Kujtim Çashku in 1998, on the other hand, is a political parable about Hoxha's paranoid bunker construction programme.

In the past decade, a number of documentaries about the persecutions in Albania were also released, mainly by institutions such as the ISKK, IDMC and Kujto et al. Some of these documentaries were also broadcast on television, reaching a wider audience. However, these films had little impact on society's perception of the dictatorship and its consequences.

By contrast, the continuous screening of feature films produced by the state-owned company *Kinostudio Shqipëria e Re* to indoctrinate the population during the dictatorship has contributed to the glorification of communism. In 2017, therefore, a broad public debate about a possible ban on broadcasting these types of films took place. However, the voices that saw these productions as 'historical as well as cultural heritage', even though they had little to do with historical reality, prevailed. This was helped by the fact that directors, actors and scriptwriters who had previously been part of the communist regime's propaganda machinery often had excellent access to the main television and print media and could therefore easily contribute to the discussions. In contrast, the opinions of representatives of persecuted families, who had called for the screening of some films to be banned, played hardly any role in the debate.[147]

147 The entire debate regarding films is summarized in the following annotated study: IDMC, *Filmat e Kinostudios pasuri kombëtare apo propagandë?* [*Cinema Studio Films, National Heritage or Propaganda?*] (Tirana: IDMC, 2019).

2.14.2 Coming to Terms with the Past through Literature

In recent years, numerous literary or literary-historical books dealing with the communist dictatorship have been published. In this context, two contrasting tendencies can be observed. On the one hand, there is literature that depicts the experiences of the politically persecuted through oral reports and archival documents. On the other, a silent rehabilitation of the old political caste, especially the dictator Hoxha, is discernible.

The following autobiographies penned by survivors of the communist terror have garnered the most readers in Albania: *Rrno vetëm për me tregue* (*Live to Tell the Tale*) by Father Zef Pllumi, published in two volumes (1995, 1997), and the two works by Fatos Lubonja *Në vitin e shtatëmbëdhjetë* (*In the Seventeenth Year*) and *Ridënimi* (*Second Judgement*), which appeared in 1994 and 1996 respectively.

Father Zef Pllumi was a Franciscan priest who was first convicted at the age of 22 and imprisoned from 1946 to 1949. He was tried again in 1967 and sentenced to 23 years in prison, which he spent in various prisons and labour camps until April 1989. Fatos Lubonja was arrested in July 1974 when his father, at that time the director of the public broadcaster RTSH, came into the crosshairs of the leadership due to his liberal propensities. Lubonja was first sentenced to seven years in prison and then to a further 16 years for alleged membership in a pro-Soviet group. Fatos Lubonja served his sentence in the regime's most notorious prisons and was only released in 1991 after serving 17 years.

A major role in the dissemination of this type of literature was played by the ISKK, which has published over 100 works on the crimes of communism.

Of the professional writers who have dealt with the communist period, the following stand out above all:[148]

Agron Tufa, who wrote several novels about his personal experiences of persecution; Ismail Kadare, who after 1990 published several essays and novels dedicated to personalities or emblematic events of the dictatorship; Luljeta Lleshanaku has dealt with this period masterfully in her numerous books of poetry that have won prestigious national and international awards; Bashkim Shehu, who repeatedly worked on various books covering the political and social aspects of the dictatorship; Rudi Ere-

148 See, by means of example, in sequence, Agron Tufa, *Mërkuna e zezë* (Onufri, 2017); *Fabula rasa* (Ideart, 2004); Ismail Kadare, *Die Verbannte* (Frankfurt am Main: S. Fischer, 2017); *Kur sunduesit grinden* (Tiranë: Onufri, 2018); Luljeta Lleshanaku, *Kinder der Natur* (Wien: Edition Korrespondenzen, 2010); *Negative Space* (New York: New Directons Publishing, 2018); Bashkim Shehu, *Fjalor udhëzues për misterin e dosjeve* (Tiranë: Toena, 2015); *Loja, shembja e qiellit* (Tiranë: Toena, 2013); Rudi Erebara, *Epika e yjeve të mëngjesit* [*The Epos of the Morning Stars*] (Tiranë: Ombra GVG, 2016); Ylljet Aliçka, *Metamorfoza e një kryeqyteti* (Tirana: Onufri 2019); *La valse du bonheur* (Paris: L'Esprit du temps, 2019); *Les slogans de pierre* (Paris: Edition Climates, 1999); Lindita, Arapi, *Schlüsselmädchen* (Weilerswist-Metternich: Dittrich Verlag, 2013); *Wie Albanien albanisch wurde – Rekonstruktion des Albanienbildes* (Marburg: Tectum Verlag, 2006); Ornela Vorpsi, *Il paese dove non si muore mai* (Zürich: Scalo, 2004); *Das ewige Leben der Albaner* (Wien: Paul Zsolnay Verlag, 2007).

bara, who won the European Prize for Literature with his novel about the depersonalization of the artist in totalitarian societies; Ylljet Aliçka, who sarcastically describes various aspects of the dictatorship; as well as other authors living abroad, such as the Albanian-German writer Lindita Arapi, or Ornela Vorpsi, who has settled in France.

In a similar fashion to the films mentioned above, however, these efforts are counteracted by various publications in which the dictatorship is glossed over or even justified. These include the memoirs of the dictator's wife Nexhmije Hoxha, a book by Hoxha's personal physician, Isuf Kalo, and two books by the former head of the General Investigation Agency, Qemal Lame. The latter presents insider knowledge about the last year of the dictatorship and about the *Sigurimi*'s persecution practices, as in the case of the well-known writer Ismail Kadare.[149] The majority of these authors paint a positive picture of the dictatorship, in which they personally enjoyed numerous privileges. Hoxha's widow, for example, showed no sympathy whatsoever for victims of the regime right up until her death in February 2020. Instead, she defended her husband and the fight against the 'enemies of the people' as a necessary prerequisite for the establishment of a socialist order.[150] For his part, Hoxha's personal physician stressed the outstanding intelligence and education of his former patient, in addition to his patriotic attitude and humane demeanour.[151]

3 Stocktaking: Successes and Failures of Transitional Justice in Albania

3.1 A Change of System

Thanks to the negotiations between the old and new elites, who were placed at the head of new pluralist parties, the transition from dictatorship to democracy in Albania occurred largely without bloodshed. Despite corresponding fears among the population, a restoration of authoritarianism did not take place. However, the functional elites of the party, the judiciary and the *Sigurimi* were not replaced, and some of them

149 Lame, Kur shembeshin themelet; Qemal Lame, *Dritëhijet e kohës. Letërsia dhe arti në diktaturë: Përndjekja e Ismail Kadaresë* [*The Shadows of Time. Literature and Art under the Dictatorship. The Persecution of Ismail Kadare*] (Tirana: Neraida, 2020).

150 Nexhmije Hoxha, *Përjetime dhe meditime në jetën time politike* [*Experiences and Meditations in my Political Life*] (Tirana: Ilar, 2019). In an interview with *Der Spiegel* in 2004, she explained: 'Our foreign enemies allied themselves with the opponents within our country. That's why we had to destroy their families and expelled troublemakers together with their relatives from Tirana and took them hostage'. Accessed 27 August 2020, https://www.spiegel.de/spiegel/print/d-30414363.html.

151 Isuf Kalo, *Blloku: Rrëfimi i mjekut personal të Enver Hoxhës* [*The Confession of Enver Hoxha's Personal Physician*] (Tirana: UET Press, 2019).

– such as parliamentary speaker Ruçi – are still active today. Additionally, the judiciary has still not become independent, but is considered inefficient and corrupt. This may also be a consequence of elite continuity, as many leading positions in the judiciary and the police apparatus continue to be held by representatives of the former nomenklatura.

The continuities of a system based on 'class hatred' are further reflected in the implacability of the political conflict between the two major parties, the SP and the DP. Society remains divided into two warring camps and finds it impossible to agree upon a common language with which to speak about the past. 'When the communist era is talked about, it is done in a highly politicized and extremely emotional way'.[152] Cross-party cooperation would require, among other things, a democratic political culture, which is extremely weak in Albania, while political polarization sometimes takes extreme forms.

Through the Law 'On the Innocence, Amnesty and Rehabilitation of Formerly Convicted and Politically Persecuted Persons' (1991) and the two resolutions 'Condemning Crimes of Totalitarian Communist Regimes' (2006) and 'Condemning Crimes against the Clergy' (2016), the Albanian parliament has formally distanced itself from the Hoxha regime repeatedly. However, the obligations arising from these resolutions have not been fulfilled. Socially, there is also no broad consensus on condemning the dictatorship. In addition, important laws such as the Verification Law (1995) or the one on the opening of the *Sigurimi* files (2015) were not passed by political consensus. Therefore, there is a risk that these laws could be repealed at any time in the event of a conflict between the parties.

3.2 Criminal Justice

Punishment of those responsible for the communist regime only occurred in Albania at the beginning of the 1990s, when important functionaries were arrested and convicted on the grounds of abuse of office and embezzlement. In 1995, several charges were brought under the new Genocide Law, but these were dropped after the former communists returned to power in 1997. As shown above, the Constitutional Court ruled that those accused could not be punished for acts that were not illegal at the time they were committed. Moreover, the Genocide Law did not trigger a wave of investigations or other activities to probe the role of officials during the communist era. Rather, the arrests acted as a means of appeasing the politically persecuted, who constituted the largest group of government supporters (which was formed by the DP at the time).

152 Oliver J. Schmitt, 'Albanien tut sich schwer', *Neue Zürcher Zeitung*, 23 July 2012, accessed 21 January 2021, https://www.nzz.ch/albanien-tut-sich-schwer-mit-der-bewaeltigung-seiner-vergangenheit-1.17382475?reduced=true.

3.3 A Change of Elites

Albania has witnessed only a very limited renewal of personnel in the state apparatus and other relevant areas. Even 30 years after the end of the communist regime, former functionaries still hold leading posts or are even active in key political positions. Although the so-called Genocide Law of 1995 provided for the exclusion of officials responsible for genocide and crimes against humanity from political life until 2002, it was repealed by the Constitutional Court in 1997. Many former political prisoners therefore hoped that the law on opening the *Sigurimi* files, passed in 2015, would start a process of lustration similar to that in other former communist countries. However, the law only made it possible to inspect files and did not provide for the removal of politically incriminated employees from public service.[153]

The formation of new elites remains a challenging task. Through total control of social life, the communist regime not only left no space in which a liberal elite could develop, but simultaneously created a high degree of conformity that still defines civil society today.

3.4 Reparations

Approaches to dealing with the communist dictatorship and its victims went through various phases. In the early 1990s, Berisha's conservative government was willing to condemn the regime both politically and legally. The first compensation laws for former political prisoners and internees were passed during this period. A coordination committee was set up to register all affected persons. Significant retrograde steps became apparent when the former communists came to power under Fatos Nano (1997–2005). In this phase, compensation was initially supported as recompense for the increased compensation granted to former war veterans, but was later discontinued under the pretext of scarce financial resources.

From 2005 onwards, the changing governments focused only on reviewing those compensation procedures that had already been set in place. New categories of victims were introduced and those affected again had to go through a lengthy process to prove their persecution. In contrast to other countries, they hardly received any support from independent lawyers, as recourse to legal action in Albania was not considered to promise success. Protests by victims against what they saw as inadequate compensation were sometimes met with police violence. Some therefore went on

153 In September 2022, after the completion of this study, the SP government brought two legislative initiatives into parliament that are intended to improve the possibilities for the lustration. They were criticized by the opposition as not being far-reaching enough. "Ruling Party Proposes Draft Laws on Lustration of Electoral Candidates", *Exit News*, 7 September 2022, accessed 12 September 2022, https://exit.al/en/2022/09/07/ruling-party-proposes-draft-laws-on-lustration-of-electoral-candidates/.

hunger strike out of desperation or resorted to even more extreme measures, such as suicide by self-immolation.

To date, the remains of thousands of people who were executed or died in custody before being buried in unmarked graves have not been found. Only in the early 1990s were many families able to locate and identify the remains of their relatives. This process has subsequently been hampered for various reasons, including numerous constructions on public and private land – both with and without permission after 1990; lack of maps and documentation on the graves of political prisoners; and a lack of political will to pursue a long-term strategy; in finding the remains.

Also, one of the most serious wounds of Albanian society, i. e. property confiscated or nationalized during the dictatorship, has not been resolved. Laws passed in the early 1990s only exacerbated the situation by alienating property. The more time that passes, the more difficult it becomes to resolve the situation. Here, too, the most affected are former persecuted and political prisoners.

3.5 The Politics of Memory

In contrast to other Eastern European countries, there were hardly any efforts in Albania after 1991 to establish a remembrance policy that would anchor the memory of the atrocities of the past in the collective memory of the nation. To this day, there is no official day of remembrance and no central memorial for the victims of the communist dictatorship. Only very few places of remembrance exist. Although the various governments have repeatedly supported individual projects, this has served more to raise their own political profile than as the basis for a long-term politics of memory.

3.6 Conclusion

Despite individual measures, Albania cannot be said to have successfully come to terms with its past. In particular, the lack of criminal justice, the failure to perform lustration and the insufficient compensation for former political prisoners have undermined the population's belief in the rule of law and democracy. Thus, the communist system continues to have an invisible effect up to the present day.

South America

Veit Strassner

Argentina: Nunca Más – The Long Road to Truth, Justice and Remembrance

1 The Experience of Dictatorship

There are good grounds for regarding Argentina as a country both used to crisis and with experience of dictatorship. Of the 35 Presidents who governed the country in the twentieth century, only ten came to power through free and fair elections. The transfer of power from an *elected* government to another *elected* government in the twentieth century was the exception rather than the rule. From 1930 to the end of the last military dictatorship in 1983, 16 of 24 Presidents were military Generals. Argentina has a tradition of coup d'état and *de facto* regimes. The political culture of the country has been marked by political violence (and partly still is). For many decades, the country's political parties, characterized by clientelism, have had limited success in channelling and redirecting political conflicts into parliamentary channels.

1.1 Relevant Period

The most recent military dictatorship in Argentina began with the army's coup d'état on 24 March 1976 and ended with the political and economic crisis that followed Argentina's defeat by the UK in the conflict over the Falkland/Malvinas islands. Democratic elections took place in October 1983 and on 10 December 1983 the responsibility for governing the country eventually passed into the hands of a civilian, Raúl Alfonsín, who had won the Presidential election.

1.2 Political Background

In order to understand the military dictatorship (1976 – 1983), the structure of conflict and the pattern of repression, it is essential to consider the country's earlier history.[1] In 1943 Juan Domingo Perón (1895 – 1974) took over the office of President and was one of the most charismatic and controversial personalities to hold that position. With his anti-communist and paternalistic social attitude, the *Caudillo* (leader)

Note: Translated by Kirsten Kearney.

1 Sandra Carreras and Barbara Potthast, *Eine kleine Geschichte Argentiniens* (Frankfurt am Main: Suhrkamp, 2013), 179 – 218.

https://doi.org/10.1515/9783110796629-007

was initially able to engage the support of indispensable social powers: the army, the Catholic Church and the workers. Perón's wife Eva ('Evita') was charismatic and deeply loved by the people until her death in 1952 from cancer. By the middle of the 1950s, tensions had escalated with the Church and the army and, after the 1955 military putsch, Perón had to flee into exile to Spain. His supporters were brutally persecuted by the military regime and the Peronist party was banned. Perón tried to continue leading the movement from within Spain. 1968 saw the emergence of the left-wing Peronist guerrilla organization, the *Montoneros*, which, from 1969 onwards, carried out acts of terror, abductions, and attention-grabbing political campaigns aiming to force the return of Perón. Partly due to their broad support in the general populace, the *Montoneros* were able to create wide-ranging clandestine structures and place demands on the government.

Within the context of this political violence, further guerrilla groups came into existence across the country, like the Trotskyist *Ejército Revolucionario del Pueblo* (Revolutionary People's Army; ERP), founded in 1970 in the mountainous northwest of the country. While the ERP was defeated by the army, the *Montoneros* only ceased their terrorist activities in 1973, when elections took place in which the Peronist party was also allowed to stand. Juan Perón was able to return to Argentina, and, after some political manoeuvring, retook the reins of power. However, in the meantime, Perón's political worldview had diverged some way from a considerable proportion of his left-wing Perónist supporters (in particular from the *Montoneros*). Disappointed, the left-wing of the *Montoneros* recommenced its armed struggle. The situation was further exacerbated in July 1974 when Perón died and his unfortunate third wife Isabel, who had been Vice-President up to this point, took on the Presidency. Political violence continued to increase. Around 200 of the *Montoneros* were killed by the *Alianza Anticomunista Argentina* (Argentine Anti-Communist Alliance; AAA), a right-wing extremist terrorist group partly supported by sources close to the government. People on the left were persecuted and students were forced to leave universities as the military gained influence over the academic sector across the country. The years of dictatorship were marked overall by massive political violence carried out on various sides. The President declared a state of emergency in November 1974 (which lasted until 1983) and appealed more and more to the military in order to control the political violence. It became obvious that she was not capable of leading the country by political means. Demands for her resignation became stronger. In his Christmas speech of 1975, General Jorge Videla, the commander-in-chief of the army, gave the President a three-month deadline.[2] When the putsch came on the 24 March, exactly three months after Christmas, it was not unexpected.

2 Gerado L. Munck, *Authoritarianism and Democratization: Soldiers and Workers in Argentina, 1976–1983* (University Park: Penn State University Press, 1998), 50.

1.3 Ideological Justification

The armed forces described their programme as *Proceso de Reorganización Nacional*, i. e. a process of reorganizing the nation. As they spelled out in the *Acta de Objectivos,* they wanted to put the nation back on a moral footing, to re-establish national security and to reform the economy. Therefore, they would create the conditions for a return to an 'authentic, representative democracy".[3] The armed forces justified their behaviour by the fact that they saw their country as being in the grip of a civil war. According to the logic of the Cold War, the danger for the nation was from the presumed or actual 'threat of communism'. To justify themselves, the armed forces drew upon the 'Doctrine of National Security' which was widespread in Latin America. This way of thinking regarded the internal and external security of a nation as being of the foremost importance in all matters of state. The military had applied the concept of a 'state of war' to the domestic sphere. Viewed through their eyes, every citizen could be a potential threat to national security. Therefore, it was the duty of the state to take (preventative) measures to put down any potential uprisings or revolutions. The logic of war, which originally was conceived of between nation-states, was carried over into domestic policy. To combat subversion, the units entrusted with these tasks were largely given a free hand. Therefore, massive limitations on civil rights could be justified (e. g. censorship, restrictions on the right of assembly and on freedom of expression). Even civil and human rights and the rule of law were subordinated to the higher goal of 'national security'.[4]

1.4 Structures of Persecution

The military *Junta* consisted of the combined commanders-in-chief of the armed forces. They represented the visible centre of political power. Key positions were filled by members of the military and increasingly also by civilian sympathizers, so that in Argentina people often refer to a *dictadura cívico-militar.*

On an operational level, the persecution was organized decentrally. Argentina as a whole was divided into five zones, then further into subzones and *áreas,* each one under the command of specific armed forces or units.[5] The repression can essentially

3 David Pion-Berlin, 'The Fall of Military Rule in Argentina: 1976 – 1983', *Journal of Interamerican Studies and World Affairs* 27/2 (1985): 55 – 76, 57.

4 José Comblin, *The Church and the National Security State* (Maryknoll: Orbis Books, 1979).

5 Accessed 11 April 2022, https://www.mpf.gob.ar/plan-condor/estructura-represiva-argentina for a breakdown of the territorial jurisdictions. These divisions were based on the political decisions of 1975 when the jurisdiction for the armed forces were established for the 'fight against subversion'. See 'Directiva del Comandante General del Ejército, No. 404/75' in *Documentos del Estado terrorista*, ed. Rosa Elsa Portugheis (Buenos Aires: Ministerio de Justicia y Derechos Humanos de la Nación. Secretaría de Derechos Humanos, 2012), 15 – 107.

be traced back to the armed forces, the military police and the secret services. The ordinary police units were only partly involved. Often local police forces were instructed to pull out of certain areas and parts of cities, in the face of military operations. Actual repression was only occasionally carried out by uniformed forces. More often it was through the operations of task forces in civilian clothing using unmarked cars.[6] The authorities did not even try to give their practices an appearance of legality through court-martials. Rather, the armed forces denied any connection with the arrests etc.

There were 762 secret detention centres and centres of torture across the country, where prisoners were held and generally experienced physical and psychological violence.[7] Many of those abducted simply 'disappeared'. There were no official executions based on any judicial (or court-martialled) sentences. Many corpses or sedated prisoners were thrown into the sea or into the Río de la Plata; numerous corpses were buried in mass graves or burned. Extrajudicial executions, arbitrary abductions and torture were part of day-to-day life. It is estimated that around 30,000 people were imprisoned for political reasons. For around 7,000 people, this imprisonment lasted longer than a month. Many people were placed under house arrest or only released from imprisonment under extremely limited conditions (*libertad vigilada).* As a direct or indirect result of this repression, around half a million Argentinians had to flee into exile.[8]

Within a short period of time the military had brought the country under their control and had instituted extreme censorship of the media. Individuals or groups who were politically opposed to the establishment were observed by the secret services.[9] The very essence of civil society became more and more limited. The military regime intended to remove all possible breeding grounds for 'subversion'. These measures were embedded in neoliberal economic reforms, which were only possible because the working class and the trade unions were no longer able to provide any resistance.

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6 CONADEP – Comisión Nacional sobre la Desaparición de Personas, *Nunca Más. Informe de la Comisión Nacional sobre la Desaparición de Personas* ³(Buenos Aires: Editorial de la Universidad de Buenos Aires, 1984), 17–22.

7 Secret detention centres and centres of torture are listed here under https://www.argentina.gob.ar/sites/default/files/6._anexo_v_listado_de_ccd-investigacion_ruvte-ilid.pdf, accessed 11 April 2022, the report of CONADEP describes a further 340 of such centres. (CONADEP, *Nunca Más*, 54–78).

8 Peter John King, 'Comparative Analysis of Human Rights Violations under Military Rule in Argentina, Brazil, Chile, and Uruguay,' *Statistical Abstract of Latin America* 27 (1989): 1043–1065, 1062; exact data about the extent of political imprisonment and exile are not available. (cf. Silvina Jensen and María Lorena Montero, 'Prisión política y destierro en la Argentina dictatorial: Materiales y preguntas para la construcción de nuevos objetos de estudio,' *Izquierdas* 26 (2016): 99–122.

9 Veit Straßner, '"*Falsos cristianos*" – Die progressive Kirche Lateinamerikas in der Sichtweise ihrer politischen Gegner', in *Religion als Ressource befreiender Entwicklung. 50 Jahre nach der 2. Konferenz des lateinamerikanischen Episkopats in Medellín: Kontinuitäten und Brüche*, ed. Margit Eckholt (Ostfildern: Grünewald, 2019), 99–120, 113–118.

The expression 'State Terror' was used early on to characterize the Argentinian military dictatorship. The concluding report of 1983 published by the National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas*; CONADEP) – the truth commission put in place at the end of the period of dictatorship – uses the phrase *terrorismo de estado* multiple times throughout.[10] This expression is still used officially to describe the years between 1976 and 1983.

The political scientist and philosopher of law, Ernesto Garzón Valdés, himself from Argentina, outlines the following characteristics of 'State Terror':

(i) The assumption that there is a 'vertical war' in which the enemy has infiltrated every level of society, often across national boundaries, with the aim of destroying the current values and systems. (ii) The abolition of the rule of law. (iii) The secret use of measures like torture and murder by state organizations and (iv) the indiscriminate usage of methods of violence to deprive people of freedom, property or even life. Often it has been unclear to the victims or to society who the perpetrators of these violent methods were. Using violence against innocent people strengthens the effects of the tactics of terror and repression.[11] Each of these aspects was present in the state terrorism of the Argentinian military dictatorship.

1.5 Victim Groups

The Argentinian military dictatorship's most prevalent group of victims was, without a doubt, the *Detenidos Desaparecidos,* in terms of patterns of repression, public perception and human rights violations.

This refers to people who were arrested or abducted and whose traces subsequently vanished. The arrests were officially challenged, and the detainees frequently moved between detention centres so that their relatives found it nearly impossible to reconstruct their whereabouts. The human rights movement spoke of (and today still speaks of) 30,000 'Disappeared'. In Argentina '*Los 30.000*' has become a set phrase, even if this number cannot be definitively proven. The Truth Commission CONADEP was created by the first democratic government after the period of military

10 The CONADEP (Truth Commission) was created immediately after Argentina's return to democracy with President Raúl Alfonsín. It was tasked with clarifying the fate of the Disappeared. Its final report laid the foundation for all further reparation work. Even though in the overwhelming majority of cases the Commission was not able to provide clarity about the whereabouts of the Disappeared, it was able to shed light on the systematic persecution that took place. Further details are found in Section 2.10.1.

11 Ernesto Garzón Valdés, 'El Terrorismo de Estado (El problema de su legitimación e ilegitimidad)', *Revista de Estudios Políticos (Nueva Época)* 65 (1989): 35 – 55, 38 f. ('El terrorismo de Estado es un sistema político cuya regla de reconocimiento permite y/o impone la aplicación clandestina, impredecible y difusa, también a personas manifiestamente inocentes, de medidas coactivas prohibidas por el ordenamiento jurídico proclamado, obstaculiza o anula la actividad judicial y convierte al gobierno en agente activo de la lucha por el poder.').

dictatorship and documented 8,961 instances of the Disappeared. Despite this, Raúl Alfonsín, the first President after the dictatorship, admitted himself that it was very likely that these results actually represented more of an 'open list' than a definitive number.[12]

Workers and employees made up 48.1 percent of the Disappeared. 10.7 percent were academics, 21 percent students, 81.39 percent were aged between 16 and 35 years old. The CONADEP report does not refer to the potential political affiliations of any of the Disappeared. Many of them, however, belonged to the *Montoneros* or to left-wing Peronist groups or were active in Marxist groups. Other progressive forces were also represented: socially-engaged church groups and individuals also became the focus of repression. Even though there were women among the political activists of the 1970s, the proportion of women in the numbers of the Disappeared was especially high, at 30 percent. Around 10 percent of these women were pregnant at the time of their abduction.[13] Some of these pregnant detainees were kept alive until the birth of their children: the children were subsequently adopted by members of the military or their collaborators or were registered under false identity as their own children. The situation was similar for small children who had been abducted with their parents. CONADEP registered 172 such cases, but the *Abuelas de Plaza de Mayo,* an association of grandmothers who have been seeking their lost grandchildren, put the figure of such illegal adoptions at closer to 500.[14] The *Abuelas*' search still continues today. In 2019 the identity and whereabouts of the '*nieto 130*', i.e. the 130th. grandchild, was discovered. Although there existed a broad range of human rights violations in Argentina, the other victim groups (like people who had to flee into exile, former political detainees, people who had lost their jobs for political reasons etc.) played a much smaller role in the public discourse. The reasons for this are varied. In view of the fate of the Disappeared, many of the survivors deemed it inappropriate to demand their own status as victims and their own rights. At the same time, for many, their experiences of repression filled them with shame. Even society itself often did not extend them understanding and sympathy to the same extent.[15]

12 CONADEP, *Nunca Más*, 293.

13 CONADEP, *Nunca Más,* 294 ff.

14 CONADEP, *Nunca Más*, 299 ff.; Ruth Fuchs, *Staatliche Aufarbeitung von Diktatur und Menschenrechtsverbrechen in Argentinien: Die Vergangenheitspolitik der Regierungen Alfonsín (1983–1989) und Menem (1989–1999) im Vergleich* (Hamburg: Institut für Iberoamerika-Kunde, 2003), 115.

15 Veit Strassner, 'From Victimhood to Political Protagonism. Victim Groups and Associations in the Process of Dealing with a Violent Past', in *Victims of International Crimes: An Interdisciplinary Discourse*, ed. Thorsten Bonacker and Thomas Safferling (The Hague: Springer, 2013), 331–344.

1.6 Those Responsible

To a large extent, Argentinian State Terror was distinguished by concealment. The country was divided into zones that were under the control of different armed units. Alongside the individuals responsible at a political level, there were thousands of officers and lower ranks of all departments of the armed and security forces. In addition, police units, various police and military secret services and other state bodies were all part of the apparatus of repression.[16]

Political responsibility lay in the hands of the governing *Junta* and their generals and officers who led each of the individual zones and subzones. On an operational level, it is much more difficult to allocate responsibility due to the decentralized subsidiary structure of the repression apparatus. In this context, the figures provided by the human rights organization, the Centre for Legal and Social Studies (*Centro de Estudios Legales y Sociales*; CELS), at the end of 2017 about the criminal prosecutions of crimes committed against humanity are particularly illuminating.[17]

Of the 3,123 people who had been accused of crimes up until 2017, most of them (85 percent) were active or former members of the armed forces. 11 percent of those accused in the human rights process were civilians. Of these, the largest group were prison officers (21 percent) and civilians working for the secret services (22 percent). A further 10 percent of civilians accused of crimes were health system employees; 12 percent of those accused were people who passed off the children of the Disappeared as their own.

The trials against civilians reflected a general tendency to focus on those responsible for Argentinian state terrorism: after the end of the dictatorship the question of guilt was primarily directed to the armed forces. As years passed, the question was then raised as to what social and political circumstances enabled the coup d'état. The focus also moved onto other bodies which also bore responsibility for the crimes of the dictatorship. Within this context, those responsible within the Church, the business community and other civil agencies were also called into question.

1.7 Places of Persecution

The Argentinian repression was decentralized in its organization. The country was divided up into different geographical areas of responsibility under the armed forces and then further divided into subzones and *áreas*. This subsidiary structure of repression made it possible for the armed forces to effectively control the whole country.

16 María Soledad Catoggio, 'La última dictadura militar argentina (1976 – 1983): la ingeniería del terrorismo de Estado', in *Online Encyclopedia of Mass Violence* (2010), accessed 11 April 2022, http://www.massviolence.org/PdfVersion?id_article=485.

17 The statistics of the perpetrators, accessed 11 April 2022, https://www.cels.org.ar/web/estadisticas-delitos-de-lesa-humanidad.

The main targets of repression were the major cities and the universities. A significant number of human rights violations took place in Buenos Aires and its surrounding areas. Other cities like Córdoba were also impacted by the repression in distinctive ways. Rural areas such as the north-west of Argentina and especially the province of Tucumán were sites of numerous crimes due to the growth of guerrilla activities in the 1970s.

The system of repression extended to the whole of the country. Widely distributed across the land, even in the outlying Tierra del Fuego archipelago, were 762 *Centros Clandestinos de Detención* (secret detention centres; CCD), most of which were on sites owned by the provincial police, the army or the federal police.[18] Some of these centres were notorious because an extraordinary number of people were imprisoned, tortured and murdered there. The most significant CCDs are *Escuela Mecánica de la Armada* (ESMA) or *El Vesubio* in Buenos Aires or *La Perla* in Córdoba.

1.8 The End of the Authoritarian Regime and Transition to Democracy

March 1981 represented a change of power at the top of the military *Junta:* Army General Videla handed over the presidency to General Roberto Viola (also of the army). This indicated a slight relaxation in political tensions. Informal work by political parties was tolerated, and there were the first attempts at dialogue with the reconstituted opposition. Elections were planned for 1984. The opposition made good use of the available room to manoeuvre. By mid-1981 the *Multipartidaria Nacional* was established, a multi-party opposition alliance that demanded a return to democracy. As a result of conflicts over direction within the *Junta*, General Viola, who had been open to dialogue, was replaced in December 1981 by General Leopoldo Galtieri, a hardliner. However, efforts to undo the developments were rendered useless. Protests could no longer be put down; the country was crippled by strikes. In an attempt to divert attention from their domestic political crises and to show their capacity to take action both internally and externally, the military decided to 're-conquer' the Falkland/Malvinas islands. The islands had belonged to Great Britain since they were colonized in 1833, and Argentina had now laid claim to them once again. Initially their strategy appeared to be working. With an external enemy, i.e. Great Britain, in their sights, the internal conflicts faded into the background. Feelings of patriotism distracted from the crises in domestic policy. The regime had not reckoned, however, with the decisive action of the Thatcher government, which immediately sent naval forces to the South Pacific. Surprised by Britain's defensive action, it quickly became clear that the Argentinian military operation had not been thoroughly

18 A list of detention centres ordered by regions, accessed 11 April 2022, https://www.argentina.gob.ar/sites/default/files/6._anexo_v_listado_de_ccd-investigacion_ruvte-ilid.pdf.

planned out and that neither the leadership nor the soldiers were actually ready for a real campaign of war.

The war ended after 72 days. It cost around 2,000 human lives and around 2 billion US dollars. However, for the armed forces it was more than a military defeat. In their most crucial area of expertise, that of leading wars and defending their country, they had failed. The lack of planning and very visible corruption put increased pressure on the political and moral legitimacy of the military government. The humiliating capitulation of the troops did not fit with the image of the heroic defenders of the Fatherland, as the armed forces liked to portray themselves. General Galtieri stepped down, the airforce and the marines removed their representatives from the *Junta* and the presidency passed to Army General Reynaldo Bignone, Argentina's fourth president within 16 months.

His attempts to control the transition process and steer it in the interests of the armed forces were unsuccessful.[19] One of these botched attempts was the passing of the *Ley de Pacificación Nacional (National Pacification Law / Self Amnesty Law,* Ley No. 22.924) shortly before the elections.[20] This legal amnesty was intended to protect members of the military from possible criminal proceedings. On 30 October 1983, the human rights activist and lawyer Raúl Alfonsín won the presidential election with a narrow majority of 51.75 percent against the Peronist: candidate Italo Luder. Power was transferred on 10 December 1983 – International Human Rights Day.

2 Transitional Justice

2.1 Political and Institutional Changes

The process of democratic consolidation began with the transfer of power to Raúl Alfonsín. In contrast to the other regime changes, the military had relatively little influence on the Argentinian transition process. Since they had been in a weakened position when they lost power, it was not possible for them to create enclaves where their power bases remained intact. For example, the government immediately expelled all the judges who had been installed during the military dictatorship from

19 Marcos Novaro and Vincente Palermo, *La Dictadura Militar 1976/1983.: Del Golpe de Estado a la Restauración Democrática* (Buenos Aires/Barcelona/Mexico: Paidós, 2003), 461–484.

20 Notes on the texts of the relevant laws: All the laws, decrees and orders outlined in this article are now available online. The texts are mainly found on the websites of the various government departments or agencies or on official webpages which deal with the most recent history of Argentina. The site maps change frequently so that the URLs are not definitive. It does not make sense therefore to use the URLs in the footnotes to direct to the text of the legal documents. It is more straightforward to look up the laws using the official number of the law or decree (if necessary, with the additional search criteria, 'Argentina').

the highest court in the land. Similarly, Alfonsín retired 50 generals.[21] Further measures to reform the armed forces aimed to ensure civil supremacy over the military. For example, the role of the (civilian-led) Ministry of Defence was strengthened so that the influence of the (military) commanders-in-chief was more limited. In the same way, the role of the armed forces in security was limited and the defence budget was noticeably reduced.[22]

Most significant was the reform of the *Código Militar*, the Code of Military Justice. Although human rights proceedings against members of the military should first be heard before the military courts, the ordinary civil courts had jurisdiction for appeals and in cases of procedural irregularities.

In the meantime, however, it was decreed that all proceedings had to take place publicly (Ley No. 23.049, Art. 7). The armed forces had to adopt these measures with immediate effect. The resulting build-up of frustration was expressed in the coming years in various military uprisings and in an increasing tension between civil society and the military.

Because of this, the normalization of relations between civic and military society played an important role in the politics of Carlos Menem, the Peronist successor to Alfonsín. It was clear that the troops' *esprit de corps* was particularly pronounced whenever they felt that the institutional interests of the armed forces were being threatened. At the start of Menem's period in power, the military were not yet subservient to civilian command. Nor did the Ministry of Defence appear to be the interface between the civilian government and the military. It was more dominated by clientelistic structures within the armed forces as well as personal connections with members of the civilian elite.[23]

In the course of his time in power, Menem was nevertheless able to reform the armed forces, reducing the budget so that the number of troops was actually halved. He stressed the serious budget deficit, and therefore he was able to achieve through economic means the military reform that Alfonsín had not been able to push through using political means.[24] As Argentinian troops also took part in UN operations, the Ministry for Foreign Affairs also took on more importance for the armed forces.[25]

Menem was therefore able to subordinate the armed forces to civilian control. He reacted strongly to infringements of rules and to insubordination. At the same time,

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21 Elin Skaar, 'Argentina: Truth, Justice, and Reconciliation', in *Roads to Reconciliation*, ed. Elin Skaar, Siri Gloppen and Astri Suhrke (Lanham/Maryland: Lexington Books, 2005), 157–175, 161; Wolfgang S. Heinz, 'Militär und Demokratie', in *Argentinien. Politik, Wirtschaft, Kultur und Außenbeziehungen*, ed. Detlef Nolte and Nikolaus Werz (Frankfurt am Main: Vervuert, 1996), 225–240, 227.

22 Carlos Santiago Nino, *Radical Evil on Trial* (New Haven/London: Yale University Press, 1996), 81f.; Rut Diamint, 'Streitkräfte und Demokratie', in *Argentinien nach Menem. Wandel und Kontinuität*, ed. Peter Birle and Sandra Carreras (Frankfurt am Main: Vervuert, 2002), 313–339, 336f.

23 Diamint, 'Streitkräfte und Demokratie', 323–328.

24 Heinz, 'Militär und Demokratie', 233–234.

25 Diamint, 'Streitkräfte und Demokratie', 333ff.

he met the armed forces halfway by extending wide-ranging pardons to those who had been sentenced for human rights violations. After the end of dictatorship, the military leadership abstained more from political life and showed no real ambitions for a renewed takeover of power, as had previously been the case throughout Argentina's history. It was therefore a learning process to accept their place under the civilian government and to acknowledge that the military did not make the political decisions, but instead was a means of carrying out the decisions made by a democratic government.[26]

A clear symbol of this change came on the 28th anniversary of the putsch. For years human rights organizations had called for the removal of the portraits of the *Junta*-Generals Jorge Rafael Videla and Reynaldo Bignone from the *Colegio Militar*, the army's training college. The paintings hung there in a gallery of former directors. For years there was no discernible political will to fulfil this demand. However, in March 2004 President Néstor Kirchner told the Ministry of Defence that he intended to remove these portraits as an official act of government on the anniversary of the putsch. On 24 March, then, in the presence of Kirchner and the entire cabinet, General Bendini, the commander-in-chief of the army, officially removed these portraits. The fact that one of the most high-ranking officers in the military took down the paintings of the former holders of military power at the request of the President was widely regarded as a sign of the military's subordination to the civilian government. In the immediate aftermath it led to many controversies and tensions; e. g., five generals resigned their posts.

2.2 Prosecution

In terms of criminal prosecution for human rights violations, Argentina was a pioneer, at least within the Latin American context, as it brought those responsible for state terrorism before public courts in the so-called *Junta*-trials and sentenced the generals to long periods in prison.

This was made possible by the following varying factors: since the military had handed over power from a position of weakness, they hadn't just failed politically and economically. They were also discredited from a moral point of view and had even completely failed in the military field. As opposed to other countries like Chile or Brazil, there were no significant groups within the populace who still gave the armed forces meaningful backing. Rather, there was (and still is today) a wide-reaching societal consensus condemning the dictatorship. Even across the (party) political spectrum there were no influential supporters. There were no amnesty laws protecting the military from criminal prosecution. The legal amnesty that they

26 Rut Diamint, La historia sin fin: el control civil de los militares en Argentina, *Nueva Sociedad* 213 (2008): 95 – 111, 104 – 107.

had put in place themselves (Self-Aamnesty Law, Ley No. 22.924) had no political or moral legitimacy and therefore could easily be repealed. Parliament declared this law unconstitutional and therefore invalid. The law which repealed the Self-Amnesty Law (Ley No. 23.040) was the first law that President Alfonsín signed. In connection with this, he issued a decree that reopened the legal proceedings against the members of the first three military *Juntas*. This first step promised much, but the criminal prosecutions led to considerable problems, as the armed forces emerged in the coming years as having powerful vetoes, despite political will and favourable conditions for the prosecutions being in place.

2.2.1 Release of Political Prisoners

Politically-motivated arrests were not central to the Argentinian repression strategy, unlike in Chile and Uruguay. Therefore, after the dictatorship was over, the release of political prisoners did not play such a significant role. Most people who were still in prison on political grounds in 1983 were not legally convicted but rather had been held in custody during the state of emergency. In these cases, their imprisonment ended with the lifting of the state of emergency in the run up to the elections. When Alfonsín came to power there were only 117 people in prison on political grounds. Instead of issuing amnesties or pardons, Alfonsín referred these cases to the courts for review. These proceedings sometimes took months, so that the last political prisoners were not released until 1986.[27]

2.2.2 The 'Trial of the Juntas' (1983 to 1985)

In his pre-election campaigning, President Alfonsín had promised to hold responsible those guilty of human rights violations. The work of CONADEP raised the already high expectations of the populace even higher (cf. Ch. 1.10.1). This was a moment in history that the Alfonsín government had to grasp. To avoid widespread trouble in the ranks of the armed forces, Alfonsín planned on limiting the range of accused persons and the timespan of the overall process. People should only be held responsible if they: (i) had either given the orders for the human rights violations or (ii) had carried these orders out 'excessively'.[28] All others who were accused could say that they were acting under orders. Three days after he came to power, Alfonsín ordered the

27 Veit Straßner, *Die offenen Wunden Lateinamerikas: Vergangenheitspolitik im postautoritären Argentinien, Uruguay und Chile* (Wiesbaden: Verlag für Sozialwissenschaften, 2007), 95–96.
28 Raúl Alfonsín, *Memoria Política: Transición a la democracia y derechos humanos* (Buenos Aires: Fondo de Cultura Económica de Argentina, 2004), 35.

imprisonment of members of the first three military *Juntas*[29] as well as four guerrilla commanders.[30] In an attempt to avoid the appearance of victors' justice, Alfonsín opted to leave the proceedings to the military courts, in direct contradiction to his pre-election position. The armed forces were therefore given this opportunity to clean up their ranks. Previously, Alfonsín had had the *Código Militar* (Code of Military Justice) reworked; this proved to be a shrewd move. The military courts hesitated and delayed proceedings, so the civil courts, the *Cámara Federal de Apelaciones* (National Criminal Court of Appeals) in Buenos Aires, took over the cases in October 1984, as planned for in the reformed Code of Military Justice.[31]

After the failure of the strategy of self-purification, which was meant to avoid tensions, the process of legal prosecutions entered a new stage, which proved to have higher political costs for the government.

The proceedings took place in the public sphere; something which was unique in Argentinian legal history. As the CONADEP report had attested, the judiciary, which had been dormant during the dictatorship, now had the chance to prove their autonomy and their credibility. This new transparency gave the judgements a greater legitimacy. Around 50,000 demonstrators gathered on the streets of Buenos Aires during the first days of the hearings to lend their support. The *Juicios* lasted until December 1985; in total, 800 witnesses were heard during almost 500 hours of hearings. By way of 709 cases the prosecutors were able to prove that the *Junta* generals were responsible for systematic state terrorism. The members of the *Junta* – Videla and Massera – were convicted of murder, torture, false imprisonment, theft and coercion and were sentenced to life imprisonment; General Viola to 17 years in prison; Admiral Lambruschini to eight years and Brigadier Agosti to three years and nine months. The other four accused were released because of a lack of evidence.[32] The population followed the whole process avidly. A weekly newspaper was established for the sole purpose of reporting on the proceedings. The newspapers printed witness state-

29 These were Generals Jorge Videla, Roberto Viola and Leopoldo Galtieri, Admirals Emilio Massera, Armando Lambruschini, Jorge Anaya and Brigadiers Orlando Agosti, Omar Graffigna and Basilio Lami Dozo.

30 Carlos H. Acuña and Catalina Smulovitz, 'Catalina, Militares en la transición argentina: del gobierno a la subordinación constitucional', in *Juicio, castigos y memorias. Derechos humanos y justicia en la política argentina*, ed. Carlos H. Acuña et al. (Buenos Aires: Ediciones Nueva Visión, 1995), 19–99, 51.

31 Nino, *Radical Evil on Trial*, 75–78.

32 Julio B.J. Maier, 'Die strafrechtliche Aufarbeitung von staatlich gesteuertem Unrecht in Argentinien', *Zeitschrift für die Gesamte Strafrechtswissenschaft* 107 (1995): 143–156, 146–147; Carlos H. Acuña and Catalina Smulovitz, 'Catalina, Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts', in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (Notre Dame/London: University of Notre Dame Press, 1997), 93–122.

ments, while proceedings were reported on television, even though there was no audio.[33]

2.2.3 The Legal Proceedings against the 'Excessive Perpetrators'

While it was relatively easy to identify those who had given the orders for violence and who bore political responsibility for state terrorism, it was a real challenge to define the groups of people who had carried out their orders 'excessively' and therefore, as Alfonsín intended, should also be punished. A first attempt as part of the self-purification process demanded by Alfonsín was that the armed forces were to submit a list of approximately 30 people from within their ranks that they saw as having carried out their orders with excessive violence and therefore whom they would accept as deserving sentencing. This was an attempt, on the one hand, to carry out the commitment that the government had made publicly, and, on the other, to avoid unnecessary trouble with the troops. They wanted to limit the number of trials and only punish the most extreme and well-known of the perpetrators.[34] This attempt failed, however, due to lack of cooperation from the military leadership. Alfonsín and his advisors nevertheless wanted to limit the number and length of the proceedings. They therefore planned that around 100 members of the military should be sentenced as an example.[35]

This plan became questionable due to the results that came to light through the CONADEP and the public pressure that subsequently mounted. Among other things, the CONADEP concluded that no 'excesses' had taken place but rather that what normally would be regarded as extremely depraved and gruesome practices had become normalized during the dictatorship.[36]

Even in the *Junta* trials it was stressed how essential it was to hold all the lower levels of the hierarchy to account.[37]

The government, therefore, had a problem; its strategy was not working to bring swift justice to those responsible for state terrorism and to those excessively implementing orders so as to satisfy the population while not putting too much pressure on the civil-military relations. In the period leading up to August 1984, human rights organizations had already gathered 2,000 charges of human rights violations; CON-

33 Claudia Feld, *Del estrado a la pantalla: Las imágenes del juicio e los ex comandantes en Argentina* (Madrid: Siglo XXI Editores, 2002); Claudia Feld, 'Memoria colectiva y espacio audiovisual: Historia de las imágenes del juicio a las ex Juntas Militares (1985–1998)', in *La imposibilidad del olvido: Recorridos de la memoria en Argentina, Chile y Uruguay*, comp. Bruno Groppo and Patricia Flier (La Plata: Al Margen/Bibliothéque de Documentation Internationale Contemporaine, 2001), 103–114.

34 Acuña and Smulovitz, 'Catalina, Guarding the Guardians in Argentina', 103–104.

35 Alfonsín, *Memoria Política*, 50.

36 CONADEP, *Nunca Más*, 481.

37 Fuchs, *Staatliche Aufarbeitung*, 81.

ADEP provided a further 1,087 cases to the judiciary. By the end of 1984 there were around 6,000 cases before the Argentinian courts, in which approximately 600 members of the armed and security forces were accused.[38]

Initially, the military courts were responsible for hearing these cases; however, due to grounds for appeal or legal irregularities, these cases passed more and more to the civil courts. These courts properly investigated the cases and imposed life sentences. The unrest in the ranks of the armed forces increased, and with it the pressure on the government to hold to their original promises about the length and extent of the proceedings. The government was forced to find ways to limit the extent of the trials in order to avoid further unrest among the troops.

2.2.4 The Amnesty Laws (1986 to 1987) ending Criminal Prosecutions

Initially, the government tried to find an informal solution to reduce the number of cases against members of the military. Alfonsín gave instructions to the responsible military judges to draw on 'acting under orders' as a first line of defence in order to reduce the number of prosecutions.

After massive public protests, resistance within Alfonsín's own party and threats from some judges to resign their positions, the government had to abandon this direction and try to find other solutions.[39]

The *Full Stop Law* (*Ley de Punto Final*, Ley No. 23.492) passed on 23 December 1986 was meant to limit the time period in which cases for human rights violations could be registered. It limited suits to those filed within 60 days of the law's enactment. Cases that had not been registered by the courts before the end of February 1987 could therefore not be submitted.

Exceptions to these restrictions came with indictment for punishable acts like falsifying documents, abductions and the concealment of children – offences linked to the theft of the children of the Disappeared. These exceptions later played an important role in the resumption of criminal prosecutions. Raúl Alfonsín later wrote in his memoirs that this law actually had a boomerang effect. They hoped that it would limit the number of prosecutions, at least in the two-month period of Christmas and the summer recess. However, the human rights movement worked flat out to register cases and prepare charges, and the courts suspended their summer recess so that before the deadline ran out in February 1987 more than 300 criminal charges had been

38 Alexandra Barahona de Brito, 'Truth, Justice, Memory, and Democratization in the Southern Cone', in *The Politics of Memory. Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen González-Enríquez and Paloma Aguilar (Oxford: Oxford University Press, 2001), 119–160, 122.

39 Kai Ambos, 'Zur "rechtlichen" Struktur der Repression und strafrechtlichen Vergangenheitsbewältigung in Argentinien: Ein Kommentar aus juristischer Sicht', in *Vergangenheitsbewältigung in Lateinamerika*, ed. Detlef Nolte (Frankfurt am Main: Vervuert, 1996), 86–95, 91–92.

filed against high-ranking military officers.[40] The judiciary therefore expressed their independence and their desire to bring forward criminal trials for human rights violations. The goal of the *Ley de Punto Final* completely backfired.

Unrest amongst the troops increased even more and culminated in quite a few rebellions among officers. The most significant were the Easter Uprisings of the *Carapintadas* (Painted Faces), a group of young officers who occupied a barracks near Buenos Aires. Many members of the military expressed their sympathy and support. The situation across the country became incredibly tense. Thousands of those who feared for the fledgling democracy assembled in front of the *Casa Rosada*, the seat of government in Buenos Aires. Alfonsín himself undertook personal negotiations with the *Carapintadas* and was eventually able to bring the uprising to an end.[41]

Even though he did not accept that he had made concessions to the armed forces, the military uprisings and threats of a further putsch could be seen as reasons why the Alfonsín government was trying to limit criminal proceedings again through an additional law. One month after the uprisings, Alfonsín brought a plan for the *Law of Due Obedience* (*Ley de Obediencia Debida*, Ley No. 23.521) to the parliament.

This was hotly disputed in parliament before it came into law on 4 June 1987. This law spelled out a legally binding, broad interpretation of the concept of 'acting under orders'. Anyone who was not in charge of at least one of the military subzones was able to claim that they were acting out of due obedience, i. e. obeying orders from their superiors.

This justification made it impossible to pursue convictions. The law defined that all live cases whose defendants fulfilled the relevant criteria would immediately be concluded without due legal process. Exceptions to this ruling included cases involving rape, child abduction, falsifying children's identity documents and offences that led to appropriation of wealth. This law eventually brought the desired limitation on the number of prosecutions. The use of the Full Stop Law had already reduced the number to 450. After the Law of Due Obedience only 100 cases remained, a number further reduced during the course of the hearings so that eventually only 18 charges were pursued.[42]

Nevertheless, further tensions resulted within the armed forces, who felt that they had been publicly slandered without reason.

2.2.5 Amnesties for the Convicted Military (1989 to 1991)

In 1989 the Peronist Carlos Menem took over the presidency. This was the first time in the history of Argentina that there was a constitutional handover of power from one

40 Alfonsín, *Memoria Política*, 53; Acuña and Smulovitz, 'Catalina, Guarding the Guardians in Argentina', 107.

41 Nino, *Radical Evil on Trial*, 95–100.

42 Diamint, 'Streitkräfte und Demokratie', 319.

elected president to another elected president who was a member of a different party than his predecessor. The greatest political challenges of his first years in power were the struggles with economic crises, which accompanied a period of hyperinflation. A further burden was the constant sabre-rattling of the discontented military, which had also plagued the last few months of his predecessor's term. While Alfonsín was prepared to hold an intensive debate about the past, Menem underlined the necessity for 'national reconciliation', or rather for 'pacification.' According to Menem, the nation should now look forward and let the past be the past. To shore up this rhetoric of reconciliation with action, Menem made widespread use of his presidential power of pardon. The vast majority of those he pardoned were members of the armed forces and civilians who had faced disciplinary action in terms of the 'war against subversion.' He also pardoned people who had been involved in the military uprisings and attempted coups of 1987 and 1988.[43] The pardons were the subject of harsh criticism: according to questionnaires, approximately 80 percent of the population disagreed with the pardons. There was no societal support for these decisions and the majority of Argentinians could not understand why they were taking place.

Despite numerous mass gatherings, Menem continued his policy of pardons.[44] At the beginning of 1991 he even pardoned the four generals who had been sentenced to long-term imprisonment during the *Junta* trials. Thus, the final members of the military sentenced under Alfonsín regained their freedom. This period of amnesty also ended the few remaining live legal proceedings. Menem's amnesty strategy not only brought the criminal proceedings to an end, it actually thwarted the efforts of the previous government to allow criminal prosecutions for human rights violations. Menem created circumstances under which the armed forces became more and more subordinate to the civilian government and even tolerated budget cuts under the auspices of 'structural reforms'.[45]

2.2.6 The Resumption of Criminal Prosecutions (mid-1990s onwards)

With the amnesty laws of Alfonsín's government and the pardons of Menem's period in power, every possibility of criminal prosecution seemed to be cut off. In the first half of the 1990s, dealing with the crimes of the dictatorship played a minor role in Argentinian public life. Free market liberalization and privatization were proving

43 Ambos, 'Zur "rechtlichen" Struktur der Repression', 93; Acuña and Smulovitz, 'Catalina, Guarding the Guardians in Argentina', 109 – 110.

44 Nino, *Radical Evil on Trial*, 104; Elisabeth Jelin, 'The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina,' *Latin American Perspectives* 21/2 (1994): 38 – 58, 49.

45 Michael Radseck, 'Das argentinische Militär: Vom Machtfaktor zum Sozialfall?', in *Argentinien heute. Politik – Wirtschaft – Kultur*, ed. Klaus Bodemer, Andrea Pagni and Peter Waldmann (Frankfurt am Main: Vervuert, 2002), 83 – 103, 98.

successful. These were years of economic upturn. The Argentinian Peso was pegged to the Dollar and gained a respectable purchasing power. Argentinians fully exploited the opportunity to consume and travel. Menem's strategy of leaving the past behind and instead focusing on the future seemed to be working. Nevertheless, relatives of the victims along with human rights organizations continued to explore ways to resume criminal prosecutions. The first fruits of these efforts became apparent from the middle of the 1990s as the topic gained renewed attention due to the uncovering of horrific revelations in the context of the 20th anniversary of the putsch. (cf. Chapter 2.13).

(i) *Juicios por la Verdad:* Truth Enquiry Processes (1995 onwards)

The *Centro de Estudios Legales y Sociales* (CELS) is a renowned human rights organization with headquarters in Buenos Aires. It has a powerful legal department with ingenious lawyers. In the middle of the 1990s, the CELS demanded that the judiciary undertake further investigations into the cases of two women who had been forcibly disappeared (both daughters of leading members of the CELS). They called on the *Derecho a la Verdad*, the right of relatives (and society) to clarity and knowledge of the truth. They argued that while the amnesty laws might exclude the punishment of those responsible, it did not remove the duty of the courts to fully clarify what had taken place, even if such legal investigations would not result in the punishment of the perpetrators. It was the job of the judiciary to give relatives the right to find out about the circumstances surrounding the Disappearance of their loved ones and where their remains lay. In this way, relatives could begin a proper process of grieving.[46]

This was not an appeal against the legitimacy of the amnesty laws. It called into question how far the duty of the court extended to conduct investigations, regardless of any possible conviction of those guilty. The CELS drew on the arguments of the Inter-American Court of Human Rights in Costa Rica, which had already forced other countries to provide full details of the fate of their so-called 'Disappeared.' In the case of the proceedings that were hard fought by the CELS, the court recognized in the first instance the principle of the 'Right to Truth,' which was not impacted by the provisions of the amnesty laws. The same court, however, ceased proceedings when the armed forces refused to provide any information about the whereabouts of Disappeared people. An appeal against this outcome was rejected by the highest court. The CELS then filed a complaint with the Inter-American Court of Human Rights that the State of Argentina was breaching the *Convención Americana sobre Derechos Humanos* (The American Convention on Human Rights). As this complaint was accepted and a conviction looked likely, Menem's government tried to come to an out of court settlement with the plaintiffs. An agreement was

46 Fuchs, *Staatliche Aufarbeitung*, 124 ff.

reached in November 1999 that the complaint would be withdrawn and the State of Argentina would in turn guarantee the right of the relatives to information and that all efforts would be made to clarify the fate of the Disappeared. In this arrangement, an explicit right to truth that did not fall under this statute of limitations was recognized. Regulations for due process and for judicial responsibility were also clarified. At least two specialized prosecutors should also be appointed to advise and support the investigative courts.[47]

Even though the process of truth discovery did not make actual criminal prosecutions possible, it did contribute towards opening up space for legal investigations to begin again and to fulfilling the need for relatives to have clarity. It also created political and societal pressure. The human rights organizations had to fight hard to win this development against the embittered resistance of the government. As a result, many federal courts initiated processes of truth discovery; however, the armed forces refused to cooperate – in some cases, members of the military were even accused of perjury.[48]

(ii) International Criminal Prosecutions

The human rights movement also raised political pressure to act in accordance with prosecutions that took place in other countries. Among the ranks of the Disappeared were some foreigners and some Argentinians of joint nationality, which introduced the possibility of taking judicial steps in other countries as well. For example, by 1983 Italy had already initiated proceedings into the cases of several of the Disappeared who were Italian nationals, while in France prosecutions over the whereabouts of two French nuns who had been forcibly Disappeared in Argentina took place. The Spanish investigating magistrate Baltasar Garzón, responsible for the arrest of the Chilean dictator Augusto Pinochet in 1999 in London, investigated the disappearance of 320 Spanish citizens. President Menem criticized these proceedings as interfering in the internal workings of a sovereign state, refused extradition orders and issued a decree forbidding Argentinian authorities from cooperating with the Spanish judiciary (Decreto 111/98). Internationally, Menem was coming under more and more pressure to account for his human rights and legacy policies. This became

47 CELS, *Derechos Humanos en la Argentina. Informe anual enero – diciembre 1998* (Buenos Aires: Centro de Estudios Legales y Sociales, 1999), 70 – 88 and CELS, *Derechos Humanos en Argentina. Informe anual 2000* (Buenos Aires: Centro de Estudios Legales y Sociales, 2000), 39 – 51; re. the case of Carmen Aguiar de Lapacó see: Comisión Interamericana de Derechos Humanos, Informe No. 21/00. Caso 12.059 Carmen Aguiar de Lapacó, 29 February 2000, accessed 11 April 2022, https://www.cidh.oas.org/annualrep/99span/Soluci%C3%B3n%20Amistosa/Argentina12059.htm.

48 Estela Schindel, 'Verschwunden, aber nicht vergessen: Die Konstruktion der Erinnerung an die *Desaparecidos*', in *Argentinien heute. Politik – Wirtschaft – Kultur*, ed. Klaus Bodemer, Andrea Pagni and Peter Waldmann (Frankfurt am Main: Vervuert, 2002), 105 – 134, 115 – 116.

especially apparent during state visits, e. g. in 1998 to France and Sweden.[49] In the domestic policy sphere, pressure was also increasing as the prosecutions abroad cast light on the practices of impunity and the refusal to pursue legal reparations at home. Despite international pressure, the subsequent governments also held to this position. In 2001 President Fernando de la Rúa declared by decree (Decreto 1581/2001) that requests for legal assistance, including extradition orders that related to the time of the dictatorship, were to be denied. However, this decree (Decreto 420/2003) was overturned in 2003 during the presidency of Néstor Kirchner. His government therefore showed willingness to support judicial proceedings both at home and abroad.[50]

(iii) Prosecutions for Child Abduction (1996 onwards)

The barristers representing the *Abuelas de Plaza de Mayo,* the association of grandmothers who were seeking their lost grandchildren, instituted criminal proceedings for child abduction at the end of 1996 against the *Junta* generals Jorge Videla and other members of the army. These offences were explicitly excluded from the amnesty laws passed during the Alfonsín government. The prosecution was able to prove that there was a systematic plan behind the practice of abducting children and newborns as well as the falsification of their identity documents and their subsequent adoption by foreign families. They were also able to prove that the highest ranks of the military bore responsibility for this plan. On this basis, General Jorge Videla was convicted in July 1998 as being indirectly responsible on five counts and was sentenced to ten years' imprisonment. The punishment was, however, swiftly transmuted to house arrest, since Videla was already 70 years old. This judgement was also very significant from another perspective: the presiding federal judge classed these proceedings for the first time as 'crimes against humanity,' meaning, therefore, that they were offences that could not be granted amnesties or come under a statute of limitations.[51]

As a result of this judgement, in following months and years around a dozen high-ranking military were sentenced to jail terms. After the amnesty laws and the pardons, these were the first judgements in almost a decade in Argentina that dealt with the crimes of the dictatorship. They showed that criminal prosecutions were still possible. It was only the persistent and untiring work of the victims and their legal teams that made this development possible – in the face of resistance from the State.

49 CELS, *Derechos Humanos en la Argentina 1998*, 21.

50 Verónica Torras, Luz Palmás Zaldua and Marcela Perelman, *Memoria, verdad y justicia como política de Estado: Análisis de políticas públicas implementadas durante los gobiernos kirchneristas (2003–2015) respecto de los delitos de lesa humanidad ocurridos en la última dictadura argentina* (Friedrich Ebert-Stiftung Argentina, Análisis No. 11–2016/Septiembre 2016), 10.

51 CELS, *Derechos Humanos en la Argentina 1998*, 88–103.

(iv) The Lifting of the Amnesty Laws (1998, 2003 and 2005)

The Inter-American Court of Human Rights in Costa Rica had already declared in 1992 that the amnesty laws were irreconcilable with the human rights conventions by which Argentina was bound.[52] Despite this, in view of the widespread silence in society about their most recent past, the government was able to ignore this. However, once legacy issues began to appear more on the societal, judicial and political agenda from the middle of the 1990s, this could no longer be ignored. In 1998, the opposition brought forward a bill that would abolish the amnesty laws. This would enable the criminal proceedings against 1,180 people who had profited from the amnesties being reopened. This initiative created widespread political and judicial debate about the morality and admissibility, as well as the dangers, of such a step. The first parliamentary initiative failed. Further attempts followed. There was also discussion around whether an annulment or a derogation of the laws made more sense. An annulment had a retroactive function – this would mean that the law and all its legal consequences would be declared null and void. A derogation, on the other hand, would leave all the legal consequences of the repealed law up to the point of the derogation unaffected and would simply affect future cases.

On 24 March 1998, the 22nd anniversary of the putsch, after a long debate in parliament, a decision was eventually made in favour of a *derogación* of both amnesty laws (Ley No. 24.952). The human rights movement was disappointed by this purely symbolic decision, as the concluded proceedings could not be reopened anyway.[53] The changed attitudes towards the past shown by the government of Néstor Kirchner led to the annulling of both amnesty laws by parliament in 2003. This law (Ley No. 25.779) made it possible to reopen the proceedings that had been halted at the end of the 1980s. At the same time, there was much judicial and legal political controversy around this decision. Clarity was eventually reached in June 2005 when the Supreme Court declared that both amnesty laws had been invalid and unconstitutional. At the same time, law Ley No. 25.779, passed in 2003 and annulling the amnesties, was declared constitutional.[54]

(v) Institutional Support of Legal Proceedings

With the resumption of the judicial investigations, numerous practical and organizational problems became apparent, which made the proceedings more difficult. For this reason, during the Presidency of Néstor Kirchner, and later of his wife Cristina

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52 Comisión Interamericana de Derechos Humanos, Informe No. 28/92, VI, 1: 'las Leyes No. 23.492 y No. 23.521 y el Decreto No. 1002/89 son incompatibles con el artículo XVIII (Derecho de Justicia) de la Declaración Americana de los Derechos y Deberes del Hombre y los artículos 1,8 y 25 de la Convención Americana sobre Derechos Humanos.'

53 Straßner, *Die offenen Wunden Lateinamerikas*, 116 – 117.

54 María José Guembe, 'Reopening of Trials for Crimes Committed by the Argentine Military Dictatorship', *Sur – International Journal on Human Rights* 3 (2005): 115 – 131.

Kirchner, a number of measures were taken to accelerate judicial investigations and to respond to practical problems. For example, a support facility was set up at the public prosecution service to assist the individual courts in order to speed up the process. Witness protection programmes were established, guidelines for conducting judicial investigations were drawn up, additional personnel resources made available, etc.[55] Overall, these measures were aimed at supporting judicial investigations, responding to practical problems and, overall, advancing the process of the legal proceedings.

2.2.7 Further Legal Policy Measures

In 2003, the Kirchner government decided to ratify the international 'Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity' and thus – also retrospectively – to suspend any statutory limitations for crimes that had already been committed. This legal treaty, signed by Argentina in 1995 but not ratified by its parliament, received constitutional status with the approval of the Chamber of Deputies in December 2003.[56]

As a consequence of the experiences with the amnesty laws of the Alfonsín government and the pardons of the Menem government, the parliament passed Ley No. 27.156 in 2015, which stipulated that crimes against humanity, genocide and war crimes cannot be the subject of amnesties or pardons under any circumstances. The derogation of the *Código Militar* in 2008 can be seen as a further legal and political milestone. Ley No. 26.394 dissolved military jurisdiction and the members of the armed forces were placed under ordinary jurisdiction.

2.2.8 Criminal Legal Proceedings – an Interim Review

Following the resumption of prosecutions, once the amnesty laws had been annulled and declared unconstitutional, the first judgement in a human rights trial was handed down in 2006. According to the state prosecutor's office, by the end of September 2020 the number of trials for crimes against humanity had risen to 597. A total of 3,329 people were charged with serious human rights violations. Judgments had been pronounced in almost 997 cases by September 2020. Because of their old age, however, the majority of jail sentences were transmuted to house arrest. 162 people were acquitted.[57] The average length of proceedings up to the pronouncement of

55 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 11–14.

56 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 10.

57 Accessed 11 April 2022, https://www.fiscales.gob.ar/lesa-humanidad/argentina-llega-a-las-casi-mil-personas-condenadas-por-haber-cometido-delitos-de-lesa-humanidad-durante-el-terrorismo-de-estado.

the verdict, including possible appeals and revisions, was around 5.3 years, which underlines the complexity of the investigations.[58]

The judicial investigations were also extended to crimes that had taken place before the actual coup but that were directly related to it (such as murders committed by the *Alianza Anticomunista Argentina*). The transnational dimension of human rights violations by the military dictatorships in southern Latin America was also examined in connection with the investigations into *Plan Cóndor* (Operation Condor).[59]

Moreover, the perspective of judicial investigations has broadened in recent years. While at the beginning it was primarily about the guilt of the military, the question came more to the fore of the responsibility of non-military agents (such as priests, doctors, etc.) and also of economic agents.[60]

2.3 The Replacement of the Elites

2.3.1 Elite Exchange under the First Democratic Government

There was an automatic change of the political elite as the military stood down from power. The political parties that had been operating in secret for years used the period of the political relaxation of the authoritarian regime to reorganize themselves. After the presidential elections, the most important offices were filled from among their ranks. Immediately after taking office, President Alfonsín dismissed all the judges of the *Corte Suprema de Justicia*, the Supreme Court, as they were judges who had been appointed by the military. Alfonsín also retired 50 generals. The fundamental exchange of elites was thus initially carried out in the judiciary and within the armed forces.[61]

2.3.2 Controversies over the Promotion of Officers

Even though a number of generals had been retired as part of the transition to democracy, there were numerous people in the ranks of the armed forces and security services who had been involved in human rights violations. Many continued to serve there and built careers within the military hierarchy. From the very beginning of democratization, the human rights movement was concerned that such members of the

58 Accessed 11 April 2022, https://www.infobae.com/politica/2020/03/24/a-44-anos-del-golpe-de-estado-suman-968-condenados-por-delitos-de-lesa-humanidad.

59 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 15.

60 Luz Palmás Zaldua et al., 'Las políticas de memoria, verdad y justicia a cuarenta años del golpe', in *Derechos humanos en la Argentina: Informe 2016*, Centro de Estudios Legales y Sociales (CELS) (Buenos Aires: Siglo veintiuno editores/CELS, 2016), 25–56, 33–49.

61 Skaar, 'Argentina', 161; Heinz, 'Militär und Demokratie', 227.

military were being promoted. Calls for bodies to be created to prevent such promotions continued to be ignored by the ruling government.

As soon as it became known through the press that officers were to be promoted or entrusted with special tasks, the human rights organizations searched their archives for information on the people concerned and presented this to the government and Congress – unsolicited, as they were the agencies involved in such promotions. The human rights movement tried to underline the contradictions involved in appointing these officers and the reservations that they had.

Since 1993, the parliamentary commission responsible for matters of promotion regularly asked CONADEP and the two human rights organizations, the Permanent Assembly for Human Rights (*Asamblea Permanente por los Derechos Humanos*; APDH) and CELS, to search their archives to find out about the history of the officers to be promoted. This was the first formalized, i.e. institutionalized, involvement of civil society bodies in the promotion process. The responsible agencies within the Ministry of Defence have also followed this practice since 2003.[62] Thus, almost two decades after the end of the dictatorship, an important contribution was made to the democratization of institutions – in particular of the armed forces.

2.4 Reparations

As early as 1984, CONADEP suggested in its final report that victims of state terrorism should be compensated. In addition to financial compensation, the commission proposed the establishment of scholarship and work programmes as well as psycho-social support for relatives.[63] The compensation policy of subsequent Argentinian governments, however, focused primarily on financial measures.[64]

2.4.1 Immediate Measures for Victims of Work Bans etc.

Shortly after the end of the dictatorship, several laws were passed concerning employment law for people who had been dismissed for political reasons or who had been subjected to other sanctions.[65] In 1984, for example, Ley No. 23.053 regulated the return of persons from diplomatic service overseas who had been refused

62 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 19 f.

63 CONADEP, *Nunca Más*, 477 f.

64 Ana Guglielmucci, 'Transición política y reparación a las víctimas del terrorismo de estado en la Argentina: algunos debates pendientes', *Taller: Revista de Sociedad, Cultura y Política en América Latina* 4/5 (2015): 24–42; María José Guembe, 'Economic Reparations for Grave Human Rights Violations', in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 21–47.

65 Guembe, 'Economic Reparations', 23 f.

entry for political reasons. In the same year, Ley No. 23.117 regulated the reintegration of workers into public companies who had been dismissed for political or trade union activities. In the following years, similar regulations were made for teachers (Ley No. 23.238) and for bank employees (Ley No. 23.523). In September 1985, Ley No. 23.278 regulated the crediting of periods of forced unemployment due to political reasons towards pension entitlements.

2.4.2 First Compensation for the Victims of the Disappeared (1986)

Following the recommendations of CONADEP, parliament passed its first compensation law at the end of 1986 (Ley No. 23.466), which granted the spouse or long-term partner of the Disappeared a pension amounting to 75 percent of the minimum wage. Children of the Disappeared were to receive the same amount up to the age of 21.[66] This compensation measure, which was very modest from the point of view of those affected, only took into account the immediate relatives of the Disappeared. Other groups of victims did not receive any compensation.

2.4.3 Exemption from Military Service for Relatives of the Disappeared (1990)

Because of their traumatic experiences, the relatives of the Disappeared had long demanded that they be exempted from military service. They referred to psychological tension, mental cruelty and discrimination. In September 1990, a law (Ley No. 23.852) was passed that exempted the children of the Disappeared from military service. President Menem initially blocked this law because it represented a special privilege for a specific group of people. The armed forces were also critical, claiming that the law expressed an anti-military stance and was based on unproven claims (namely that the armed forces were responsible for the Disappearances).[67] The president's veto, however, could be overruled. With the abolition of compulsory military service in 1995, this law lost its meaning.

2.4.4 Compensation for Former Political Prisoners (1991)

Shortly after the end of the dictatorship, numerous former political prisoners filed civil suits against the Argentinian state to assert their claims for damages. Although

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66 Diana Conti, 'La democracia y su respuesta a las violaciones a los Derechos Humanos el pasado', *Hechos y Derechos*, 8 (2001): 57–70, 62.

67 Patricia Valdéz, '"Tiempo Óptimo" para la Memoria', in *La imposibilidad del olvido. Recorridos de la memoria en Argentina, Chile y Uruguay*, comp. Bruno Groppo and Patricia Flier (La Plata: Al Margen/Bibliothéque de Documentation Internationale Contemporaine, 2001), 63–82, 67.

many of these complaints received positive decisions in the first instance, they failed before higher appeals bodies. Finally, the Supreme Court ruled that the deadline for asserting such claims had expired and that further civil claims were no longer permissible. After the legal process in the country itself was exhausted, around 270 former political prisoners turned to the Inter-American Human Rights Commission (*Comisión Interamericana de Derechos Humanos*; CIDH) in Costa Rica. When it became apparent that Argentina would be obliged to pay compensation, the government initially reached an out-of-court settlement with the plaintiffs. However, when Argentina faced the threat of a renewed summons to the CIDH because the passage of the relevant compensation laws was delayed, President Carlos Menem regulated the compensation of former political prisoners in a decree in January 1991 (Decree 70/91).

This decree provided for compensation of around 75 US dollars per day of imprisonment; special payments in the event of particularly serious injuries and ill-treatment were also provided. However, this compensation decree did not apply to all former political prisoners, but only to those who had filed a civil complaint within two years of the end of the dictatorship. Only 277 people fulfilled the conditions set out in the decree. The vast majority of former prisoners were therefore excluded from compensation. The *Subsecretaría de Derechos Humanos* was commissioned to implement this regulation. In total, nearly 20 million US dollars in compensation was paid out on the basis of this decree.[68]

Menem was also criticized from within the ranks of his own party for this unauthorized solution, which excluded the majority of those who had been affected. A cross-party legislative initiative to regulate compensation was passed in the same year (1991). Ley No. 24.043 stipulated that all those persons who had been detained by the executive branch or by military courts during the state of emergency were entitled to the compensation of Decree 70/91 – regardless of whether they had already brought a civil action against the state. Applications could be submitted until 1998. Of around 14,000 applications submitted, approx. 8,000 were approved. The compensation payments totalling in the region of 690 million US dollars were paid out in the form of government bonds.[69]

2.4.5 Clarification of the Legal Status of the 'Disappeared' (1994)

Alongside the serious psychological and social consequences for the relatives of the Disappeared, they also faced legal problems in terms of financial and property issues and civil status; for example, they could not access the property deeds of the Disappeared person or remarry. In order to solve this impasse, the relatives in such situa-

68 Conti, 'La democracia', 62.

69 Fuchs, *Staatliche Aufarbeitung*, 108 ff.

tions often had to have the Disappeared person declared 'presumed dead' (*fallecimiento presunto*), which caused deep distress. This was of course particularly painful and problematic, since the relatives, who had been denied any information about the fate of the Disappeared by state authorities, now had to apply to the authorities of the same state for the death of the Disappeared person to be recognized.

The Ley No. 24.321, adopted in mid-1994, fulfilled what the relatives had demanded for a long time – that they could apply to the civil courts for a *declaración de ausencia por desaparición forzada* (declaration of absence due to forced Disappearance). In terms of civil and property law, the status was equated with the *fallecimiento presunto*, but without assuming the death of the person concerned.

2.4.6 Law on Compensation for the Relatives of the Disappeared (1994)

With the Ley No. 23.466 of 1986, the relatives of the Disappeared had been granted modest compensation, i. e. a pension equivalent to 75 percent of the minimum wage. Aside from this, some families had also filed civil lawsuits against the Argentinian state and had sought damages and compensation payments in court, which ranged from 250,000 to 3 million US dollars.[70]

With Ley No. 24.411, which was passed in 1994 unanimously and without debate, one single solution was achieved for all relatives of the Disappeared and murdered. They were entitled to a one-off compensation payment of around 220,000 US dollars. In accepting this sum, relatives also had to commit not to pursue any further legal action.

The application process was associated with a great deal of bureaucratic effort. A lawyer was required for certain steps in the application process, which in turn resulted in significant costs. For the compensation payments, the Menem government estimated a total of around three billion US dollars. Payment in the form of government bonds relieved the state budget somewhat, but was associated with the risk of losses for the recipients if they wanted to sell these bonds on the stock exchange before the end of the ten-year term.[71] This compensation solution was the cause of great tension between the relatives of the Disappeared. Many perceived this one-off payment as hush money – especially since it brought with it the obligation to refrain from further legal action.

70 Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York/London: Routledge Chapman & Hall, 2002), 176 f.

71 Fuchs, *Staatliche Aufarbeitung*, 112 f. The application deadlines were extended several times; most recently at beginning of 2007 (Ley No. 25.985).

2.4.7 Compensation for Children Imprisoned or Born in Custody (2004)

After the former political prisoners and the relatives of those who had been Disappeared or murdered had been compensated through the compensation laws of the Alfonsín and Menem governments, during the Presidency of Néstor Kirchner, Ley No. 25.914 provided compensation for people who were either born while their mothers were in prison or who were abducted and imprisoned with their parents. This law provided for a one-off payment the equivalent of a 20-month salary of a senior public servant. In the event of serious injuries, special payments were also provided. A condition for compensation via this act was also refraining from further claims for damages.

2.4.8 Other Compensation Laws

(i) Extension of the existing compensation laws (2009 and 2015)
At the end of 2009, another Compensation Act (Ley No. 26.564) was passed, which broadened the right to compensation from those covered by Ley No. 24.043 (about the compensation for former political prisoners) and Ley No. 24.411 (about the compensation for the relatives of the Disappeared and murdered) to include people who suffered human rights violations from 16 June 1955, (i. e. from the military coup against Juan Perón) to the end of the dictatorship on 9 December 1983.

This included people who were victims of the 'rebels', but also those whose origins were in the armed forces, security forces or paramilitary groups. Soldiers who had been imprisoned because they refused to obey those planning the coup were also included. In 2015 it was decided (Ley No. 27.143) that there should be no statute of limitation on the application periods for the relevant compensation laws (Leyes Nos. 24.043, 24.411, 26.564).

(ii) Pension payments for former political prisoners (2013)
Ley No. 26.913, adopted at the end of 2013, granted former political prisoners (those entitled to receive benefits under Ley No. 24.043 and other groups of people) a *pensión graciable* (non-compulsory allowance on retirement) independent of any other pension benefits or compensation payments. It provided for a monthly payment, of an amount based on one of the lowest grades in the public service, roughly corresponding to the minimum wage (approx. 375 euros per month, as of October 2020).[72]

72 Ley No. 26.913, Art. 5: 'El beneficio que establece la presente ley será igual a la remuneración mensual asignada a la Categoría D Nivel 0 (cero), Planta Permanente Sin Tramo – Agrupamiento General – del Escalafón para el personal del Sistema Nacional de Empleo Público – SINEP – en los términos que establezca la autoridad de aplicación.'.

(iii) Extension of compensation to former exiles (2016)

As early as 2004, the Supreme Court had ruled that for Susana Yofre de Vaca Narvaja, who had to flee into exile after her husband had been murdered and her son had been kidnapped, her years of exile should be compensated in the same way as in the case of time spent in prison. The court confirmed that the suffering that the plaintiff had to experience in exile should be equated with that of the political prisoners. After this individual decision, and in view of the considerable number of Argentinians who had to go into exile for political reasons, work was carried out to create a legal regulation for the compensation claims. The legislative process was delayed again and again. Subsequently, this issue was resolved in 2016, not by a law, but by a resolution passed by the Minister for Justice and Human Rights (Resolución MJYDH 670/16). This resolution, which explicitly mentions the case of Susana Yofre de Vaca Narvaja, ruled that Argentinians who can demonstrate that they had to leave the country for political reasons were entitled to a quarter of the benefits that the Ley No. 24.043 provided for former political prisoners.

2.4.9 Psycho-Social Support for Victims of Repression

When former ESMA prisoners visited a detention and torture centre along with President Néstor Kirchner in 2005, the serious consequences that the victims suffered even years later became clear to the public. After long conceptual debates about an appropriate *asistencia integral*, the *Centro de Asistencia a Víctimas de Violaciones de Derechos Humanos*, *Dr Fernando Ulloa* (The 'Dr. Fernando Ulloa' Centre for the Assistance of Victims of Human Rights Violations) was created in 2011 as an institution of the *Secretaría de Derechos Humanos* (Secretariat for Human Rights), established by the Ministry of Justice. In the following year, its area of responsibility was extended to include victims of current human rights abuses.[73] The centre came to be of particular importance as criminal investigations into the past resumed, since these proceedings triggered retraumatization in witnesses as well as in victims and relatives.[74] In addition to holistic therapy, support and counselling for victims, the *Centro Ulloa* also has the task of promoting the networking and qualification of therapists at a national level, promoting the content-related debate on the connection between human rights violations and mental illnesses, and providing political advice.

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73 Vera Vital Brasil, Fabiana Rousseaux and Bárbara Conte, 'Reparación simbólica en América Latina como Política de Estado: La experiencia de asistencia a víctimas en Brasil y la Argentina', *Territorios Clínicos de la Memoria* (2019), accessed 11 April 2022, https://tecmered.com/reparacion-simbolica-en-america-latina-como-politica-de-estado.

74 Mariana Wikinski, 'Testimonio y experiencia traumática: la declaración ante la justicia', in *Experiencias en salud mental y derechos humanos. Aportes desde la política pública*, ed. Ministerio de Justicia y Derechos Humanos de la Nación. Secretaría de Derechos Humanos (Buenos Aires: Ministerio de Justicia y Derechos Humanos de la Nación. Secretaría de Derechos Humanos, 2015), 134–141.

2.5 Reconciliation

The term 'reconciliation' is not frequently used in the Argentinian context and – especially from the point of view of the victims and the human rights movement – has a negative connotation. The background for this is likely to lie in the fact that the concept of reconciliation often has a religious element and has been brought into play again and again by the Catholic Church. In Argentina – unlike in neighbouring Chile, for example – the Catholic Church played a largely ambivalent to dishonourable role in the era of dictatorship: there were no public charges of injustice, but doors were often locked to those seeking help and a number of bishops were closely connected to the military regime, etc. In addition, some military clergy played a dubious role in the detention and torture centres.[75] Even in public discourse, the Bishops' Conference repeatedly demonstrated its nearness to the regime.[76] For example, around 1984, at the time when CONADEP was trying to record and investigate the crimes of the dictatorship and when the trials of those chiefly responsible for state terrorism were being prepared, the Bishops' Conference declared that 'true reconciliation is not based solely on truth and justice but also on love and forgiveness.'[77] The public perceived this mostly as partisanship with their old allies. This concept of 'reconciliation' was therefore understood by the victims as an attempt to leave the past behind without those responsible being held accountable and without even investigating the long-denied and contested facts.

In the same way, President Carlos Menem repeatedly used this topos and thus justified the pardon of the convicted military personnel and some members of the guerrilla forces. His politics of dealing with the past followed the ideal of *Reconciliación* or *Pacificación Nacional*, which was largely shaped by the idea that the past should be the past and people should look forwards. For the victims and their relatives, impunity and forgetting represented the other side of the coin with which this so-called national reconciliation was to be paid.[78] Against this background, it is understandable that reconciliation initiatives in Argentina were not very successful and could not play a significant role in the politics of dealing with the past.

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75 Loris Zanatta, *La larga agonía de la Nación Católica: Iglesia y dictadura en la Argentina* (Buenos Aires: Sudamericana, 2015), 211–302; Stephan Ruderer, 'Between Religion and Politics: The Military Clergy during the Dictatorships of the Late Twentieth Century in Argentina and Chile', *Journal of Latin American Studies* 47/3 (2015): 463–489.

76 Veit Straßner, '"La lucha continúa!" – Der Kampf um die Erinnerungen an die Verschwundenen der argentinischen Militärdiktatur', *Totalitarismus und Demokratie. Zeitschrift für internationale Diktatur- und Freiheitsforschung* 3 (2006): 345–386, 300–302.

77 Conferencia Episcopal Argentina, 'Asamblea Plenaria: *Democracia, responsabilidad y esperanza* (13.04.1984)', in *Iglesia y Democracia en la Argentina: Selección de documentos del Episcopado Argentino*, ed. Conferencia Episcopal Argentina (Buenos Aires: Conferencia Episcopal Argentina, 2006), 95–102, 101.

78 Straßner, *Die offenen Wunden Lateinamerikas*, 132.

2.6 Laws Relating to Transitional Justice

The issue of dealing with the past and, in particular, issues around compensation have always been dealt with in Argentina in a legal manner. Since the origins, the content and the context of the development of the reparation laws have already been presented in more detail at relevant points in this study, a tabular overview of the relevant legal norms should suffice here in order to avoid duplication and repetition (Tab. 1).

Tab. 1: Overview of laws relating to Transitional Justice in Argentina

Legal Norm	Year	Content
Ley No. 22.924	1983	*Ley de Pacificación Nacional:* Amnesty for possible crimes that were committed in the context of the anti-subversion fight, but also for possible terrorist crimes
Ley No. 23.040	1983	Repeal of the military government's self-amnesty law (*Ley de Pacificación Nacional*, Ley No. 22.924)
Decreto 187/83	1983	Creation of the Truth Commission *Comisión Nacional sobre la Desaparición de Personas*
Ley No. 23.049	1984	Reform of the Code of Military Justice (*Código Militar*)
Ley No. 23.053	1984	Return of people from overseas diplomatic service who had been refused entry for political reasons
Ley No. 23.117	1984	Reintegration of employees in public service who had been dismissed for political or union activities
Ley No. 23.238	1985	Reintegration of teachers who had been dismissed for political reasons
Ley No. 23.278	1985	Awarding pensions credits for periods of time spent unemployed for political reasons
Ley No. 23.466*	1986	First law on financial compensation for relatives of the Disappeared providing a minimum pension
Ley No. 23.511	1987	Establishment of the national gene database
Ley No. 23.523	1988	Reintegration of bank employees who had lost their jobs for political reasons
Ley No. 23.852	1990	Removal of compulsory military service for the children of the Disappeared
Decreto 70/91*	1991	Decree governing financial compensation of former political prisoners
Ley No. 24.043*	1991	Compensation law for former political prisoners
Ley No. 25.457	1992	Establishment of the CONADI

Tab. 1: Overview of laws relating to Transitional Justice in Argentina *(Continued)*

Legal Norm	Year	Content
Ley No. 24.321*	1994	Clarification of the legal status of the Disappeared through the *declaración de ausencia por desaparición forzada*
Ley No. 24.411*	1994	Compensation for the relatives of the Disappeared and the murdered via a one-off payment of around 220,000 US dollars
Ley No. 25.633	2002	Declaration of the 24th March as *Día Nacional de la Memoria por la Verdad y la Justicia* (Day of Remembrance for Truth and Justice)
Ley No. 26.085	2004	Declaration of the Day of Remembrance for Truth and Justice on the 24th March as a national holiday
Ley No. 26.564	2009	Extension of the Leyes Nos. 24.043 and 24.411 to include the time period between 16th June 1955 to 9 December 1983
Decreto 4/2010	2010	Regulation of access to files and archives
Ley No. 26.691	2011	Declaration of the secret detention centres from the time of the dictatorship as places of remembrance
Ley No. 26.913	2013	Granting of a *pensión graciable* (non-compulsory allowance on retirement) for the beneficiaries of the Ley No. 24.043 and other groups of people
Ley No. 27.143	2015	Abolition of the application deadlines for compensation payments in accordance with the Leyes Nos. 24.043, 24.411 and 26.564
Resolución 670/16 (Ministry of Justice and Human Rights)	2016	Financial compensation for people who had to go into exile on political grounds

Note: All the laws, decrees and ordinances listed here are available online, but the URLs change frequently. The laws can be easily found by a simple online search with the number of the law or decree (if necessary with the additional search criterion 'Argentina'). The laws marked with * (as well as other provisions for implementation, if applicable) can be found in English translation in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), chapter 22.

Three aspects in particular stand out if one considers the process of development and the body of Argentinian reparations and compensation laws:

(i) Usually, the main content-related issues of reparations or compensation were regulated by the legislature in the form of laws. Legal norms below the level of actual laws such as presidential decrees or ministerial decrees present the exception (of course, this does not affect the decrees and resolutions that relate to the relevant laws). In the case of Compensation Decree 70/91, the President's independent decree was soon followed by a united legal regulation/ratification by the legislature.

(ii) It is also striking that many reparations laws (both in the area of actual reparations and criminal prosecutions) were hard-won. As a rule, the initiative for the laws did not come from government agencies. Rather, it was the pressure that

human rights and victims' organizations built up through test cases that put the issues on the public and political agenda.

A change came about during the Peronist governments of Néstor Kirchner, and later, Cristina Kirchner. Dealing with the past was made an explicit policy goal under these presidencies. Among the previous presidents (with some exceptions for the presidency of Raúl Alfonsín), however, it could almost be said that progress in the area of reparations was achieved despite government policy rather than because of it.

(iii) In connection with the cases proving legal precedent and the test cases mentioned, as in comparable cases, international legal norms are of particular importance in Argentina. Again and again it was the Inter-American Human Rights Court in San José, Costa Rica that the victims called upon. An impending defeat in San José then caused the government to offer out-of-court settlements and uniform regulation of the issues at stake in the form of laws.

2.7 Access to Files

2.7.1 The Alleged 'Non-Existence' of Government Information and Files

As in many countries with comparable histories, access to reliable information about the type and extent of repression as well as about the fate of individual victims or who should be held responsible was a sensitive issue.[79] In Argentina in particular, repression was characterized by a high degree of camouflage, which is also shown in the widespread practice of Disappearance. The armed forces and security forces continually denied that they were (or are) involved in these repressive actions. They pretended not to know anything about the 'Disappearance' of people and consequently did not have any relevant files or archives. According to the narrative that has been cultivated for decades, there are simply no archives about the 'anti-subversion struggle'.

2.7.2 The Importance of Archives of Human Rights and Victims' Organizations

As a result, the archives that the human rights and victims' organizations compiled over the years comprised the only source of information. CONADEP also relied heavily on the documentation held by these organizations to support its work. It was similar with the inquiries in the context of the *Junta* trials and later in the 'Judicial Proc-

79 Elizabeth Jelin, 'Introducción: Gestión política, gestión administrativa y gestión historica: Ocultamientos y descubrimientos de los archivos de la represión', in *Los archivos de la represión: Documentos, memoria y verdad*, ed. Ludmila da Silva Catela and Elizabeth Jelin (Madrid: Siglo XXI editores, 2002), 1–13.

esses of Truth Recovery' as well as the legal investigations that took place in other countries. At the same time, these processes unearthed further material and further knowledge that often lay scattered in the court archives.

2.7.3 The Creation of the National Archive of Remembrance (2003)

In December 2003, President Néstor Kirchner created the decentralized *Archivo Nacional de la Memoria* (National Archive of Remembrance; ANM) (Decreto 1259/2003), which was affiliated with the *Secretaría de Derechos Humanos*, to manage and conserve the documents that had accumulated over time. The founding decree names the following tasks of the archive: 'Gathering, analysing, classifying, copying, digitizing and archiving information, witness statements and documents about the violations of human rights and civil liberties by the Argentinian state and about the social and institutional responses to these crimes.' The ANM was also actively to seek relevant information and documents from other authorities. In previous years, secret archives of various units of the armed forces and security forces had been discovered in various provinces.[80] The ANM would develop these and all subsequent collections and make them accessible.

In the course of investigations following the repeal of the amnesty laws, the courts repeatedly wanted to fall back on evidence from the ANM. In practice, this was a problem, as many of these documents were subject to confidentiality. It was therefore necessary in each individual case to release these files for judicial investigations. In 2010, Decreto 4/2010 granted access to the relevant files (with the exception of files relating to the Falklands/Malvinas conflict or other inter-state conflicts). The duty of confidentiality, as spelled out in the decree, would run counter to the political strategy of dealing with the past that the Argentinian state had been pursuing since 2003, i.e. since the beginning of Néstor Kirchner's presidency.

2.7.4 The Discovery and Opening Up of Military Archives

Subsequently, working groups were set up in the various authorities and ministries to search for relevant files and archives in their facilities. In 2013, for example, the Ministry of Defence reported that 1,500 files with 'blacklists' from the time of the dictatorship had been found in the basement of an Air Force building. Minutes of *Junta* meetings were also discovered. After this discovery, the Defence Minister ordered that the heads of all general staff in the armed forces should ensure that any archival material be located and reported in all armed forces facilities. In 2015, an archive

80 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 6f.

structure was created within the Ministry of Defence to develop and make these archives accessible.[81]

2.7.5 Developing and Conserving the Archives of Human Rights and Victims' Organizations

For decades, the archives of human rights and victims' organizations contained the only documents and files on the human rights violations of the military dictatorship. The condition of the 'archives' largely depended on the financial resources of NGOs and the commitment of the people who took care of the development and conservation of the archival materials. In 2000, the most important NGOs came together to form an alliance on the politics of remembrance.[82] *Memoria Abierta*, as the association was called, set itself the goal of completely registering, indexing and digitizing the archives of participating organizations in order to give interested journalists and researchers better access to the sources. Around 25,000 archival items have already been registered in this way. Based on their experiences with the state, the human rights' and victims' organizations wanted to retain ownership of their archival holdings and were not willing to place them in the hands of the state. At the same time, *Memoria Abierta* created an audio-visual archive and over the years has recorded and tagged hundreds of eyewitness reports.[83]

2.7.6 Summary

Considerable progress has been made in recent decades given that initially there appeared to be no archives apart from the archives and collections within the human rights and victims' organizations and, later, that access to archives was strictly controlled. In 2011, the NGO *Memoria Abierta* presented a guide to archives in which the inventories best known and developed at that time were listed. The aim was to support the work of the public prosecution services in investigating crimes against humanity. In 2011 there were already 26 archives referenced in the publication.[84]

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81 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 7 f.

82 At that time the following NGOs were involved: Asamblea Permanente por los Derechos Humanos (APDH), Buena Memoria, Centro de Estudios Legales y Sociales (CELS), Comisión de Homenaje a las Víctimas de Vesubio y Protobanco, Comisión por la Memoria, la Verdad y la Justicia de Zona Norte, Familiares de Desaparecidos y Detenidos por Razones Políticas, Fundación Memoria Histórica y Social Argentina, Madres de Plaza de Mayo – Línea Fundadora, Servicio de Paz y Justicia (SERPAJ).

83 Straßner, *Die offenen Wunden Lateinamerikas*, 132 f.; Frederico Guillermo Lorenz, 'Archivos de la represión y memoria en la República Argentina' (2007), accessed 11 April 2022, http://www.historizarelpasadovivo.cl/downloads/archivoargentina.pdf, 5 f.

84 Memoria Abierta, *Guía de archivos útiles para la investigación judicial de delitos de lesa humanidad* (Buenos Aires: Memoria Abierta, 2011).

In more recent years, further archives have been added. A marked difference in quality came with the opening of the first military archives.[85]

Although access to the individual archives was usually regulated at a provincial level and according to the rules of the specific archive, the specific working conditions and means of access varied from archive to archive and depended to a large extent on the willingness of the institutions to cooperate.[86]

2.8 Memorial Sites

Immediately after the end of the dictatorship, the themes of remembrance and commemoration initially played a lesser role. The activities of human rights and victims' organizations focused on the search for truth and justice. In the context of the 20th anniversary of the coup in 1996, the wishes and demands of the human rights movement for a memorial began to firm up. After numerous debates and controversies, the city parliament of Buenos Aires decided to create a *Parque de la Memoria*, a memorial park, on the banks of the Río de la Plata. Many bodies had been washed up on the banks of the river; many more bodies were gone forever. It took several years for the park to be completed. As well as remembrance, cultural events and educational human rights events are also held there today.[87]

Around the same time, Carlos Menem, the then President, sent an opposing signal. In January 1998 he ordered the demolition of the *Escuela Mecánica de la Armada* (Higher School of Mechanics of the Navy; ESMA) (Decreto 8/98). ESMA, located in Buenos Aires, was one of the most notorious detention and torture centres during the dictatorship. Thousands of people were held and tortured there. Many of their dead or sedated bodies were then dropped into the Río de la Plata.

In Decreto 8/98 it was explicitly stated that the demolition was of 'undeniable symbolic worth' and was testimony to the will to leave behind the 'contradictions of the past" and to 'accept the lessons of recent history'. This would be how the 'will for reconciliation between the Argentinian people would be expressed'. A representative symbol of national unity should be created on the same site.[88]

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85 Cinthia Balé, Usos del archivo y políticas de la memoria: un análisis del proceso de "apertura" de los archivos militares en Argentina (2003–2015), Nuevo Mundo Mundos Nuevos *(2018)*, accessed 11 April 2022, https://doi.org/10.4000/nuevomundo.73860.

86 Juan Luis Besoky, 'Como dos extraños: dilemas del joven historiador frente al archivo,' *Hilos Documentales* 1/1 (2018), accessed 11 April 2022, https://revistas.unlp.edu.ar/HilosDocumentales/article/view/5956/5332.

87 Accessed 11 April 2022, https://parquedelamemoria.org.ar/en/empy for a striking visual impression.

88 Estela Schindel, 'Die Präsenz der Vergangenheit im urbanen Raum. Erinnerungsorte in Argentinien, Brasilien, Chile und Uruguay', *Lateinamerika Analysen* 9 (2004): 155–180, 169 f.

This pre-emptive move by Menem created widespread public debate and sparked violent protests from the human rights movement. Relatives of the Disappeared filed a lawsuit against these plans and received a ruling in October 1998; as a site of massive human rights violations, ESMA had an important role to play in ongoing or future court proceedings, for example when it came to reconstructing what happened there. In addition, ESMA was part of the nation's cultural heritage and therefore was deserving of protection.[89] Five years later, under President Kirchner, ESMA was handed over to human rights organizations so that a *Museo de la Memoria* could be established there. The *Museo de la Memoria* is directly dependent on the Human Rights Secretariat of the Ministry of Justice and Human Rights and is publicly funded. It is well equipped with a staff of around 50 people (plus supervisory and service staff).

The main buildings of the ESMA host a permanent exhibition. Ranged across several floors and in many exhibition halls, different aspects of state terrorism are explained, specifically relevant to the ESMA. The historical context, the history of ESMA and the history of the *Juicios* are explored with films, information stands and video installations. Individually-themed rooms deal with the fate of pregnant prisoners, torture, forced labour, the staff (torturers, commanders) or particular topics, like how the property of the abducted was used to enrich others. The permanent exhibition was developed during a long process of consultation, in which not only specialists and museum experts but also ESMA survivors, contemporary witnesses and representatives of human rights and victims' organizations were involved.[90] In addition to the permanent exhibition, changing specially-themed exhibitions are constantly on offer. There are also cultural and academic events based around the topic of the culture of remembrance and dictatorship. In addition to pedagogical materials, the museum also offers teacher training courses and guided visits. Tens of thousands of people visit the museum every year.

Based on the individual decision to make ESMA a place of remembrance, a law was passed in 2011 that declared that all secret detention centres from the time of the dictatorship should be places of remembrance (Ley No. 26.691). This law obliged the government to preserve those places and to allow for judicial investigations. In addition, the places should be preserved as memorial sites where the memory of what happened 'during the state terrorism in our country' should be kept alive (Art. 2). Since then, almost 50 memorials at emblematic sites of the dictatorship have been created in Argentina under the administration of the *Archivo Nacional de la Memoria*.[91] Information panels were installed at a further 160 places. Responsibility for this lay partly at the level of federal government, partly at the level of the

89 CELS, *Derechos Humanos en la Argentina 1998*, 68 ff.

90 Marisa González de Oleaga, '¿La memoria en su sitio? El museo de la Escuela de Mecánica de la Armada', *Kamchatka. Revista de análisis cultural* 13 (2019): 117–162.

91 An overview of memorials and sites of remembrance: accessed 11 April 2022, https://www.argentina.gob.ar/sites/default/files/mapa_espacios_memoria.pdf.

provincial governments.[92] Civil society actors such as victims' and human rights' organizations or survivors with first-hand knowledge of these places were always involved in the design of the sites of remembrance and the information panels.[93]

2.9 Commemorative Events

2.9.1 The Thursday Protests of the *Madres de Plaza de Mayo*

For decades, Thursdays have been the regular weekly memorial day on which the *Madres de Plaza de Mayo*, the Mothers of the Disappeared with their white headscarves, gather in front of the presidential palace with their accusations of human rights violations, demanding clarity about fate of the Disappeared. Since April 1977 the *Madres* have met weekly in the Plaza de Mayo to march around the May Pyramid at the central hub of the plaza. Standing protests were forbidden during the dictatorship. In November 2020, the *Marcha* took place for the 2,222nd time in the Plaza de Mayo. On normal Thursdays, around two to three dozen people still take part in the *Marcha*. Due to advancing age, however, fewer and fewer *Madres* take part in the rallies.

2.9.2 24 March Declared a Day of National Remembrance

The emblematic day of remembrance in terms of the Argentinian military dictatorship is 24 March; the day of the coup. During the military dictatorship, the armed forces used this day to look back on the reasons why they had 'taken responsibility for saving the nation from the threat of subversion'. From the beginning of the 1980s, however, in the context of the anniversary of the coup, critical and dissenting opinions were repeatedly heard during protests.[94]

With the return to democracy, the human rights movement used this day to give weight to its demands for *Verdad y Justicia*, for truth, or clarity, and justice. It was initially an unofficial day of remembrance that the extra-parliamentary opposition and civic society used to protest against inadequate responses to the past. Thousands of people regularly took to the streets on that day. For years the heads of government tried to ignore the date as much as possible. It was not until the 20th anniversary of the coup in 1996 that, for the first time, a democratically-elected president, Carlos

92 Lists of memorial plaques, information signs etc are available: accessed 11 April 2022, https://www.argentina.gob.ar/sites/default/files/mapa_senalizaciones_sitios_memoria.pdf.

93 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 9 f.

94 Frederico Guillermo Lorenz, '¿De quién es el 24 de Marzo? Las luchas por la memoria del golpe de 1976,' in *Las conmemoraciones: Las disputas en las fechas "in-felices"*, ed. Elisabeth Jelin (Madrid: Siglo XXI Editores, 2002), 53–100.

Menem, spoke out about the coup on that date. However, he did this in an abstract way, did not allocate any responsibility and referred to a 'dirty war' in which a lot of blood had been shed.[95]

In doing so, he used the imagery of two demons (one subversion, the other the military) who were waging a bloody war against one another, an image which has been used again and again in Argentina. This well-established narrative, known as the 'theory of the two demons', sees the violence on both sides as equal whilst ignoring the responsibility and involvement of other actors and of society as a whole.[96] On the occasion of the 20th anniversary of the coup, numerous events initiated by the human rights movement took place, in which between 50,000 and 100,000 people took part in Buenos Aires alone.[97]

After 24 march had been a day of remembrance for many years, with the human rights movement hosting many events on that date, President Menem ordered in a decree in 1998 (Decreto No. 314/98) that the date should be used for a day of 'critical analysis' of the coup and that the day should be used to remember the victims – 'the victims of irrational violence caused by people from the armed groups, as well as the victims of the illegal repression.'

Four years later, in 2002, parliament passed Ley No. 25.633, which established 24 March as *Día Nacional de la Memoria por la Verdad y la Justicia* (National Day of Remembrance for Truth and Justice). It was intended to commemorate those who 'fell victim to the process that began that day in 1976' (Art. 1). Thereafter, 24 March became an official day of remembrance, but was not yet a 'public holiday' in the sense that people would be granted a day off work. This was achieved in 2006 when parliament approved a bill by President Néstor Kirchner making 24 March a national holiday (Ley No. 26.085).

There was real controversy when the Conservative President Mauricio Macri wanted to convert the *Día Nacional de la Memoria, por la Verdad y la Justicia* in 2017 into a movable holiday so that it could be postponed to a Monday or a Friday if necessary, in order to give the population a long weekend. This decision drew such massive protests that Macri had to backtrack. His critics saw this as a further sign of Macri's strategy of trying to suppress the importance of the dictatorship in public perception and of trivializing state terrorism. In line with this strategy, for example, in the new edition of the CONADEP report Macri only included the prologue of the first edition, which had caused controversial discussions, and deleted the second foreword, which had been extended in other new editions of the report (see Chapter 2.10.1).

95 Lorenz, '¿De quién es el 24 de Marzo?', 85 f.
96 Straßner, '"La lucha continúa!"'.
97 Lorenz, '¿De quién es el 24 de Marzo?', 87 f.

2.9.3 The Human Rights Movement's 'Resistance Marches'

Since 1981, the *Madres de Plaza de Mayo* had organized a *Marcha de Resistencia* every December. They always took the current political situation into consideration as well as their ongoing concerns (clarifying the fate of the Disappeared, punishing those responsible, etc.). The motto of the first *Marchas* was '*con vida los llevaron, con vida los queremos*' ('they took them alive, we want them back alive'). In the context of the Falklands/Malvinas conflict, for example, the *Marchas'* motto was '*Las Malvinas son argentinas, los desaparecidos también*' ('The Malvinas Islands are Argentinian, and so are the Disappeared'). Over the course of time, the profile of the *Marchas* changed, although their basic demands for *Verdad y Justicia* always remained the same. The *Marchas*, in which thousands of people regularly took part, had the function of denouncing the policy of impunity.[98]

In 2006, during Néstor Kirchner's presidency, the *Madres* discontinued their annual *Marchas de Resistencia*. With Kirchner in the presidential palace, they reasoned, they would have a friend and no longer an enemy in the *Casa Rosada*, the seat of government. On 10 December 2015, the International Day of Human Rights and the day that the conservative Mauricio Macri was inaugurated, the *Madres,* who were now very elderly, resumed their *Marchas de Resistencia*.

2.10 Transitional Justice Institutions

2.10.1 The Comisión Nacional sobre la Desaparición de Personas (CONADEP)

Expectations for the first post-dictatorship government were high. Raúl Alfonsín started his election campaign promising to investigate the human rights violations of the dictatorship and to bring those responsible to justice. In 1975 Alfonsín had founded the human rights organization *Asamblea Permanente por los Derechos Humanos* (APDH), so he had a long history of being close to victims' concerns.

In his first week after taking office, Alfonsín set up the *Comisión Nacional sobre la Desaparición de Personas* (CONADEP).[99] He gave them six months to investigate the fate of all those who were Disappeared between 1976 and 1983 (Decreto 187/83). All state institutions as well as the armed forces and security forces were obliged to cooperate. CONADEP had the task of preparing and supporting the work of the courts. However, they were not able to make any legal assessment themselves.

Contrary to the demands of the human rights movement, CONADEP was not a parliamentary investigating committee, but rather one set up by the president,

98 Inés Vázquez et al., *Luchar Siempre. Las Marchas de la Resistencia 1981–2003* (Buenos Aires: Editorial de Las Madres, 2004).

99 Emilio Crenzel, 'Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice,' *The International Journal of Transitional Justice* 2 (2008): 173–191.

whose members were appointed by him. The 13-member committee consisted of representatives from parliament, religious communities and well-known personalities from culture and society. The role of Chair was filled by the writer Ernesto Sábato. The majority of the approximately 100 employees of CONADEP came from the ranks of the human rights organizations, whose archives were the main source of information for the commission's work.

CONADEP's mandate originally ran for six months, but was extended for a further three months. The testimonies of around 7,000 people were heard during this time. The statements of the survivors were particularly valuable in reconstructing of the fate of the Disappeared. It was thus possible to identify around 340 secret detention centres across the country and inspect some of them. Searches took place for the remains of the Disappeared in cemeteries and in potential mass graves.

After nine months of work, Alfonsín presented the commission's results in a moving ceremony on 20 September 1984. Around 70,000 people took part, as the report was delivered in public on the streets of the city. The Disappearances of 8,960 people were documented on around 50,000 file pages. At the same time, the Commission admitted that the actual number was higher.[100] In its report, CONADEP stated that the crimes were not isolated cases, but that they showed systematic state terrorism, in which 'excesses' had been normalized.[101] The report did not name those responsible. Those names were given to the President separately.

The importance of CONADEP cannot be overstated. In July 1984 a two-hour documentary film was created about the work of the commission, in which relatives and victims had their say.[102]

The *Subsecretaría de Derechos Humanos* was created to continue the work and the archives of CONADEP. This institution was tasked with clarifying the fate of the missing children and with receiving further reports. They compiled a summary of the CONADEP results, which was published in book form under the title *Nunca Más. Informe de la Comisión Nacional sobre la Desaparición de Personas* in November 1984. Two further editions were required within two months. In the following years the work appeared in numerous editions and re-editions.[103] It is still available in

100 CONADEP, *Nunca Más*, 479.

101 CONADEP, *Nunca Más*, 8.

102 Crenzel, Argentina's National Commission, 181–184.

103 The prologue of the first edition caused polemical discussions, as it followed a narrative that is known in Argentina under the term *Teoría de los dos demonios:* In short, this means that two 'demons' (the subversive forces on the one hand and the armed forces on the other hand) waged a bloody war against each other. This creates a symmetry between the violence of the two actors. Society itself does not play a role in this context; rather it is the 'place' where the two demons meet. On the 30th anniversary of the coup, under the presidency of Peronist Nestor Kirchner, a re-edition of the book was published, to which a further prologue was added, which distanced itself from this point of view. Ten years later, while the conservative and economic neo-liberal Mauricio Macri was president, another new edition appeared – but only with the original prologue. This example shows the historical-political significance of narratives and frames. See Emilio Crenzel, *The Crimes of the Last Dicta-*

bookshops today. In line with its mandate, CONADEP handed over 1,000 cases to the judiciary. The newly established *Subsecretaría* supported the courts and referred further cases of human rights violations to the judiciary.[104]

2.10.2 The Creation of a Central Human Rights Institution

In the context of the work of CONADEP, the *Subsecretaría de Derechos Humanos* was created in September 1984 (Decreto 3090/84). This institution was initially affiliated with the Ministry of the Interior and had, among other things, the task of providing a contact point for reporting human rights violations, of promoting human rights protection, of promoting clarity in the fate of the Disappeared, etc. Top priority, however, was to keep and conserve the documents of CONADEP.

This organization still exists today. However, its designation, the institutional connections, its field of activity and its importance have changed over the course of time. As part of a structural reform of the Ministry of the Interior, the institution initially received the rank of *Dirección Nacional de Derechos Humanos*. Responsibility was expanded to include compliance with international human rights norms. The institution was also responsible for processing the compensation payments. In a further structural reform of the Ministry of the Interior, the institution was renamed *Subsecretaría de Derechos Humanos y Sociales* in 1996. In 1999 the *Subsecretaría* was affiliated to the Ministry of Justice and in 2002 was raised to the rank of *Secretaría* (Decreto No. 357/2002).

The institution grew step by step. At the beginning, around 50 people were employed in the *Subsecretaría*. During Néstor Kirchner's time in power, the number rose as high as 1.000 at times. The institution's fields of activity were also expanded. The *Secretaría de Derechos Humanos* is currently part of the Ministry of Justice and Human Rights and is itself divided into two *Subsecretarías* – one *Subsecretaría* for the promotion of human rights and one *Subsecretaría* for the protection of human rights. Among others, its areas of responsibility included the following sub-departments: the National Institute for Issues of Indigenous People, the Federal Human Rights Council, the *Archivo Nacional de la Memoria* (National Archive of Remembrance) (see Chapter 2.7.3), CONADI (see Chapter 2.10.3), the *Centro Cultural de la Memoria Haroldo Conti* (a centre for human rights education and training), the central coordination point for places of remembrance and memorials, the Memorial Museum of the *Escuela Mecánica de la Armada* (ESMA), and the central registration office for victims of state terrorism (RUVTE).[105]

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torship in Argentina and its Qualification as Genocide: A Historicization, Global Society (2019), accessed 14 July 2022, https://doi.org/10.1080/13600826.2019.1598944.

104 Nino, *Radical Evil on Trial*, 80.

105 Accessed 11 April 2022, https://www.argentina.gob.ar/derechoshumanos.

Therefore, the institution established as a result of CONADEPs work did not just continue to exist, but was actually further strengthened over time as its area of responsibility expanded. This reflects the growing human rights awareness in Argentina. While the topic of 'human rights' was initially only associated with the dictatorship, today there is a more comprehensive understanding. In the course of time, prominent personalities from the ranks of the human rights movement repeatedly filled the leadership positions of the *(Sub)secretaría*.

2.10.3 The Comisión Nacional por el Derecho a la Identidad (CONADI)

CONADEP focused on the fate of the Disappeared. CONADI, the National Commission for the Right to Identity, on the other hand, dealt with the fate of the *desaparecidos vivos*, the 'living disappeared', i. e. the Disappeared children.

The *Banco Nacional de Datos Genéticos*, the National Genetic Data Bank, was created as early as 1987 (Ley No. 23.511). The *Abuelas de Plaza de Mayo*, the association of grandmothers looking for their grandchildren who were disappeared or who were born in custody, have repeatedly advocated improving the equipment of the Genetic Data Bank. After many years of insistence, they succeeded in establishing CONADI in 1992 (Ley No. 25.457). This was initially dependent on the *Subsecretaría de Derechos Humanos* but later became independent. Government representatives in CONADI work closely with the *Abuelas*. In order to strengthen the victims' trust in this institution, Claudia Carloto, daughter of the well-respected Estela Carloto, the president of the *Abuelas*, took over management of CONADI. In addition to searching for the missing children, CONADI offers relatives and those affected legal assistance and provides psycho-social support for the parents as well as for those children or young adults whose identity has been confirmed.

In its search for the missing children, CONADI also used wide-ranging public information campaigns to raise awareness of the problem. By means of information from the population and subsequent genetic testing, the actual identity of numerous children has been clarified. In 2019, the whereabouts and identity of Javier Matías Darroux Mijalchuk, the 130th disappeared grandchild, was confirmed.[106]

106 The 130th grandchild was Javier Matías Darroux Mijalchuk, who 'Disappeared' with his mother in 1977 at the age of four months. His father had been kidnapped a few days earlier, as confirmed by eyewitnesses. Since then, he was counted as one of the 'Disappeared'. His mother had received a tip off on where to find her partner. When she went to the place with her baby, she too was kidnapped and Disappeared. The baby was then put up for adoption. The official version was that he was a foundling abandoned on the street, whose identity was unclear. Over the years, Javier Matías Darroux Mijalchuk began to have doubts about his identity. Through the public relations work of the *Abuelas*, he became aware of how to reach them and subsequently made contact. Genetic analyses were finally able to confirm that he had grown up with a false identity which he held for over four decades and that his parents were two of the "Disappeared". It is possible that he has a brother or sister who has

2.11 Victims' Associations

There were many victims of the Argentinian dictatorship. However, within public perception, in political debate and in legal methods of dealing with the past, the 'Disappeared' or their relatives dominate. Deeply symbolic of these are the *Madres de Plaza de Mayo*, the mothers who came together during the dictatorship who went round to various police stations seeking their children who had been arrested and disappeared.[107] The *Abuelas de Plaza de Mayo*, the grandmothers who are seeking their grandchildren who disappeared or were born during the imprisonment of their mothers, are of comparable importance. Other groups of victims play a clearly less significant role in Argentina.

Although the *Madres* and the *Abuelas* are the central protagonists, the human rights organizations are of outstanding importance. They support and accompany the victims and victims' organizations and make significant contributions to the political and legal processes of dealing with the past, along with their legal departments and lawyers, who show solidarity by supporting them in their work. As a rule, the human rights advocacy organizations and the victims' groups act together.

2.11.1 Argentinian Human Rights Organisations

Most of the human rights organizations in Argentina emerged in the context of the political violence of the 1970s:[108] In 1975, the *Asamblea Permanente por los Derechos Humanos* (APDH) was founded, in whose ranks were activists from different ideologies and parties. Around the same time, the *Movimiento Ecuménico por los Derechos Humanos* (Ecumenical Movement for Human Rights; MEDH) was established. This initiative arose as members of the clergy from various denominations tried to find ways to support people who had been persecuted from outside of the frequently narrow institutional frameworks of their churches. It was largely traditional Protestant churches that engaged in MEDH, but there was also involvement from individual

also disappeared, as his mother was already pregnant again when she was abducted (Victoria Ginzberg, 'Quién es el nieto 130,' *La historia de Javier Matías Darroux Mijalchuk*, 12, 14 June 2019).

107 Kuno Hauck and Rainer Huhle, '20 Jahre *Madres de Plaza de Mayo*. Geschichte, Selbstverständnis und aktuelle Arbeit der *Madres de Plaza de Mayo* in Argeninien', in *Vergangenheitsbewältigung in Lateinamerika*, ed. Detlef Nolte (Frankfurt am Main: Vervuert, 1996), 108 – 127; Asociación Madres de Plaza de Mayo, *Historia de las Madres de Plaza de Mayo* ²(Buenos Aires: Editorial de las Madres, 2003); Marguerite Guzman Bouvard, *Revolutionizing Motherhood: The Mothers of the Plaza de Mayo* (Wilmington: S. R. Books, 1994).

108 Elisabeth Jelin, 'La política de la memoria: El movimiento de Derechos Humanos y la construcción democrática en argentina', in *Juicio, castigos y memorias: Derechos humanos y justicia en la política argentina*, ed. Carlos H. Acuña et al. (Buenos Aires: Ediciones Nueva Visión, 1995), 103 – 146, 105 – 111; Louis Bickford, 'Human Rights Archives and Research on Historical Memory: Argentina, Chile, and Uruguay', *Latin American Research Review* 35/2 (2000): 160 – 182, 170 – 176.

Catholic dioceses. Attempts to engage the Catholic Church as a whole or to get the Bishops' Conference involved were unsuccessful.[109] A particular strength of the MEDH was its connection to the World Council of Churches (WCC) in Geneva and the support it received from them, which also opened up the world of international communication for the organization.

The 1970s also saw the emergence of a continental movement; the *Servicio Paz y Justicia* (Service Peace and Justice; SERPAJ), inspired by Liberation Theology. In 1974 the Argentinian Adolfo Pérez Esquivel became secretary of SERPAJ-Latin America. He was arrested in April 1977 and remained in prison for 14 months despite international campaigns for his release. The Argentinian branch of SERPAJ was finally established once he was freed. When Pérez Esquivel was awarded the Nobel Peace Prize in 1980, this increased his moral standing and thus the importance of his organization. To this day, Pérez Esquivel has an almost iconic status within the Argentinian human rights movement. SERPAJ accompanied the relatives of those arrested and disappeared, cooperated closely with other NGOs and victims' organizations, publicly denounced human rights violations, but also tried to influence the churches and demanded committed advocacy for human rights.

In 1980, the *Centro de Estudios Legales y Sociales* (CELS) was founded by members of the APDH. The CELS, in whose ranks there were a number of relatives of the Disappeared, always had brilliant lawyers. As well as providing legal advice, the CELS documented human rights violations, accompanied relatives and those affected and, after the end of the dictatorship, became the central human rights organization in the field of transitional justice.

Since the mid-1990s, when the theme of remembrance or legacy work became increasingly important, a range of human rights organizations and local initiatives have emerged that are committed to the theme of *Memoria*. Many of these groups have come together in the *Memoria Abierta* alliance, striving to find the appropriate societal approach to dealing with the human rights violations of the dictatorship.[110]

The Argentinian human rights organizations therefore emerged in the context of the military dictatorship and of the political violence that preceded it. Once the dictatorship came to an end in 1983, the human rights violations of state terrorism and, later, the fight against impunity came more to the fore. Over time, however, the focus

109 Stephan Ruderer and Veit Strassner, 'Ecumenism in National Security Dictatorships: Ecumenical Experiences in the Southern Cone', in *A History of the Desire for Christian Unity*, Vol. III, ed. Alberto Melloni (Paderborn: Brill Verlag, forthcoming); Daniel Jones, Santiago Luján and Analía Quintáns, 'De la resistencia a la militancia: las Iglesias evangélicas en la defensa de los derechos humanos (1976 – 1983) y el apoyo al matrimonio igualitario (2010) en Argentina', *Espiral, Estudios sobre Estado y Sociedad* XX/59 (2014): 109 – 142, 122 – 126.

110 Damián Ferrari, *Memoria Abierta. Una experiencia de Coordinación Interinstitucional para facilitar el acceso a la información sobre Derechos Humanos* (Minneapolis: 2005), accessed 11 April 2022, http://www.memoriaabierta.org.ar/materiales/pdf/utilizando_cooperacion.pdf.

expanded, so that these organizations also deal with the rights of indigenous groups, women's and children's rights, police violence and the state of the penal system.

2.11.2 The Madres de Plaza de Mayo

The mothers with their white headscarves, who have met every Thursday since 1977 in the *Plaza de Mayo* to demonstrate for the truth about the Disappeared and for punishment for those responsible, have become a global symbol of the human rights violations of the Argentinian military dictatorship and of the struggle worldwide for *Verdad y Justicia*, truth and justice. They first came together in Buenos Aires and later expanded across the country.

In 1986, during Argentina's first democratic presidency under President Alfonsín, there was a split within the organization: there had been disagreement for a long time over the question of how far cooperation with state agencies should go. Another critical point was the question of whether to accept compensation payments from the state. A further role was played by personal animosities and internal power struggles. A large number of the *Madres* (around 2,500) joined Hebe de Bonafini, who represented the more radical wing, and founded the *Asociación Madres de Plaza de Mayo*.[111] They largely reject cooperation with state agencies and refuse any form of financial compensation. They reject all attempts to pronounce the Disappeared as dead, as well as the erection of monuments and memorials, until such a point when the guilty are identified and punished. Over the course of time the language of the *Asociación de Madres* has become gradually more radical and politicized. They held a position of absolute opposition until Néstor Kirchner came into power. Hebe de Bonafini, born 1928, led this *Madres* group since the split and has had a very visible media presence. The *Asociación de Madres* has often played a special role within the human rights movement because of its radical, uncompromising stance.

The second group of *Madres*; the *Madres de Plaza de Mayo – Línea Fundadora*, was better integrated into the human rights movement and, after the end of the dictatorship, cooperated more with state agencies. However, the general public perceived the *Madres* more as a *single* group. It was mainly Hebe de Bonafini's group that shaped the public perception of the *Madres* through their media presence.

111 Elin Skaar, *Human Rights Violations and the Paradox of Democratic Transition. A Study of Chile and Argentina* (Bergen: Chr. Michelsen Institute, 1994), 157 f.

2.11.3 The Abuelas de Plaza de Mayo

The *Abuelas de Plaza de Mayo*; the mothers of women who were pregnant at the time of their arrest or who had been kidnapped along with their babies and toddlers, was created around the same time as the *Madres.*[112] They were not only searching for their own children but also for their grandchildren. The *Abuelas* are particularly dependent on information stemming from the population and on the support of the government. Due to their purpose and their moderate and diplomatic tone, they have a high level of public sympathy and a very visible media presence.

2.11.4 The Familiares de Detenidos y Desaparecidos por Razones Políticas

The criterion for belonging to the groups of *Madres* and *Abuelas* was always an immediate family connection to the Disappeared. On the other hand, the organization *Familiares de Detenidos y Desaparecidos por Razones Políticas*, founded in 1976, is open to all relatives of those who were disappeared or imprisoned. As the name suggests, this organization is made up of the relatives of people who fell victim to the dictatorship for *political* reasons. The *Familiares* showed a political awareness very early on and emphasized the political background of the Disappearances, whereas the *Madres* and *Abuelas* initially focused the narrative on the 'children' who were kidnapped because they were socially committed.

2.11.5 The Relatives of the Disappeared from Other Countries

In terms of criminal proceedings dealing with the past, of particular importance were those cases where the Disappeared had a different nationality or dual citizenship (cf. Chapter 2.2.6). The relatives of these Disappeared often formed themselves into smaller groups as well, in order to work together with embassies and civic society partners in their specific countries. This resulted in groups such as the *Familiares de Detenidos Desaparecidos alemanes y de origen alemán* (Families of the German or German-born Disappeared) or the *Familiares, Abuelas y Madres Línea Fundadora residentes en España*.

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112 Valeria Vegh Weis, 'The Relevance of Victims' Organizations in the Transitional Justice Process: The Case of the Grandmothers of Plaza de Mayo in Argentina', *Intercultural Human Rights Law Review* 12 (2017): 1–70, accessed 11 April 2022, https://www.academia.edu/34124420/The_Relevance_of_Victims_Organizations_in_the_Transitional_Justice_Process_The_Case_of_the_Grandmothers_of_Plaza_De_Mayo_in_Argentina.

2.11.6 The Hijos por la Identidad y la Justicia contra el Olvido y el Silencio (H.I.J.O.S.)

The organization H.I.J.O.S. (Sons/Daughters for Identity and Justice Against Forgetfulness and Silence)[113] emerged in the mid-1990s as an association of children of the Disappeared.[114] The goal of this organization is the fight against impunity and against 'forgetting'. The H.I.J.O.S. started by creating spectacles which were a 'mixture of popular justice, political demonstration and street carnival.'[115] These events took participants to the homes and workplaces of the military who had been responsible for human rights violations in order to expose them as torturers and murderers in their own environments.

As time went on, the generation of the parents of the Disappeared withdrew more and more from the active fight against impunity and forgetting, so the H.I.J.O.S. stepped up and gradually took their places as 'legitimate representatives' of the concerns of victims' organizations, increasingly taking on public roles in the process of dealing with the past. They currently represent victims' concerns on commissions and panels.

2.12 Measures in the Educational System

During the dictatorship, the school system was under special observation, as any politicization of the students was to be prevented. They mainly focused on disciplinary matters and aspects of school structure and administration. In terms of content, contemporary topics played a lesser role in the curricula up to the Educational Reform of 1993. The years of the dictatorship, however, were largely presented in a benign manner in school books. From 1993 onwards a more critical view of the years 1976 to 1983 became apparent.[116]

The requirement to deal with the most recent past was established in 2006 under the presidency of Néstor Kirchner in the *Ley de Educación Nacional* (Ley No. 26.206). Article 92c defines the need to discuss the 'historical and political processes that led to the breach of the constitutional framework and to state terrorism'. The explicit aim is to 'create reflective thinking among students, to promote democratic and constitutional attitudes as well as positive attitudes towards human rights.' This is the guideline established in law at the federal level. The way in which this requirement be-

113 In Spanish the word 'Hijos' means sons or descendants, hence the play on words with the abbreviation H.I.J.O.S.

114 Nazareno Bravo, 'H.I.J.OS. en Argentina: La emergencia de prácticas y discursos en la lucha por la memoria, la verdad y la justicia', *Sociológica* 27/76 (2012): 231–248.

115 Schindel, 'Verschwunden, aber nicht vergessen', 127.

116 Gonzalo de Amézola, 'Currículo oficial y memoria: El pasado reciente en la escuela argentina', *Enseñanza de las ciencias sociales* 7 (2008): 47–55, 47 f.

came reality at the provincial level, however, varied greatly.[117] The goal of this historico-political education was to strengthen democratic attitudes and embed an appreciation of human rights by addressing the dictatorship and human rights violations.[118]

2.13 Coming to Terms with the Past through the Media

The media played an important role in dealing with the past in Argentina. They reported continuously and thus kept this topic in the social consciousness. However, there was a decline in reporting at the beginning of the 1990s, once the legacy of the dictatorship seemed to have disappeared from the public agenda after President Menem issued his pardons. The regularity of reporting aided public and societal engagement with the period of the military dictatorship. The human rights movement also succeeded time and again in generating political pressure to take action, both with and through the media. The strategic function of the media for the human rights movement can also be seen in the fact that the human rights organization APDH, for example, specially developed a manual for journalists, in which the necessary background information for reporting on human rights issues is conveyed.[119] In the early phase of dealing with the past, detailed reporting of the work and results of CONADEP played an important role. The commission also used press conferences at national and regional levels to provide information about the truth recovery process and to encourage potential witnesses and relatives to testify.[120]

The trials against the military *Junta* were also closely followed by the media. For the first time on television there were filmed recordings of court hearings (although only the visuals were transmitted, not the audio). In addition to the normal press coverage, *El Diario del Juicio* created its own weekly publication, which reported on the progress of the proceedings and complemented the TV coverage. The *Diario* was published between May 1985 and January 1986. It also published copies of witness reports. A total of around 2.5 million copies were sold, with a weekly circulation of around 71,000 copies on average. 36 editions of the *Diario* were published.[121]

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117 Joan Pagès and Jesús Marolla, 'La historia reciente en los currículos escolares de Argentina, Chile y Colombia: Desafíos de la educación para la ciudadanía desde la Didáctica de las Ciencias Sociales', *Historia y Memoria* 17 (2018): 153 – 184, 170 – 172.

118 Gonzalo de Amézola, 'Una educación por el repudio: La formación ciudadana con el ejemplo de la dictadura militar 1976 – 1983 en escuelas secundarias de Argentina', *CLIO. History and History teaching* 41 (2015), accessed April 11, 2022, http://clio.rediris.es/n41/articulos/mono/MonAmezola2015.pdf, 2f.

119 APDH, *Memoria, Verdad y Justicia. Herramientas para la comunicación desde los derechos humanos* (Buenos Aires: Asamblea Permanente por los Derechos Humanos, 2019).

120 Hayner, *Unspeakable Truths*, 33f.; CONADEP, *Nunca Más*, 443 – 456.

121 Feld, *Del estrado a la pantalla*; Feld, 'Memoria colectiva'.

Following this example, the *Facultad de Periodismo y Comunicación Social* of the University of La Plata (Province of Buenos Aires) partnered with the human rights organization APDH to create the journal *Verdad y Justicia* in 2010. *El diario del juicio a los penitenciarios*, reported on the trial of 14 former prison staff in La Plata who were accused of crimes against humanity during the dictatorship.

The media – and in particular investigative journalism – played an important role in understanding state terrorism and in dealing with human rights violations through criminal trials. It was investigative journalists such as María Seoane and Horacio Verbitzky whose research repeatedly gave new momentum to societal dealings with the legacy of dictatorship.[122]

An incredibly important interview was conducted by Horacio Verbitzky, journalist for the left-wing liberal daily paper *Página/12*, in the mid-1990s with Adolfo Scilingo, a former naval officer. In this conversation, Scilingo described the practice of so-called 'Death Flights', in which prisoners were sedated under the pretext of being vaccinated, loaded onto an airplane and thrown out over the open sea. Scilingo himself took part in two of these operations. These flights took place in rotation, i.e. they were always carried out by different people in order to consolidate the 'Pact of Silence.' Scilingo stated that these death flights took place twice a week for two years. Around 1,500 to 2,000 people were Disappeared this way. The interview was first published in the daily press. Verbitzky later worked on the subject in the book *El vuelo* (*The Flight*).[123]

Even if Scilingo's confessions did not reveal anything that was not already known, they sparked enormous societal and political debate. A few months before the 20th anniversary of the coup, the question of how society should deal appropriately with the past reappeared on the public and political agenda. The attempts by the Menem government to put an end to this issue through its pardons and its discourse on 'national reconciliation' and on looking to the future had failed.

In addition to the general media, the publications and periodicals of the human rights and victims' organizations also played an important role, even though they were usually not aimed at a larger readership, but rather served to mutually support and connect people within the human rights scene and its sympathizers.

The magazine *Puentes*, which has been published by the *Comisión Provincial por la Memoria* in La Plata since 2000, was of national importance, as it focused primarily on questions of transitional justice and the culture of remembrance in Argentina, but also on overarching issues involved in dealing with the past. By 2016, a total of 31 issues of the magazine had appeared.[124]

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122 Alicia Miller and Vanina Berghella, 'Una mirada sobre el periodismo de investigación en la Argentina,' in *¿Qué periodismo se hace en Argentina? Perspectivas locales y globales*, ed. Konrad-Adenauer-Stiftung (Buenos Aires: Konrad-Adenauer-Stiftung, 2018), 75–108, 81f.

123 Horacio Verbitsky, *El Vuelo* (Buenos Aires: Planeta, 1995).

124 Published editions can be accessed online, accessed 11 April 2022, https://www.comisionporlamemoria.org/project/puentes.

2.14 Coming to Terms with the Past through Art

Argentina is a country with a strong literary and artistic tradition in which political and societal issues always play an important role. It is therefore not surprising that the recent past has been the subject of a wide range of forms of cultural debate.

In the Argentinian literary canon there exists a multitude of texts that deal, implicitly or explicitly, with the dictatorship.[125] The attempt to deal with the past using literature began during the years of military rule and continues to the present day, as reflected in contemporaneous exile literature.[126] The dictatorship is the subject of both non-fiction essays and of fictional literature. Over the years the range of this struggle with the past broadened out: e. g. the importance of the literature of witnesses has increased.[127]

Recently there have been an increasing number of literary works by the children of the Disappeared. This generational change among the authors casts light upon different aspects of the process of dealing with the past. Often there is a tension between admiration and compassion for the missing parents on the one hand and accusation on the other, due to the far-reaching consequences that the parents' political commitment had for the families.

Using film to deal with the past was as widespread in documentary film-making as in feature films.[128] In many cases the dictatorship is the explicit subject of the film, but often it also provides the historical background to fictional films, such as the blockbuster and crime film *El secreto de sus ojos* (*The Secret in their Eyes*, directed by Juan José Campanella, 2009).

Using cinematography to explore the impact of the dictatorship, different emphases and shifts in emphasis can be identified. A particularly significant film was *La noche de los lápices* (*The Night of the Pencils*, directed by Héctor Olivera, 1986).

This latter film is based on a real event, i. e. the kidnapping, torture and murder – the 'Disappearance' – of seven young people in the city of La Plata in 1976. This film shaped the social perception of the typical 'disappeared' victim because it paints the picture of the Disappeared as idealistic, socially-committed young people who – as in this case – were only campaigning for student rates on buses and thereby came into the sights of the regime. The 'Disappeared' were portrayed as socially committed

125 Ana Rosa Domenella Amadio, 'Novelas sobre la dictadura cívico-militar en los ochenta y treinta años después', *Revista Huella de la Palabra* 12 (2018): 14 – 29.

126 José Luis de Diego, *Campo intelectual y campo literario en la Argentina (1970 – 1986)* (PhD diss., Universidad Nacional de La Plata, 2000), accessed 11 April 2022, http://www.memoria.fahce.unlp.edu.ar/tesis/te.150/te.150.pdf.

127 Victoria García, 'Testimonio y ficción en la Argentina de la postdictadura: Los relatos del sobreviviente-testigo', *Revista Chilena de Literatura* 93 (2016): 73 – 100.

128 José Gabriel Cristancho Altuzarra, 'Memoria, oposición y subjetividad política en el cine argentino', *Imagofagia* 10 (2014): 1 – 62. An overview with summaries is available here: accessed 11 April 2022, http://www.memoriaabierta.org.ar/ladictaduraenelcine.

but basically largely apolitical young people. As society continued to try to deal with the dictatorship, looking more closely at the origins of the political violence and military rule, there continued to exist opposing currents that focused on the *militancia política* and the political and ideological motivation of the 'Disappeared". The *Asociación Madres de Plaza de Mayo* takes an extreme position here, tending to regard all those who have disappeared as 'revolutionaries'.[129]

Argentinian theatre also deals with this theme. Griselda Gambaro is considered one of Argentina's most outstanding playwrights. Her work deals with torture and repression, but also with general conditions in society.[130]

In the context of dealing with the past, special mention should be made of the *Teatro x la Identidad* (*Theatre for Identity*), which was largely initiated by and with the *Abuelas de Plaza de Mayo*. Since 2000, this project has used political theatre to address different aspects of the fate of children who have 'disappeared' and who have been deprived of their identity.[131] The motto of the *Teatro x la Identidad* is: 'Actuar para no olvidar, actuar para encounterrar la verdad' ('Acting / taking action so as not to forget, Acting / taking action to discover the truth').[132] For over 20 years the *Teatro x la Identidad* initiative has regularly performed (political) plays selected by its own committee in theatres, cultural centres, public spaces and schools. Its aim is to keep the memory of the atrocities of the dictatorship alive and to initiate and promote creative processes of reflection. At the same time, making the *Abuelas*' demands public is central, i. e. the search for the 400 alleged disappeared children.[133]

3 Stocktaking: Successes and Failures of Transitional Justice in Argentina

After the years of military dictatorship Argentina returned to democracy in 1983. In the nearly four decades since re-democratization, different phases have emerged in dealing with the crimes of the dictatorship. The most prominent factors in determining the place of this topic on the social and political agenda were the personal convictions and priorities of the respective state presidents and their respective political cost-benefit analyses or external limiting factors, such as the actual power of the armed forces. The ability of the human rights movement to generate political

129 Straßner, '"La lucha continúa!"'.

130 Gail Bulman, 'Moving On? Memory and History in Griselda Gambaro's Recent Theater', *Studies in 20th & 21st Century Literature* 28/2 (2004): 379 – 395.

131 María Luisa Diz, 'Teatro x la Identidad: Un escenario para las Abuelas de Plaza de Mayo', *Reflexión Académica en Diseño y Comunicación* XXI/42 (2020): 228 – 234.

132 Accessed 11 April 2022, https://teatroxlaidentidad.net/contenidos/quienessomos.php. The motto here plays with the double meaning of the verb *actuar*, which means both to act and to take action.

133 Accessed 11 April 2022, https://teatroxlaidentidad.net/index.php.

pressure to take action was also of central importance. On the other hand, external factors, such as the confessions of the former officer Adolfo Scilingo in the mid-1990s, played an important role.

The phases involved in dealing with the past

In the case of Argentina, three main phases a post-dictatorship development can be identified: The first phase encompasses the first few years of the Alfonsín government. This phase was marked by the political will to implement the demands for *Verdad y Justicia*, truth and justice. However, this strategy reached its limits when the increasing growth in resistance of the armed forces became apparent and the fear of another military coup spread across the country. From this point onwards, the politics of the past was largely characterized by attempts to keep discussion on the subject as limited as possible, or even to ignore it completely.

Both amnesty laws, the pardons from President Menem, and financial compensation for former political prisoners as well as for the relatives of the Disappeared fall within the second phase. This phase included the last year of Alfonsín's presidency, the two terms of office of Carlos Menem (1989 to 1999) and the subsequent presidencies of Fernando De la Rúa (1999 to 2001) and Eduardo Duhalde (2002 to 2003).

A paradigm shift in the politics of the past came about when Néstor Kirchner took office (2003 to 2007) and with the two terms of office that his wife Cristina Kirchner held (2007 to 2015). Both made coming to terms with the past one of the most important goals of their presidencies. This phase included the repeal of the amnesty laws, the expansion of compensation payments, numerous commemorative policy decisions as well as further measures to provide institutional support for transitional justice. When the neoliberal conservative Mauricio Macri came to power (2015 to 2019), however, clear obstacles and backward steps became apparent. Macri tried multiple times to play down the issue and the importance that his direct predecessors had attached to it. State support measures for transitional justice were also cut.[134]

Transition to Democracy and Civic-Military Relations

The primary and most significant success in Argentina in terms of dealing with the past is that the regime change was non-violent. The military were not able to permanently secure any enclaves of power. Even though certain situations emerged repeatedly, especially during Alfonsín's time in power, in which the country was destabilized by the activities of the armed forces, no relapse into authoritarianism or

134 Luciana Bertoia, 'La agenda de Memoria, Verdad y Justicia en tiempos de cambios: Tensiones, rupturas y continuidades en el discurso del gobierno macrista en torno al terrorismo de Estado', *Aletheia* 7/13 (2016), accessed 11 April 2022, http://www.memoria.fahce.unlp.edu.ar/art_revistas/pr.7622/pr.7622.pdf; Palmás et al., 'Las políticas de memoria, verdad y justicia'.

further coups ever occurred. The functional elites from the military and the judiciary were swiftly replaced. The courts took on human rights issues right from the outset, acting self-confidently and autonomously, as became apparent in 1986, when Alfonsín's plans to reduce the number of legal proceedings against members of the military failed due to the independence of the courts.

It took some time, however, before the armed forces were truly subordinate to civilian rule. The concept of the 'self-purification' of the armed forces pursued by Alfonsín failed; Menem was able to achieve success here, however, through his reforms of the military and his practice of issuing generous pardons. When General Martín Balza, the Army Chief of Staff, made a self-critical assessment in 1995 of the role of the armed forces during the dictatorship, his position was still characterized by contextualizing and relativizing violence.[135]

In 2004, however, Admiral Jorge Godoy, Chief of Staff of the Navy, clearly distanced himself from the human rights violations. He stated that truth recovery and punishing those responsible was the only way to overcome their troubled past. A clear sign of this distancing was the removal of the portraits of the *Junta* generals from the gallery of former directors in the army's training college.[136] Another step towards the removal of military privileges was the dissolution of military jurisdiction and the subordination of soldiers to the civil justice system.

Truth Recovery

Argentina was a pioneer in the investigation of crimes committed under dictatorship, which had previously been systematically covered up and denied. The CONADEP set up by President Alfonsín was the first truth commission of its kind in Latin America (the commission created two years earlier in Bolivia never presented a final report). Within a short period of time, CONADEP succeeded in establishing a 'global truth" by revealing the system of repression and the way in which state terrorism worked. It also managed to record the names of nearly 10,000 people who disappeared and, for the most part, also the circumstances of their Disappearance.

The population played an intensive role in the work of the commission. Its results are essentially undisputed today. A broad consensus always existed in Argentina in condemnation of the dictatorship, in large part thanks to the work of CONADEP.

Although the Argentinian strategy of dealing with the past has achieved considerable success in establishing a 'global truth', with regards to 'actual truth' these achievements are much more modest. The fate of the vast majority of the Disappeared is still unclear, as is the case with the missing children. In only a few cases has it been possible to find and identify the human remains of the Disappeared. This shows that

135 Martín Antonio Balza, '"Das Ziel rechtfertigt niemals die Mittel": Fernsehansprache des Stabschefs des argentinischen Heeres, General Martín Antonio Balza, vom 25.4.1995', in *Vergangenheitsbewältigung in Lateinamerika*, ed. Detlef Nolte (Frankfurt am Main: Vervuert, 1996), 96–99.
136 Straßner, *Die offenen Wunden Lateinamerikas*, 149.

the military's 'Code of Silence', as well the silence of those responsible and of those involved in specific operations, still has a profound effect.

The victims and their relatives welcomed the investigative work and the establishment of a basic social consensus. This satisfaction, however, is overshadowed by an even greater dissatisfaction that no information about the specific fates of the Disappeared has been provided.

Criminal Proceedings

Argentina has played a special role in prosecuting systemic injustice. The *Junta* trials successfully sentenced the key people responsible for state terrorism to long prison terms in a highly transparent and constitutional process before the ordinary courts (and not, for example, before a special tribunal). This approach was unparalleled at the beginning of the 1980s. After this decisive start, the expectations of the population and the fears of the military were equally great.

Alfonsín pursued a plan of more limited and symbolic criminal investigations. In order not to endanger the fledgling and still unstable democracy, he opted for a manageable number of trials in which the 'excessive offenders' would be tried. After his strategy was not successful, he had to find new ways to limit the number of trials in the face of growing unrest in the armed forces. The amnesty laws finally closed down any form of criminal investigation. Alfonsín was massively criticized for these decisions, mostly on ethical grounds. From a responsible ethical perspective, the decision-makers at the time faced a difficult trade-off between the legitimate demand for justice on the one hand and the fear of the consequences of possible renewed military action on the other. It is evident that these politically motivated decisions did not strengthen the already chronically low level of trust in the institutions and in the rule of law.

If the possibility of prosecution came to an early end with the amnesty laws, the few perpetrators who had been convicted and imprisoned were then set free as a result of Menem's pardons. These decisions were widely criticized not only by the victims but also by large proportions of the population. It created a feeling of powerlessness. *Impunidad*, impunity, became the core issue in the discourse of the human rights movement.

It took years for resourceful lawyers from the human rights movement to restart the hold that had been put on criminal prosecutions. These efforts were aided by Scilingo's confessions, which brought the dictatorship's human rights abuses back into public awareness. The lawyers succeeded in initiating criminal proceedings, initially despite the existing amnesty laws. The Inter-American Court and Commission on Human Rights and the Human Rights Court in Costa Rica played an important role here. The Argentinian human rights movement used these bodies mainly as political levers to put pressure on their own national government.

Most of these trials, however, which were carried out despite the ongoing amnesty laws, did not result in convictions. Despite this, they were of great political importance because they created pressure on the government to act.

Actual progress was achieved in the mid-2000s, after the amnesty laws were repealed: between 1985 and 2005, a total of 38 defendants were found guilty of crimes against humanity.[137] Between 2005 and 2020, the number of judgments rose to nearly 1,000. This number is quite remarkable. However, it should be remembered that many of the perpetrators from that time period had already died. Many of those convicted served out their sentences under house arrest due to their old age. The fact that the perpetrators had been able to live out their everyday lives largely undisturbed for years put trust in the rule of law to a severe test.

The few successes that were achieved in the area of criminal prosecutions in the pre-Kirchner period were essentially due to the tireless commitment of the human rights movement. In 2002 José María Guembe of the human rights organization CELS described how the progress that they had made in recent years in Argentina in the field of criminal prosecutions had been achieved *despite* the state. The commitment of the citizens, who demanded that the state put in maximum effort to deal with the past, was a decisive factor.[138]

During the presidencies of Néstor and Cristina Kirchner, on the other hand, there was active institutional support for the courts with respect to criminal prosecutions, which – albeit long overdue – did strengthen trust in the rule of law. The fact that the judicial system was strengthened in this way helped it to further evolve. A lasting contribution to safeguarding human rights was also made through (human) rights policy decisions. Despite this, there was still the repeated intimidation of witnesses, homicides and, in 2006, even 'Disappearances' in the context of human rights trials. Yet again, this is indicative of serious problems with the Argentinian rule of law.[139]

Compensation and Reparation

Guembe's thesis that everything that was achieved in Argentina in the field of criminal investigation had to be forcibly taken from the state also applies in part to the issue of compensation payments. Although the first damages claims were recommended by CONADEP and implemented by the government, these benefits remained minimal. Compensation for former political prisoners was initially obtained through legal proceedings against the Argentinian state – in the last instance before the Inter-American Human Rights Court in Costa Rica. Only when threatened with a judgment did President Menem first issue a decree on the question of compensation – but not,

137 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 21.

138 María José Guembe, 'Die Suche nach Wahrheit vor den Gerichten,' in *Experimente mit der Wahrheit: Rechtssysteme im Wandel und die Prozesse der Wahrheitsfindung und Versöhnung. Documenta11_-Plattform2*, ed. Okwui Enwezor et al. (Ostfildern: Hatje Cantz, 2002), 261–272, 272.

139 Torras, Palmás and Perelman, *Memoria, verdad y justicia*, 23.

however, for all those who had been affected. The legislature subsequently regulated the compensation payments through a formal compensation law for all those affected. The benefits were initially one-off payments. It took until the Kirchner government for compensation to be extended to include exiles. In the same way, a *pensión graciable* (non-compulsory allowance on retirement) was later introduced for former political prisoners. Similarly, the compensation for the relatives of the Disappeared, which went further than the initial law on compensation, first had to be fought for in court.

The verdict on these compensation policies is mixed. On the plus side, it is true that many groups of victims received compensation payments over the course of time. Some of the sums paid out were considerable. It is important to consider, however, that many compensation payments were initially paid out in the form of government bonds in order to relieve the burden on the state treasury. If those affected wanted to access their money directly, they had to sell their bonds, which meant that they could not always exploit the full value of their compensation.

However, the following aspect is clearly negative: all of those affected were victims of *state* violence. Therefore, as the legal successor to the military government, democratic Argentina had a definite duty to compensate the victims. As a rule, however, this obligation was not honoured. In fact, the victims had to assert their rights before the courts.

Another critical aspect is the form of the compensation: until well into the 2000s, state compensation largely took the form of financial contributions (usually one-off payments). The hot topic of compensation had the potential to split the victims' organizations in Argentina. For some, the compensation payments were a welcome support to help cope with everyday life financially, while others referred to 'blood money' or 'hush money'.

The Argentinian compensation policy has little to do with *reparación integral*, which is often called for by the victims, i.e. a compensation policy in tune with the problems that victims face in their everyday lives and which specifically addresses these problems. One form of holistic recompense would include the following benefits: a monthly sum to compensate for lack of income, scholarships for the children of the Disappeared, medical and psychological support, and symbolic measures to recognize injustice.

Politics of Commemoration

The topic of memorials and commemoration gained importance as time went on. As early as the beginning of the 2000s, the discourse on appropriate ways by which to commemorate and interpret the recent past began on a societal and cultural level.[140] It was the Kirchner government that made commemoration a political issue and tried

140 Straßner, '"La lucha continúa!"'.

to embed the horrors of the past in the collective memory of the nation through targeted work around memorials. The government deserves credit for, on the one hand, paying for the costs and maintenance of the memorial sites, and, on the other hand, for developing the specific designs at a local level in conversation with those affected and with contemporary witnesses. Although ESMA is *the* central memorial in Buenos Aires, the decentralization of commemorative work and the establishment of memorials in all parts of the country have increased awareness of the issue.

Archives and Access to Documents

Much has happened in recent years as regards access to relevant sources. Although the armed forces and security forces continually repeated the mantra over the years that there were no files and no archives, a number of archive holdings have now been discovered, indexed and made accessible to the judiciary, the press and researchers. When the *Archivo Nacional de la Memoria* was established, it also centralized archival administration and coordination. This is undeniable progress. At the same time, however, it must be stated that there is a lack of systematic recording of the holdings and a lack of (digital) indexing and of digitalization in general. Likewise, clear strategies for preserving the archives of human rights and victims' organizations are still lacking.

Societal Dealings with the Dictatorship

Overall, there is broad social consensus in Argentina with regards to state terrorism. There are hardly any deniers and only a few revisionists and relativists. An important foundation for this consensus has definitely been created by CONADEP. In addition, the tireless calls for *Verdad y Justicia* from the victims and the human rights movement have kept the topic in the public awareness for decades. This is certainly part of the tragedy of the role of the victims; the suffering they have experienced cannot be recompensed and the onus to keep alive the memory of the abuses suffered lands de facto on their backs. Their dissatisfaction is the reason why their concerns keep appearing on the societal and political agenda. As a result, society is forced to repeatedly grapple with the past. While society can learn from it and mature, the process itself places great strain upon the victims.

Societal wrangling with the dictatorship has also found expression in art and culture. The most varied facets of the dictatorship were highlighted. At the same time, however, the dictatorship was used again and again as a backdrop for other fictional stories. This also seems to be an important step; the dictatorship is not only an explicit topic for cultural debate, but is implicitly dealt with in connection with other topics.

Another important development in the societal confrontation with the dictatorship is the broadening of focus. It is no longer just about the cruelty of the military, but rather much more about the conditions in which violence develops, about sup-

porting factors, about non-military actors, about who profits from the regime, etc. This also shows a deepening and more multifaceted confrontation with state terrorism.

The experience of recent military dictatorship also has an impact on the nation's sense of history. The Argentinian national narrative is shaped by armed conflicts, military successes and heroic generals, etc. The confrontation with the dictatorship triggered a process of critical questioning of this construction of national identity. This becomes clear, for example, in the controversies surrounding the figure of General Julio Rocas (1843 – 1914), who was celebrated in national historiography as the 'Conqueror of Patagonia'. The fact that thousands of indigenous people were killed in this 'conquest' of Patagonia did not feature in the narrative. In the context of the confrontation with the Argentinian dictatorship, state crimes were repeatedly referred to as genocide.[141] This paradigm of genocide subsequently facilitated a critical reinterpretation of Argentinian history. In this context, General Roca, who had been seen as a heroic conqueror and bringer of civilization, now became a perpetrator of genocide.[142]

The experiences with state terrorism not only provide an interpretative framework for the history of Argentina, but also for its present. Police violence, for example, is still a problem in Argentina. Corruption, a lack of supervisory authorities and a lack of professionalism mean that there is little trust in the members of the security forces. Even today, people who are taken into custody by the police 'disappear'. Such incidents are particularly important in the context of recent history.[143]

Conclusion

The case of Argentina is revealing and illuminating in many ways. In conclusion, a few things should be briefly mentioned that are emblematic of the example of Argentina.

The *form of political transition* is critical in terms of the possibilities of coming to terms with the past. In the case of Argentina, it was a regime collapse than a consolidated and negotiated transition. At the start of the Alfonsín government, good preconditions existed to enable a positive process of dealing with the past.

An *early and comprehensive investigation of crimes*, such as that carried out by CONADEP, is important in order to achieve the necessary support among the population. This also creates the basis for a clear demarcation from the previous regime.

141 Crenzel, *The Crimes of the Last Dictatorship*, 7 – 15.

142 Carlos Masotta, 'Imágenes recientes de la "Conquista del Desierto": Problemas de la memoria en la impugnación de un mito de origen', *Runa: Archivo para las ciencias del hombre* XXVI (2006): 225 – 245; Diana Lenton et al., 'Huellas de un genocidio silenciado: Los indígenas en Argentina', *Conceptos* 90 (2015): 119 – 142.

143 Michelle D. Bonner, 'Never Again: Transitional Justice and Persistent Police Violence in Argentina,' *International Journal of Transitional Justice* 8 (2014): 235 – 255, 235 f.

Limitations on action and political restrictions are of great importance in the process of dealing with the past. During Alfonsín's time in power in particular, it became clear that the armed forces, as a domestic political power, were able to exercise vetoes and therefore, for example, prevent criminal proceedings. In a Weberian way, the government was caught on the horns of a dilemma. They either maintained their 'ethics of conviction', pursuing their original goal, or they had to turn to their 'ethics of responsibility' and react to the political pressure surrounding them.

The *role of victims' organizations and the human rights movement* cannot be overestimated. In the case of Argentina, it is mainly thanks to these groups that progress has been made in the area of transitional justice. For much of the past few decades they have been the driving force that has often had to drive the government forwards in front of them.

The *role of the government* in the transitional justice process is also evident. It is precisely the difference between President Menem's political strategy on dealing with the past and that of the two Kirchner presidents that makes it clear just what progress can be achieved if the *agenda setting* when dealing with the past is made by the government and does not have to be forced from 'below'.

Processes involved in dealing with the past have a specific *sequence of phases:* At the beginning, the focus is often on the most pressing questions (such as release from prison, elite exchanges, etc.) as well as the need for investigation and punishment. Questions of compensation and reparation often follow. As time progresses, questions around the politics of commemoration and then the politics of history itself play a role. It is also often the case that certain measures – even if they were necessary right from the start – only become possible later. Generational aspects definitely play an important role here. This was evident in the criminal prosecutions in Argentina.

Ricardo Brodsky

Chile: Report on the Democratic Transition Process after Pinochet

1 The Experience of Dictatorship

The long road that a society must travel down to heal and take ownership of the dramatic consequences left behind by mass systematic human rights violations at the hands of a dictatorial regime or a civil war is a complex and never-ending process. The case of Chile identifies key experiences and reveals lessons on the limits of transition processes by showing where these processes did or did not work in a certain instance.

In Chile, the concepts of democratic transition and post-dictatorship have been the subject of much debate. There is no political or academic consensus to define when democratic transition begins and ends, while the term 'post-dictatorship' is used on occasions to criticize continuities with the previous regime and imply that there is no true democracy in the country. In this text, we use both terms interchangeably and understand the democratic transition and consolidation process to refer to the space in time that starts when the government headed by General Augusto Pinochet came to an end (March 1990) and ends when the risks of return to authoritarian rule are overcome. Consolidation is the period that ensures the ongoing existence of the factors that made the change in regime possible: these are the basic consensus regarding the existence of human rights, the democratic regime and the basis of Chile's economic and social policy. This period involves a verification of the processes aimed at perfecting democratic institutions, fighting poverty and strengthening the validity of the rule of law.[1]

After the event known as the *estallido social* ('social outbreak') in the month of October 2019, the National Congress in November of that year gave way to a constituent process to draft a new constitution within a year, to replace the one in force from 1980. This process began through a plebiscite in which 78.27 percent approved the creation of a Constituent Convention of 155 members elected by vote, establishing that it should be equal in terms of gender composition (50 – 50), with participation from independents and with 17 seats reserved for representatives of native peoples[2]. Undoubtedly, this process means the end of the dictatorial heritage ex-

1 Edgardo Boeninguer, *Democracia en Chile. Lecciones para la gobernabilidad* (Santiago: Editorial Andrés Bello, 1997).

2 These were divided into seven seats reserved for the Mapuche people, two for the Aymara, one for the Rapa Nui, one for Quechua people, one for the Atacameño, one for the Diaguita, one for the Colla, one for the Kawashkar, one for the Yagán and one for the Chango.

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pressed in the 1980 constitution and the incorporation of new actors for the elaboration of a new social pact involving citizen participation for the first time in the history of Chile.

1.1 Relevant Period

On 11 September 1973, the three branches of the Chilean armed forces (FFAA) and police force (*Carabineros*) staged a military coup in Chile and proceeded in a military junta to designate their commanders-in-chief as the *Mando Supremo de la Nación*[3] or supreme government body, concentrating the executive, legislative and constitutional powers in their hands.

The dictatorship lasted from that date until 11 March 1990. There were three distinguishable stages during this period:

One started with the military coup and ended with the dissolution of the *Dirección de Inteligencia Nacional* (Chilean Intelligence Agency; DINA) in 1977. This period can be defined as state terrorism, given the volume and intensity of systematic and planned human rights violations at the hands of state agents.

A second stage lasted from 1978 to 1988. This was a more extensive period that included the enactment of a new constitution in 1980. This stage was a direct civic-military dictatorship unilaterally led by General Pinochet in a sort of presidential Caesarism. The constitution adopted in 1980 'contemplated a transition period until its full implementation, a period that was designed to last for eight years. And this period was regulated by a set of transitory articles, whose general concepts and details basically reproduced the prior regime (1973 – 1980).'[4] This stage culminated with the defeat of General Pinochet in the referendum held on 5 October 1988.

A third phase began after the referendum until the handover of the government on 11 March 1990. During this period, the opposition negotiated with the regime on 54 reforms to the constitution aimed at guaranteeing political pluralism and regulating states of exception. Meanwhile, the outgoing government enacted various organic constitutional laws that would require high quorums to be modified by the future National Congress. For some analysts, this period can also be defined as an '(incomplete) transition to democracy.'[5]

3 Accessed 11 April 2022, http://www.memoriachilena.gob.cl/602/w3-article-92407.html.

4 *Informe de la Comisión de Verdad y Reconciliación* (Report of the Chilean National Commission on Truth and Reconciliation), 34.

5 Manuel Antonio Garretón, *La posibilidad democrática en Chile* (Santiago: Flacso Chile, 1988).

1.2 Political Background

The military coup coincided with a general policy imparted by the United States in Latin America, which supported the installation of military dictatorships throughout the region. From a national perspective, this occurred within a context of acute political, social and economic crisis. The government of Salvador Allende – upheld by a coalition of left-wing parties known as *Unidad Popular* (Popular Unity; UP), which at the time defined themselves as Marxists and expressed a popular movement that had been gaining ground in Chilean society since the early twentieth century – sought to begin a political transition process towards a socialist regime that would maintain democratic freedoms and reject the use of armed force, which was predominant in Latin America at that time.

The electoral triumph of Salvador Allende in 1970 (at first with a relative majority of 36.6 percent of the votes) and the support of the Christian Democrats in the National Congress allowed him to be appointed president of Chile. The government made confident strides towards the implementation of its programme, which included the nationalization of the copper industry, until then in the hands of North American companies, and the nationalization of the banking industry and most of the larger companies in the country, as well as furthering the agrarian reform that had begun under the government of Eduardo Frei Montalva (1964 – 1970). These policies were pushed forward even though the UP did not have a political majority in parliament. This, in conjunction with the opposition resistance, began to generate a climate of growing political and social polarization. Three years into this government, there was a profound division between Chileans, a political crisis that was played out in prolonged middle-class union strikes and an economic disaster expressed in shortages and hyperinflation. As there were no institutional options available for putting an end to the government (in the parliamentary election in March 1973, the government obtained 40 percent of the votes, which prevented the opposition from reaching the quorum it needed to constitutionally indict the president), and as the UP lacked a parliamentary majority to approve its initiatives and was politically paralyzed as a result of its strategic divisions, violence emerged and the ghost of civil war loomed increasingly closer. In this context of a 'catastrophic dead heat,' the opposition majority chose to move forward on the military coup, implementing it with particular rawness and violence, shaking the entire world and installing a prolonged dictatorship.

1.3 Ideological Justification

From an ideological standpoint, the dictatorship sustained its discourse on two initial converging pillars: anti-communism and the Doctrine of National Security. Its *Declaración de Principios* (Declaration of Principles) (October 1973) proclaimed the need for a profound and prolonged intervention for the 'moral, institutional and material

reconstruction of Chile and a change in the Chilean mentality,' affirming the need for a civic-military movement, a democracy 'more of substance than of forms' and armed and security forces that could 'guarantee' a 'broad concept of National Security.'[6]

The doctrine of national security pushed by Washington in the Cold War context, a military ideology shared throughout the Latin American region, proposed the existence of an internal enemy that had to be defeated by whatever means possible. In this sense, from the perspective of the regime, 'the repression was the legitimate response to overt or latent subversion and was exempted from respecting the human rights of people who only had themselves to blame for swelling the ranks of the enemy.'[7]

In terms of the economic project, the nationalist and corporatist currents at the heart of the regime, mostly represented by the military, were in conflict with sectors led by neoliberal economists, educated by the University of Chicago, who sought to create a market society model and reduce the role of the state to a minimum. This latter group gained the upper hand after successfully aligning with business groups and with Pinochet, supporting his personal leadership over the rest of the military junta and turning neoliberalism into a third ideological cause of the dictatorship.

1.4 Structures of Persecution

The regime was heavily repressive at the beginning (1973 – 1977) against *Unidad Popular* party activists and leaders and later, after 1978, against its democratic opposition, social leaders and human rights defenders.

During the first phase, the intelligence services of all three branches of the armed forces, sometimes separately and sometimes as a whole, imprisoned thousands of people in stadiums, concentration camps, military compounds and clandestine detention sites. After this initial period, on 14 June 1974, DINA was formed under the direction of Colonel Manuel Contreras, bringing personnel from the armed forces and military police together under a centralized command. This organism went on to be responsible for the executions and disappearances of activists from the *Movimiento de Izquierda Revolucionario* (Left Revolutionary Movement; MIR), communist and socialist parties, and members of the smaller UP parties and independent citizens. The DINA also acted outside of Chile under the auspices of Operation Condor[8] in cooperation with the intelligence services from Argentina, Uruguay, Paraguay and Brazil, exchanging information and coordinating repressive actions, kidnappings and

6 *Declaración de Principios del Gobierno de Chile*, October 1973.

7 *Informe de la Comisión Nacional sobre Prisión Política y Tortura* (Santiago, 2004), 165.

8 Operation Condor was a secret network of repression formed by the security services of the Latin American southern cone countries, called together by the then director of the DINA Manuel Contreras in 1975 in Santiago, Chile.

assassinations of members of the opposition. Independent of this, the DINA, in alliance with local ultra-right terrorist groups, was responsible for assassinations and assassination attempts in Washington (Orlando Letelier, former minister under Allende, and Ronnie Moffit), Rome (Bernardo Leighton and his wife Ana Fresno, former *Demócrata Cristiano* vice-president during the government of Eduardo Frei Montalva), and Buenos Aires (General Carlos Prats, former commander-in-chief of the army and his wife Sofía Cuthbert).

Once the DINA was dissolved in August 1977 under pressure from the US government, which demanded sanctions for the crime in Washington, the *Central Nacional de Informaciones* (National Information Centre; CNI) was created in its stead and continued a more selective repression that did not resort to forced disappearances or terrorist attacks abroad. However, from 1980 onwards, due to the activation of social movements and armed movements against the government,[9] there was an upsurge in crude and systematic repressive action, including assassinations, kidnappings and torture of activists. Together with this, independent groups from each branch of the armed forces and police continued to operate, committing crimes that carried high public repercussions during these years (*caso degollados*, Tucapel Jiménez, among others).

1.5 Victim Groups

Based on investigations conducted by the truth commissions and courthouses, the main victims of repression were government authorities and officials under Salvador Allende and leaders of UP parties and the MIR. Repressive actions resulted in several types of victims:

- Exiles (approximately 300,000 people)
- People dismissed from their jobs in public service (160,000 people)
- Tortured political prisoners (38,254 people)
- People executed (2,123 people)
- Detained-disappeared people (1,092 people).

Sixty-one percent of all political prisoners and torture victims (33,221 people) were concentrated in the first months immediately following the military coup.[10]

9 Notable among the armed groups was the *Frente Patriótico Manuel Rodríguez* (Manuel Rodríguez Patriotic Front, FPMR), stemming from the communist party.

10 *Informe de la Comisión Nacional sobre Prisión Política y Tortura*.

1.6 Those Responsible

All people identified and tried after the return to democracy were former members of the armed forces or agents of security organisms. The courts have identified perpetrators without the cooperation of the armed forces, which continue to pay homage on a regular basis to some of the main perpetrators or members of the military junta.

The primary political responsibility for human rights crimes and violations falls to Augusto Pinochet, who assumed indisputable and undisguised leadership in repressive actions, but this does not excuse the other members of the military junta: Gustavo Leigh (Air Force), José Toribio Merino (Armed Forces) and César Mendoza (*Carabineros*). Judicially, Pinochet was tried in, among other cases, the *Caravana de la Muerte* (caravan of death) case for directly instructing General Sergio Arellano to travel to different detention centers throughout the country and execute or orchestrate the disappearance of 94 detainees without trial.

The structure of the DINA, the main executor of human rights violations, consisted of a General Staff headed by Manuel Contreras and 74 officers belonging to different branches of the armed forces, *Carabineros* and *Gendarmería*, in addition to a contingent in each region of the country. The names of around a thousand agents who operated in the country and abroad are known[11].

Among the members of the General Staff were Rolf Wenderoth, Cesar Manríquez Bravo, Vianel Valdivieso, Raúl E. Iturriaga Neumann, Hernán Brantes Martínez, Marcelo Moren Brito, Maximiliano Ferrer Lima, Víctor Hugo Barría Barría and German Barriga Muñoz, among others, all officers in the Army.[12]

It is interesting to highlight the fate of some of the most notorious agents and managers of the security services during the dictatorial period:

- Manuel Contreras, Director of the DINA, sentenced to 526 years plus two life sentences, died in prison in 2015.
- Pedro Espinoza, Chief of Operations of the DINA, sentenced to life imprisonment.
- Marcelo Morén, responsible for the Villa Grimaldi or Cuartel Terranova detention center, sentenced and died in the Punta Peuco prison in 2015.
- People found responsible at the CNI:
- Odlanier Mena, sentenced to six years, imprisonment, committed suicide.
- Hugo Salas, sentenced to life imprisonment.

The DINA was organized into operating commands under the following agents:

- Miguel Krassnoff, sentenced to almost 300 years for multiple cases of detaining-disappearing opponents.

11 Accessed 11 April 2022, https://memoriaviva.com/nuevaweb/organizaciones/dina.

12 Accessed 11 April 2022, http://www.archivochile.com/Dictadura_militar/org_repre/DMorgrepre0004.pdf.

- Michael Townley, who carried out the assassinations of Orlando Letelier and Carlos Prats (he lives in the United States under the witness protection programme for providing testimony in the Letelier case).
- Álvaro Corbalán, agent and torturer, sentenced to life imprisonment.
- Osvaldo Romo, sentenced for his role as agent and torturer, died in prison.
- Armando Fernández Larios, perpetrator of several assassinations in the DINA, including his participation in the *Caravana de la Muerte* and the assassination of Orlando Letelier.

A list of 642 security service agents have all been found guilty of direct responsibility in human rights crimes and sentenced to imprisonment in Punta Peuco or in regular prisons. The full list of agents convicted of the crimes of kidnapping, torture or murder can be found on the website of the Museum of Memory and Human Rights, alongside 3,267 cases and the list of 386 Supreme Court judgments related to human rights violations.[13]

1.7 Places of Persecution

Persecution took place throughout Chile. Based on the *Comisión Nacional sobre Prisión Política y Tortura* (National Commission on Political Imprisonment and Torture; Valech Commission I), valid testimonies exist of the use of 1,132 sites as detention centres throughout the country (including police checkpoints). Prisoner camps were established between September 1973 and 1976 and people were detained for months without contact with their families and without being charged with any specific crime.

A number of political torture and detention centres cited in the Valech I Report can be mentioned:

- Arica and Parinacota Region: 14 sites. Notable among these is the DINA site in the former Citröen factory.
- Tarapacá Region: 16 sites, including the Pisagua Prisoner Camp.
- Antofagasta Region: 36 sites, including the former nitrate mine Chacabuco Prisoner Camp.
- Atacama Region: 20 sites, including the DINA site on the Copiapó Regiment land.
- Coquimbo Region: 30 sites, including the Infantry Regiment No.1, Arica in La Serena.
- Valparaíso Region: 95 sites, including the Cuartel Texas Verdes (where the DINA was born) and the training ship, the *Esmeralda*.

13 Both accessed 11 April 2022, http://interactivos.museodelamemoria.cl/justicia/listadocondenados.php, http://interactivos.museodelamemoria.cl/justicia/listadosentencias.php.

- Metropolitan Region: 165 sites, including Villa Grimaldi, Londres 38, Clínica Santa Lucía, Tres Álamos, Chile Stadium and National Stadium.
- O'Higgins Region: 47 sites, notably Infantry Regiment No. 19, Colchagua.
- Maule Region: 62 sites, notably the German colony Colonia Dignidad.
- Biobío Region: 112 sites, notably the CNI headquarters known as Casa de la Risa/ Casa de la Música.
- Araucanía Region: 66 sites, including the prisons of Temuco, Angol, Curacautín and Traiguén.
- Los Lagos Region: 34 sites, including the Isla Teja prison.
- Los Lagos Region: 60 sites, including the Puerto Montt prison.
- Aysén Region: 12 sites, notably the Investigations Headquarters in Coyhaique.
- Magallanes Region: 24 sites, notably the Dawson Island prisoner camp.

1.8 The Form in which the Regime Was Overcome

One of the transitory articles of the 1980 constitution established that a referendum should be held in 1988 in which the citizens should vote for or against a single presidential candidate proposed to the country by the junta of commanders-in-chief. Meanwhile, 1983 saw a wave of mass popular protests, as well as the reactivation of political parties that had been outlawed until then. These protests forced the regime to seek a political aperture, authorize the return of some exiles and grant guarantees for carrying out the 1988 referendum.

Most of the opposition, grouped under the *Concertación de Partidos por la Democracia* (Coalition of Parties for Democracy, *Concertación*), called on Chileans to register on the electoral roll in order to vote 'NO' in the referendum. This effectively occurred in October 1988, when 56 percent voted against the proposal of the armed forces, which was to prolong the mandate of General Pinochet for eight more years. This marked the beginning of a long journey that included reforms to the 1980 constitution and the presidential election of 1989, in which opposition candidate Patricio Aylwin was elected with 55.2 percent of the vote, heading a coalition party structured around the *Demócrata Cristiano* (Christian Democratic) and democratic socialists parties. On 11 March 1990, Patricio Aylwin (1990 – 1994) assumed the presidency of Chile, while Augusto Pinochet reserved the post of commander-in-chief of the army for himself.

The 1980 constitution, despite the rigidity under which it was conceived, has undergone 257 amendments via 57 laws throughout its 40 years in existence. The most important reforms were in 1989 (54 reforms) and 2005, which lifted what were known as 'authoritarian enclaves' under the government of Ricardo Lagos.

Currently, under a new reform to the constitution, a process has been initiated that is aimed at preparing a new constitutional text through a democratically elected Constitutional Convention, which must be ratified in a plebiscite in September 2022.

2 Transitional Justice

2.1 Political and Institutional Changes

The set of efforts undertaken by Chilean society over the past 30 years in the areas of truth, justice, reparation and memory form a foundation for the construction of broad cultural, political and social consensus directed at preventing the reiteration of experiences like those lived between 1973 and 1990. This takes place in the context of the reconstruction of a democracy in which – the still pending discussions of reform notwithstanding – the rule of law applies and there is equality under the law, respect for public freedoms, independence of the branches of government, and alternation of power through free and competitive elections.

In addition, two efforts are fundamental to strengthening these guarantees of *Nunca Más:* the creation of institutional structures for promoting and respecting human rights and the education of new generations about memory and human rights. There are serious deficiencies in regard to the latter.

In regard to the former, on 10 December 2009 Ley No. 20.405 was published, which created the National Institute of Human Rights, an autonomous public agency charged with promoting and protecting the human rights of all individuals living in Chile. The agency has been operational since July 2010. Its mission is described as protecting and promoting full respect for human rights in Chile. As an institution of the republic, it is responsible for observing, reporting and intervening in defence of human rights that are threatened or violated and for promoting the construction of a culture that recognizes said rights and promotes them in all areas of national life.[14]

Another key initiative was the creation of the Under-Secretary of Human Rights in the Justice and Human Rights Ministry. This was created to engage public institutions and organisms around the creation of policies and plans with a focus on human rights with social impact; and for cases on human rights violations, to establish the truth and guarantee that they will not recur. Its most important functions include preparation and proposal of the National Human Rights Plan and its presentation to the Interministerial Human Rights Committee. Likewise, it coordinates its implementation, monitoring and assessment with other ministries, acquiring the information it needs and providing technical assistance to the Foreign Affairs Ministry in court proceedings and with international human rights entities, as well as preparing and monitoring periodic reports.

In 1992, another institutional field, the Aylwin government implemented popular elections for municipal authorities (mayors and councillors) and members of regional councils. In 2005, under the presidency of Ricardo Lagos (2000 – 2006), constitutional reforms were enacted through Ley No. 20.050 to suppress some of the 'author-

14 See INDH mission, accessed 03 November 2022, https://www.indh.cl/mision/.

itarian enclaves' inherited from the time of the dictatorship, such as the revocation of designated senators for life, a reduction in the power of the National Security Council with the president of Chile, and a reform of the system for appointing the members of the Constitutional Court. For some, these reforms meant the end of the 'protected democracy' where military and conservative sectors exercised a right to veto and altered the electorally constituted majority. However, other reforms remained pending, such as the reform of the binomial electoral system, which would only see the light of day in 2017.

Along the line of constitutional reforms, on 15 November 2019, under a scenario of major social protests, National Congress agreed to a constitutional reform to hold a referendum in which citizens could vote as to whether they did or did not support the drafting of a new constitution and whether this should be prepared by a mixed constitutional convention (half parliamentary leaders and half people elected ad hoc) or a body entirely elected with parity between men and women. 78.27 percent of voters opted for a completely elected constitutional convention with gender parity to draft a new constitution.

2.2 Prosecution

From the end of the dictatorship through to 1998, judicial investigations generally did not make a great deal of progress and courts tended to apply the 'three legal knots': the Amnesty Law (issued by the dictatorship), extinguishment of criminal action, and res judicata.

The judicialization of human rights cases in Chile began with a very small number of cases during the dictatorship through the decisive action of human rights defence attorneys, organizations that sought to protect and defend victims beginning in September 1973, and judges who dared to investigate the discovery of bodies, as in the Lonquén Case (1978). This judicialization extended to cases that fell outside of the Amnesty Law Decree either through express exclusion from the text of the law (as in the Letelier case) or due to the fact that the date of the crime was after 1978, the year that the Amnesty Law was issued. (This included crimes that occurred in the 1980s, such as the murder of union leader Tucapel Jiménez or the case of three communist professionals whose throats were slit in 1985.) These legal investigations led to the imprisonment in 1994 of Manuel Contreras, the main perpetrator of crimes during the period of the DINA.

However, the issuing of temporary and final stays of proceedings in human rights cases was standard procedure and was legally possible because the courts only applied national positive legislation in their rulings and interpretation of the law, refusing to accept the validity and jurisdiction of international human rights law.

Specifically, pro-dictatorship attorneys and jurists have argued that international human rights regulations are only programmatic and aspirational and reject the idea that these may be binding and mandatory in nature.

In 1998, during Pinochet's arrest in London and the Round Table Dialogue,[15] new conditions began to emerge that have enabled slow but gradual and progress with judicial investigations and assigning responsibility to those who directly took part in human rights violations.

The first case against Pinochet was filed in 1998 by Gladys Marín, then-President of the Communist Party, for the disappearances of five Communist Party leaders. The case argued that crimes of genocide or multiple aggravated homicides, kidnappings, illicit association or illegal burial had been committed. By the end of the year, 17 cases had been filed and handled by jurisdictional judge Juan Guzmán of the Santiago Court of Appeal. (A total of 298 complaints against Pinochet were admitted, all of them added to the case referred to herein.)

In September 1998, a new case law stage also began when the final stay that had been issued based on the Amnesty Law was lifted in the Poblete Córdoba case. The court, interpreting internal regulations, found that, as of the date of the crime, the Chilean government was in a 'state or time of war' and that the Geneva Convention applied. The convention establishes the duty to ensure the safety of individuals, particularly detainees. The court added that international agreements must be carried out in good faith and that, based on their nature and purpose, they have preeminent application under Article 5 of the constitution. The Supreme Court ruled that, in order to issue a final stay under the Amnesty Law, the investigation must be exhaustive, that is, the circumstances of the disappearance of the victim and the identities of those who took part in the act must be established.

As aforementioned, in April 2001, following the end of the Round Table Dialogue, the government asked the Supreme Court to appoint special judges to investigate cases of human rights violations that remained open. The court accepted the request and appointed 60 judges to handle the processing of approximately 110 cases exclusively or preferentially.[16] However, in 2007 – the year in which convictions were issued in 18 cases involving 66 victims – the Supreme Court began to apply the gradual extinguishment regulated by the Criminal Code.

As is evident, the application of justice has depended to a great extent on the criteria of the Courts of Appeal and Supreme Court, which have varied over time. This evolution also took place in the context of a society that was still strongly divided by the interpretations of the recent past and the enormous presence of the media, institutions and factions of representatives of the dictatorial power.

The Ministry of the Interior's human rights programme has played a key role in this process. The programme originally only handled cases of the detained-disappeared, but since the passage of Ley No. 20.405 it has also handled cases of persons

15 Round Table Dialogue will be explained later, in section 2.10.

16 Investigations into cases occurring during the dictatorship were made through the old criminal justice system, where there was no prosecutor's office and judges were the ones responsible for investigating and sentencing. This is an extremely slow system that is generally not public like the criminal justice system now in use.

executed for political reasons. Progress has been more challenging in regard to torture, and there are currently only a few open legal cases.

As of 2019, according to the Transitional Justice Observatory of the University Diego Portales, there are 1,469 human rights cases in process or under investigation against over 900 former agents of repression. By late 2019, we can consider the following summary table (Tab. 1):

Tab. 1: Convictions and convicted between 2010 and 2019 in final judgments of the Supreme Court cases of human rights violations between 1973 and 1990. Source: Transitional Justice Observatory, 2019. Universidad Diego Portales.

Number of processes completed in the Supreme Court	295
Total convictions	916
Total custodial sentences	642
Total non-custodial sentences	274
Total acquittals	272
Number of security agents involved in the processes	891
Number of security agents convicted	579

In keeping with international law, there has been a move away from amnesty or the extinguishment of cases involving crimes of humanity. However, the main weaknesses that remain in the Chilean justice system are its slow pace, low penalties, lack of transparency regarding the granting of intra-prison benefits, continued application of extinguishment to civil cases and gradual extinguishment of criminal cases, relative lack of legal protection for survivors of political imprisonment and torture, and refusal of the executive and legislative branches to fulfil their international responsibilities regarding the annulment of the 1978 Amnesty Law, all of which produce a lot of frustration in the world of victims.

2.3 The Replacement of the Elites

Chile presents a case of reinforced elitism, in other words, a situation where opportunities to reach positions of power are largely determined by family relations, gender, educational capital and association with institutionalized structures for selecting political staff: political parties, study centres and NGOs.

Since the mid-1980s, the technocratic character of state leadership has been strengthened with even more ties to the business world, a characteristic that continued and even grew deeper under democratic governments. The cross-cutting ties between the elite of economic professionals and the administration are especially important. If not a shared ideological matrix, at the very least they have a shared

sophistication and valuation of knowledge and tasks. The decisive influence of this technocracy has been indisputable since the era of the Chicago Boys during the dictatorship and, during democracy, from the *Corporación de Investigaciones Económicas para Latinoamérica* (Economic Research Corporation for Latin America; CIEPLAN) of the former Finance Minister Alejandro Foxley and other centres that group together economists of former Finance Minister Andrés Velasco, such as *Expansiva*.[17] This highly specialized social stratum, which draws upon elevated cultural capital and postgraduate training in North American and European universities and strong political ties to right-wing and *Concertación* political parties, exercises a hegemonic influence through the design and assessment of public policies, in the exercise of important government posts, in the lobby industry, in universities, in international organisms and in debate on public affairs via extra-parliamentary committees. Some authors have coined the term *Technopol*[18] to define them, identifying a reduced number of professionals and political leaders who constitute this group, most belonging to Christian and socialist democratic parties and constituting what was known as the 'transversal party' of the *Concertación*.

Professional politicians are normally recruited from university student movements, especially from *Universidad de Chile* and *Universidad Católica*, as well as professional spheres, especially those of doctors, lawyers and economists.

With the arrival of democracy, a large number of people from human rights movements, NGOs and political parties in opposition to the dictatorship entered the political system (government and congress). In parallel, due to an electoral system that favored the minority, people who actively participated in the military regime also consolidated positions. Throughout two decades, a highly stable elite leadership remained in place at both government and parliamentary levels. Only after Michelle Bachelet took office (2006 – 2010) was there an attempt to renew the composition of the elite in the government through measures such as gender parity and the search for new young elements to cover government posts, a process that was only partially successful.

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17 'The group known as the Chicago Boys were disciples of Milton Friedman, mostly educated at the University of Chicago, who controlled economic policy during most of the military dictatorship. CIEPLAN, or *Corporación de Investigaciones Económicas para Latinoamérica* (Economic Research Corporation for Latin America), is a highly influential political think tank. Created in the 1970s, it included *Demócrata Cristiana* economists expelled from *Universidad Católica* and had a significant influence on the *Concertación* governments. *Expansiva* was a think tank created in the 1990s as a network of professionals with the goal of influencing public policy with a liberal focus. It had a significant presence in the first cabinets of the government of Michelle Bachelet (2006 – 2010)' (De la Maza, *De la elite civil a la elite política*).

18 See Alfredo Joignant, *Las élites gubernamentales como factor explicativo de un modelo político y económico de desarrollo: el caso de Chile* (1990 – 2009) (Santiago, Chile: Carolina Foundation 2011) or Alfredo Joignant and Pedro Güell eds., *Notables, tecnócratas y mandarines: Elementos de sociología de las elites en Chile 1990 – 2010* (Santiago, Chile: Ediciones Universidad Diego Portales, 2011).

According to a poll of the political elite held in 2011, 93.5 percent of those polled were political party activists and 85.8 percent belonged to student organizations or professional colleges, while only 4.9 percent were from union organizations.[19]

Over time there has been a generational replacement of first-, second- and third-rank political-technical cadres (ministers, undersecretaries and heads of services), always with the technocratic characteristics described above: young people with post-graduate studies in government, public policy and economics. Normally these cadres are recruited by the senior public management system (or civil service), an autonomous service that evaluates CVs and proposes shortlists to the political entity.

It is important to note that the main political players during the transition were all people who played important roles in the *Unidad Popular* period and during the dictatorship. For example, Patricio Aylwin was president of the *Demócrata Cristiana* party in 1973, Gabriel Valdés (first president of the Senate in 1990) was Foreign Affairs Minister under the government of Eduardo Frei Montalva, José Antonio Viera Gallo (first president of the House of Representatives in 1990) was Under-Secretary for Justice in the government of Salvador Allende. On the right, the most important leaders, Sergio Onofre Jarpa, Andrés Allamand and Jaime Guzmán, were all important players in the fight against the *Unidad Popular* government and during the administration of the military regime. The leadership and predominance of this generation remained intact during the years of the *Concertación* government (1990 – 2010) and was only partially 'biologically' reproduced. Only after 2011 did the country begin to see the emergence of a new political generation tied to student movements, who developed new political parties and movements and joined parliament, making their own voices heard. However, this process made no essential modifications to the social characteristics of this possible new group of leaders, except in terms of creating a greater female presence.

2.4 Reparations

The fourth part of the Report of the Truth and Reconciliation Commission included a series of recommendations related to symbolic and material reparations for the victims and relatives of those who had suffered human rights violations and political violence. The following were among the proposals it made:

- Public reparation of the dignity of the victims.
- Recommendations of a legal and administrative nature to resolve the situation of missing persons.
- Recommendations of a social security nature: social security, reparation pension.

19 Gonzalo De la Maza, *De la elite civil a la elite política. Reproducción del poder en contextos de democratización* (Santiago, 2011).

- Health recommendations: free access to special health care.
- Education recommendations: support for and access to higher education for victims and their children.
- Recommendations regarding facilitating access to housing for victims and their families.
- General welfare recommendations: debt forgiveness, exemption from mandatory military service for victims' children.

These recommendations were implemented through the enactment of three main laws:

Ley No. 19.123 in 1992, which created the National Reparation and Reconciliation Corporation (CNRR), whose remit was to continue the investigations of the National Truth and Reconciliation Commission and to implement the reparation measures for the victims contained in Law No. 19.123 and the proposals made by the Truth Commission. Thanks to this law, the victims identified in the Rettig Report receive several different types of material and moral reparations. These include, in 1992, a monthly stipend of 140,000 pesos (368 US dollars) plus compensation for children up to the age of 25 (except in the case of disabled individuals, who receive a pension for life) and a 'one-time bonus of 1,680,000 pesos (4,418 US dollars)[20] for the children of non-surviving victims who did not receive a reparation pension (because they were of legal age) and for those who stopped receiving it (because they reached the legal age)'.[21] The government also issued charity pensions to those who maintained emotional connections to or economic dependence on individuals who had been detained-disappeared and whose situation did not fall into the previous categories.

To address the physical and psychological aftermath of human rights violations, the *Programa de Reparación y Atención Integral de Salud* (Comprehensive Health Care and Reparation Programme, PRAIS[22]) was created to provide free and preferential treatment to individuals who receive Rettig and Valech[23] pensions and their families, as well as returned exiles, dismissed individuals and their direct family members from all of Chile's public health services. Scholarships have been granted to the children of victims up to the age of 35. They include payment of enrollment and tuition for higher education and a monthly subsidy for secondary and university students at the undergraduate level and exemption from mandatory military service for the children, grandchildren and great-nephews and nieces of victims.

20 In 1992, 1 US dollars = 380.22 pesos. Accessed 11 April 2022, https://www.sii.cl/pagina/valores/dolar/dolar1992.htm.

21 Maria Luisa Ortiz et al., 'Rehabilitation of victims,' in *The Chilean Experience*, in *Memory of Nations: Democratic Transition Guide* (Prague: CEVRO, 2019), 32.

22 As of February 2011, PRAIS had provided services to 606,347 accredited members throughout Chile with an annual budget of approximately 3.5 million US dollars (Ministry of Health data).

23 Section 2.1 explains what the Rettig and Valech Commissions mean in detail.

Ley No. 19.234, of 1993, by means of which pension benefits were granted to people dismissed from their jobs for political reasons during the dictatorial period. Individuals who were dismissed for political reasons have been served through a special programme that has been in place since 1993. It is overseen by the Ministry of the Interior and regulated by Leyes Nos. 19.234 (1993), 19.582 (1998) and 19.881 (2003). It has established benefits for former public officials who were fired for political reasons. Its coverage was later extended to employees and workers from private firms in which the government intervened, members of the armed forces, and members of the judicial and legislative branches. Beneficiaries receive a 'time stipend' that complements their benefit contributions for up to 54 months, a pension to which they are not required to contribute, compensation for dismissal from their functions, and a pension for those who were forced to leave their posts. The programme has received nearly 250,000 applications, and 158,778 cases have been certified as qualifying for these benefits.

The time stipend: Ley No. 19.234 stated that people who had been dismissed from their job were entitled to a certain number of months of benefit contributions for each year of benefit contributions they had registered at the time of their being laid off, up to a maximum of 36 months. Ley No. 19.582 modified the maximum number of months to 54 in all cases, depending on the date of dismissal. The details are as follows:

- Those dismissed between 11.09.1973 and 31.12.1973 are entitled to six months of contributions for each year of contributions registered at the time of their being laid off.
- Those dismissed between 01.01.1974 and 31.12.1976, are entitled to four months for each year of contributions.
- For those dismissed between 01.01.1977 and 10.03.1990, the entitlement is three months per year.

The monthly stipend is a guaranteed minimum income, which is added to an indemnity for termination of duties equivalent to one year of pension, i.e. 2,160,000 pesos (2,803 US dollars). The monthly amount was 180,000 pesos in 2019 (233 US dollars).[24]

Later, in 2004, **Ley No. 19.980** modified **Ley No. 19.123**, establishing new benefits for people included in the Report of the National Commission on Political Prison and Torture. The victims recognized in the Valech Report have also received reparations that include a monthly pension and a single payment of damages for children born in prison or detained with their parents or those who do not receive a pension. The government has granted other reparations in the area of healthcare, exemption from military service and scholarships for university study to victims, which can be transferred to a child and/or grandchild. A decision was made to remove annotations

24 In 2019, 1 US dollars = 770.39 pesos. Accessed 11 April 2022, https://www.sii.cl/valores_y_fechas/dolar/dolar2019.htm.

from the criminal records of political prisoners regarding convictions issued by military or regular courts for acts that took place between 11 September 1973 and 10 March 1990. This Ley No. 19.980 of 2004 includes the right to receive a monthly pension of approximately 190,000 pesos (328 US dollars). Minors born in prison receive a bonus of 10,000,000 pesos (17,355 US dollars)[25] in addition to medical and educational benefits that include free access to all levels of education[26].

There are also other laws designed to increase the benefits, modify terms or grant supplementary extraordinary bonuses (Leyes Nos. 19.582 (1988), 19.881 (2003), 19.992 (2004), 20.134 (2006), 20.874 (2015)).

Symbolic and collective reparation involves the creation of memorials and memorial sites for the victims of human rights violations and the creation of the Museum of Memory and Human Rights Foundation by the State of Chile.[27] Following the recommendations of the Rettig Report, President Michelle Bachelet set up a foundation comprising a wide range of people from academia and the area of human rights to direct the museum, which was inaugurated in January 2010 and is publicly funded.

A set of reparation measures not directly related to the Truth Commission Reports has been introduced. These include the following:

The Programme to Support Political Prisoners (Ley No. 18.050, 1990). Approximately 350 people were in prison for political reasons in March 1990. A total of 119 received a presidential pardon and 26 had sentences commuted. Once they were free, the programme granted economic support and labour reinsertion to beneficiaries.

The National Return Office (Ley No. 18.994). This office, which was open from 1990 to 1994, was created for individuals who were exiled for political reasons. It supported labour and social reinsertion for individuals who returned to the country, recognized degrees or professional accreditations earned abroad, provided support for the transport of personal goods, and granted access to the PRAIS programme, legal aid and elementary and secondary school for individuals who had not finished their studies. The office served 52,557 people.

Restitution of Goods (Ley No. 19.568). Between 1998 and 2003, individuals and legal entities (political parties, unions, media outlets and others) received compensation or restitution for goods that had been confiscated by the government between 1973 and 1990. A total of 23 million US dollars in restitutions were made.

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25 In 2004, 1 US dollar = 576.17 pesos. Accessed 11 April 2022, https://www.sii.cl/pagina/valores/dolar/dolar2004.htm.

26 As a reference, it should be taken into account that in Chile the legal minimum wage in 2020 is 320,000 pesos (421 US dollars) and the basic solidarity pension is 120,000 pesos (157 US dollars). In 2020, 1 US dollar = 760 pesos.

27 See section 2.8.

Along with the above, it should be considered that, according to an official letter from the State Defence Council to the Chamber of Deputies of 2018,[28] the amount that the Chilean government has had to provide for reparations ordered by the courts in civil lawsuits against the state was 133 million US dollars between 1997 and 2017. In that period, the justice courts analysed 939 civil cases for human rights violations, with 538 being concluded by judgment or court settlement.

2.5 Reconciliation

The concept of reconciliation, of unmistakable Christian inspiration, was largely used by the first transitional government of Patricio Aylwin (1990 – 1994), responding to a need for moral healing across Chilean society, tired of the violence, the polarization and the dictatorial experience. It attested to the need to accept rules and shared values of coexistence, to respect the rights of every person and to restore a sense of community among Chileans. Under this idea, important strides were made in the valuation of democratic institutions. However, institutional limits persisted and there were open wounds that never healed, stemming from both the experience of human rights violations and the social and economic structure of Chile.

Aylwin's reconciliation policy stated that 'we must address this delicate matter of reconciling the virtue of justice with the virtue of prudence, and once personal responsibility has been assigned where it corresponds, the time will come for forgiveness.'[29] This led to the establishment of an official truth on human rights violations through the *Informe de la Comisión de Verdad y Reconciliación* (Truth and Reconciliation Commission Report, Rettig Report), morally penalizing the military regime, returning exiles home, enforcing social acceptance of policies aimed at making reparations to victims and freeing political prisoners. However, it was unable to 'assign personal responsibility,' much less bring about the time for forgiveness, which implied expressions of regret or compassion by the perpetrators.

In this connection, it was significant that the commander-in-chief of the army, General Emilio Cheyre, made a statement known as *Nunca Más* in 2003, in the context of the Round Table Dialogue, saying: 'Does the scenario of global conflict already described excuse the human rights violations that occurred in Chile? My answer is unequivocal: no. Human rights violations can never, for anyone, have an ethical justification.'[30] Yet the paradoxical truth that, in practice, annulled the political gesture is that Cheyre was the only commander-in-chief of the army condemned in a human rights case as an accessory after the fact.

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28 Accessed 11 April 2022, https://www.latercera.com/nacional/noticia/fisco-ha-pagado-80-mil-millones-victimas-casos-dd-hh/154859.

29 Speech made by President Patricio Aylwin in the National Stadium when he took office in March 1990.

30 Declaration of the commander-inchief of the army. *Nunca Más*, 2004.

The causes of what could be seen as a failure of reconciliation are diverse. According to former president Ricardo Lagos, Chileans have learned to be tolerant of differences, but reconciliation cannot be considered successful while the limits of democracy established in the constitution are not overcome. In his words,

> what I would say is that it is hard to think about reconciliation when someone is, in the opinion of others, taking advantage of an electoral system that was imposed by force (...) If no solution is found to these issues, if we are yet to finalize an institutional order that everyone can agree on, how can we process our differences? Can we internally move on to a more subjective sphere of reconciliation?[31]

Similarly, reconciliation politics also went head-to-head with the demands for justice from victims' groups. Under the idea of reconciliation, some sectors sought to pressure victims into forgiving both the regime as a whole and the perpetrators without waiting for recognition of guilt or responsibility. In the absence of self-criticism and regret on behalf of those who violated human rights and those who upheld these violators politically, the demand for reconciliation turned against the victims and became a sort of moral pressure to stop clamouring for justice; in other words, stop demanding exhaustive investigation into each case and sentence fitting the crimes committed. Lawyer and Communist leader Carmen Hertz suggests that if 'the state has wounded the condition of man, causing irreparable damage to both society and victims, it isn't up to the latter to generate reconciliation with the state.'[32] From this perspective, the reconciliation policy ceased to be welcome in the world of the victims and those who support them.

For human rights defence jurist José Zalaquett, 'national reconciliation (...) will go on for years, in the best of cases.' In fact, there are those who say that it is not possible to fully attain this while the events of the past survive in 'living memory.'[33] It is clearly impossible to assert that the reconciliation policy has been a success: the parties that were in conflict have agreed to live together and respect the rules of democratic coexistence, but they are far from building ties of shared belonging, of civic friendship and solidarity. On the contrary, they continue to build confrontational memories, living on as heroes and villains, victims and executioners.

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31 Ricardo Lagos,'25 años después, notas para una difícil reconciliación,' *in Las voces de la Reconciliación*, ed. Hernán Larraín Fernández and Ricardo Núñez Muñoz (Santiago: IES, 2013), 55–56.
32 Carmen Hertz, Reconstrucción de la Convivencia Nacional, *in Las voces de la Reconciliación*, ed. Hernán Larraín Fernández and Ricardo Núñez Muñoz (Santiago: IES, 2013), 123–124.
33 José Zalaquett, Reconciliación nacional como meta última de la reconstrucción política y moral del país, *in Las voces de la Reconciliación*, ed. Hernán Larraín Fernández and Ricardo Núñez Muñoz (Santiago: IES, 2013), 140.

2.6 Laws Relating to Transitional Justice

The recommendations of the truth commissions included measures that prohibited the recurrence of these events through amendments to national legislation involving the incorporation of international human rights agreements. With this, the hope is to establish legal guarantees in reference to the situations described in the reports and to any other types of human rights violations.

In that context, Chile adopted various international agreements and ratified international human rights protection instruments, which today form part of its legal framework. These include the International Convention for the Protection of All Persons from Enforced Disappearance, the Rome Statute, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the abolishment of the death penalty, and Agreement 169 on Indigenous and Tribal Peoples in Independent Countries of the International Labour Organization (ILO).

One of the most complex and extensive items to address was the implementation of laws related to the situation for political prisoners who remained from the dictatorial period and the adaptation of the criminal statutes to international human rights standards. Issues such as pardon, the death penalty, terrorist behavior and amnesty were addressed in the following legal initiatives approved by the National Congress:

- Ley No. 19.027 (1991) amends Ley No. 18.314, which determines terrorist behavior and its penalties. This introduces important changes to the law that regulated terrorist behavior.
- Ley No. 19.029 (1991) amends the Military Justice Code, the Criminal Code, Ley No. 12.927 and Ley No. 17.798. This introduces changes to the indicated laws to eliminate references to the death penalty.
- Ley No. 19.047 (1991) amends diverse legal texts that best guarantee the rights of people (*Ley Cumplido*[34]). The Law on State Security, the Military Justice Code, the Law on Weapons Control, Criminal Code, Criminal Procedure Code, Aeronautical Code and Organic Court Code were amended and several Decree Laws overturned. This law enabled the processes found in the military courts to be transferred to the corresponding Courts of Appeals and to accelerate the closure of these cases. As a result, sentences were commuted or reduced.
- Ley No. 19.055 (1991) amends the Political Constitution of Chile. This law amended the Political Constitution on matters related to pardon, amnesty and probation.
- Ley No. 19.123 (1992) created the National Corporation for Reparation and Reconciliation, mandated continuation of the investigations of the National Commission for Truth and Reconciliation and in dictates implementation of reparation

34 Francisco Cumplido, Minister of Justice of the Aylwin government.

measures for victims contemplated in the same legal body and proposed by the truth commission.
- Ley No. 19.313 (1994) overturns the provisions of Ley No. 11.625 on antisocial states and security measures and modifies the Criminal Procedure Code. This eliminates regulations that established a criminal qualification against certain people due to their social characteristics.
- Ley No. 19.567 (1998) amends the Criminal Procedure Code and the Criminal Code on matters related to detention and sets forth standards for the protection of citizen rights, adapting these to international standards on justice and human rights.
- Ley No. 19.962 (2004) provides for the elimination of certain criminal records imposed by military courts between 1973 and 1990.
- Ley No. 19.980 (2004) modifies Ley No. 19.123, establishing benefits for persons included as victims in the Report of the National Commission on Political Prison and Torture (increases repair benefits).
- Ley No. 19.992 (2004) establishes reparation pensions and other benefits to qualified Valech Report individuals.
- Ley No. 20.134 (2006) grants an extraordinary bonus for workers dismissed for political reasons from the private sector and autonomous companies.
- Ley No. 20.874 (2015) legislates a Single Reparatory Contribution for qualified Valech Report individuals and surviving spouses: one million pesos (1,538 US dollars).
- Ley No. 21.124 (2019) aimed at substituting custodial sentences affecting the perpetrators of crimes against humanity, granting the benefit of serving sentences outside prisons to people who met two prerequisites: those who had already served two-thirds of their sentence and those who collaborated substantially with the investigation into the crime in question. This was approved by congress by a narrow margin and was enacted in January 2019.

2.7 Access to Files

Chile can be considered a paradigmatic case of files hidden by repressive organisms. A shroud of mystery surrounds the alleged destruction of the DINA and CNI files, whether through their effective destruction or inability to access them. Ley No. 20.285 on transparency and access to public information, enacted in 2008, has failed to break through the secrecy within the armed forces. This is why all studies into human rights violations during the dictatorship have been based on files from human rights defence organisms, on oral testimony, on reports from the truth commissions, investigations undertaken by the courts of justice and, most recently, testimonies gathered by the Museum of Memory and Human Rights.

An exception to this general scenario is the case of the *Archivos del Terror* (Archives of Terror): a random discovery of 700,000 documentary pieces belonging to

the Paraguayan secret service, which contained communications between repressive apparatuses in the region, in the context of Operation Condor, which has furthered different investigations in Chile, Argentina, Uruguay, Brazil and Paraguay.

Another important exception was the delivery of files from the German colony Colonia Dignidad to the National Human Rights Institute (*Instituto Nacional de Derechos Humanos*; INDH), with 45,608 files of individuals in alphabetical order. These files were seized in 2005 as part of an investigation into the disappearance of people in the colony, which reveals the link between Colonia Dignidad and the DINA in the exercise of repression and intelligence tasks.

Reports from the Rettig and Valech commissions contain relevant testimonies on repression. However, access to the archives from the Valech Commission I is subject to a 50-year legal prohibition under the rationale of protecting the privacy of victims who declared under this commitment. These archives are in the hands of the INDH and physically kept in the Museum of Memory and Human Rights. This protection of information goes so far as to prevent the law courts from gaining access to these testimonies.

There have been no public initiatives aimed at allowing access to the archives of the armed forces and intelligence agencies. On the contrary, Ley No. 18.771, issued in 1989 by the outgoing Pinochet government, allowed the elimination and destruction of documents every five years by the defence ministry and the armed forces, exempting them from the obligation to send them to the National Archive as other public bodies do. In 2005, a project was presented to the National Congress to remove this provision and establish the obligation to send the documentation to the National Archive, but the project has not been approved to date.

The Library of Congress has the minutes of the military junta and the laws adopted in the period 1973 – 1990, with the exception of around 150 laws that the military junta classified as secret. Likewise, the National Archive, holds the documentation of all the ministries, except for the defence ministry.

The main archives related to human rights and memory in Chile are:

- *Fundación de Documentación y Archivo* (Documentation and Archive Foundation) at the Vicaría de la Solidaridad. This institution keeps the archives of *the Comité de Cooperación para la Paz en Chile*, *Comité Pro Paz*, and *Vicaría de la Solidaridad*, which are especially relevant because these organisms assumed the legal defence of people persecuted between 1973 and 1990. http://www.vicariadelasolidaridad.cl.
- *Agrupación de Familiares de Detenidos Desaparecidos*, (Group of Families of the Detained-Disappeared; AFDD): With the technical support of the National Archive, the AFDD has created an archive with information on each of the detained-disappeared, as well as the actions developed in their defence. www.facebook.com/agrupacion-de-familiares-de-detenidos-desaparecidos.
- *Agrupación de Familiares de Ejecutados Políticos*, (Group of Families of the Detained-Disappeared; AFEP). This is an archive organized into diverse collections,

containing information on people executed for political reasons and their aggressors. www.afepchile.cl.

- *Comisión Chilena de Derechos Humanos*, (Chilean Human Rights Commission; CCHDH). Created in 1978, the CCHDH has diverse collections of cases of victims of human rights violations and documents produced by the commission, as well as a collection containing personal documents from its founder, Jaime Castillo Velasco. www.cchdh.cl.
- *Corporación de Promoción y Defensa de los Derechos del Pueblo*, (Corporation for the Promotion and Defence of the Rights of the People; CODEPU). Created in 1980 for the defence of human rights, it extended its work into different Chilean cities. Its archive contains files on legal assistance, bulletins, photographs and others. www.codepu.cl.
- *Fundación de Protección a la Infancia Dañada por los Estados de Emergencia*, (Foundation for the Protection of Minors who have Suffered as the Result of States of Emergency; PIDEE). Created in 1979, this foundation advocated the protection of boys and girls whose parents suffered at the hands of repression. It helped some 12,000 children and created a shelter for them. Its documentation centre includes images and documents related to its work. www.pidee.cl.
- *Fundación de Ayuda Social de las Iglesias Cristianas*, (Social Assistance Foundation of Christian Churches; FASIC). This foundation is dedicated to providing psychological, social and legal assistance to political prisoners. Its archives contain all the information related to its work in defence of human rights. www.fasic.cl.
- *Programa de Derechos Humanos Ministerio de Justicia y Derechos Humanos*. The Documentation and Archives Area of the Human Rights Programme, in accordance with the provisions of Ley No. 19.123 (Article 2), is the custodian of the archives of the National Truth and Reconciliation Commission and the National Corporation for Reparation and Reconciliation. Likewise, its mission is the conservation, collection, custody and protection of documents, such as: judicial decisions, official letters, testimonies, maps, photographs, among others. https://pdh.minjusticia.gob.cl/area-documentacion-y-archivo.

Archives from memorial sites

- *Fundación Museo de la Memoria y los Derechos Humanos* (Museum of Memory and Human Rights Foundation). The museum was inaugurated in 2010 and its collection includes archives declared Memory of the World by UNESCO and others compiled by the museum. Its archives include more than 1,500 personal and institutional donors and are divided into a documentary fund known as CEDOC and an audio-visual fund, the CEDAV. https://web.museodelamemoria.cl/sobre-las-colecciones/.

- *Corporación Parque por la Paz Villa Grimaldi* (Villa Grimaldi Park for Peace Corporation). Archive created in 2010, comprised of an oral archive, documentation centre and documentary archive. www.villagrimaldi.cl.
- *Londres 38, Espacio de Memorias*. Since 2007, Londres 38 has built a digital archive with images, texts and videos, which includes the archive of Colonia Dignidad files. www.londres38.cl.

In addition to the above, there are electronic digital documentation repositories. These include:

- *Memoria Viva* (Living Memory). Digital archive of human rights abuses under the military government in Chile (1973–1990). www.memoriaviva.com.
- *Archivo Chile* (Chile Archive). Site of the Miguel Henríquez study centre (founder and leader of the MIR). www.archivochile.com.
- *Arqueología de la Ausencia* (Archaeology of Absence). Site that seeks to preserve the stories of the detained-disappeared. www.arqueologiadelaasusencia.cl.

The archives of the foundations related to former presidents Aylwin and Lagos are noteworthy among the archives on the political process of the transition. They include documentary and visual archives from the dictatorial and transitional period.

- *Fundación Aylwin*: www.fundacionaylwin.cl.
- *Fundación Democracia y Desarrollo:* www.fdd.cl.

2.8 Memorial Sites

There are fundamental milestones in the implementation of a public policy of memory, i.e. a policy that seeks to remember the acts in order to extract lessons from them and give meaning to the experience. The most important such milestones in Chile have been the two Truth Commissions and public support for the installation of memorials that commemorate the events, which also could be considered policies of symbolic or collective reparations. A major part of these measures came from recommendations made in the Rettig Report, such as the creation of memorials, the recognition of the main torture centres as national monuments, support for cultural projects aimed at reclaiming the memory of the victims, and others that have emerged as a result of the pressure and actions of victims' groups that have not rested in their demands for truth and justice.

The first of these measures was the creation of the General Cemetery Memorial in Santiago, inaugurated in February 1994. In March 2003, in commemoration of the 12th anniversary of the Rettig Report, an agreement was signed between the government and Victims' Relatives Groups in order to build symbolic reparation projects in municipalities throughout the country including Tocopilla, La Serena, Los Ángeles, Coronel, Talca, Valdivia, Calama, Osorno, Peñalolén, Linares, Pisagua, Punta Arenas,

Chaitén, Parral, Paine and Chihuío. This policy seeks to recover the 'places of memory,' name them, identify them and give them a context.

The new relationship between human rights and historical monuments, understood as representative spaces of Chile's cultural heritage, began in 1995 when the National Monuments Council took responsibility for protecting the Hornos de Lonquén (mine ovens where human remains were found). This is the initial milestone in this history of the relationship between cultural heritage and memorialization policies. Since that time, other political repression centres have been declared historical monuments. José Domingo Cañas 1367, Nido 20, Londres 40 (formerly 38) 'Cuartel Yucatán', Villa Grimaldi 'Cuartel Terranova', the National Stadium, Patio 29, various buildings in Pisagua, the Víctor Jara Stadium, the Rio Chico Prison Camp in Isla Dawson, and the administration house of the Tres y Cuatro Alamos Detention Centre have all received protection under the National Monuments Law.

The Museum of Memory and Human Rights (2009) represents the culmination of this effort to engage in memorialization and is the most important public mechanism of symbolic reparation for the victims. Its mission is to 'increase awareness of the systematic human rights violations committed by the Chilean government between 1973 and 1990, and to generate an ethical reflection on memory, solidarity and the importance of human rights to ensure that acts that affect the dignity of human beings are Never Again – *Nunca Más* – repeated.'[35]

Notwithstanding the above, there is no unified opinion among Chileans regarding whether the state should finance memorials or monuments that pay homage to the victims of human rights violations. According to the 2019 Bicentennial Survey conducted by the *Universidad Católica*,[36] 37 percent disagree with this idea, 35 percent agree and 25 percent are indifferent.

There are 215 memorials in Chile, which include museums, memorial sites, sculptures and street and avenue names, distributed throughout the country as follows, broken down by region:

- Arica and Parinacota Region: three
- Tarapacá Region: nine
- Antofagasta Region: thirteen
- Atacama Region: three
- Coquimbo Region: six

35 The Museum of Memory and Human Rights defines its mission by emphasizing the idea that knowledge of the events that occurred during the dictatorship and recognition of the victims will create a collective conscience and a moral rejection of human rights violations. In a statement from its board of directors in 2011, it said that 'the awareness that the museum promotes does not have a political but a moral purpose: to transform respect for human rights into a categorical imperative of our coexistence.' Accessed 11 April 2022, www.museodelamemoria.cl.

36 Bicentennial Survey 2019. The Bicentennial Survey is a project conducted by the Pontificia Universidad Católica since 2006, 'whose purpose is to obtain highly reliable information over time on the state of Chilean society.'

- Valparaíso Region: ten
- Metropolitan Region: ninety-eight
- O'Higgins Region: twelve
- Maule Region: nine
- Biobío Region: twenty
- Araucanía Region: eleven
- Los Ríos Region: ten
- Los Lagos Region: six
- Aysén Region: one
- Magallanes Region: four

2.9 Commemorative Events

Different commemorative events have been held and special dates recognized in Chile's civil society by custom or government initiative. For example, 10 December is Human Rights Day, 30 October is National Day Commemorating People Executed for Political Reasons (Decree 119, 2009), 26 June is International Day in Support of Victims of Torture (instituted by the United Nations in 1997), 30 August is National Detained-Disappeared Day (Decree 211, 2006).

There have been special commemorative and relevant events organized around 11 September.

In September 2011, former president of Chile Salvador Allende was officially buried in the Santiago General Cemetery. Until then, his body had been relatively hidden and anonymous in the Santa Inés cemetery in Valparaíso.

On 11 September 2003, in the context of commemorations of the 30th anniversary of the military coup, then President Ricardo Lagos opened a side door of the La Moneda Palace, where the lifeless body of Salvador Allende had been carried out and which had been bricked up in the reconstruction of the building. At the same time, inside the building, the *Salón Blanco* (white room) was inaugurated, a room dedicated to the memory of Salvador Allende.

On 11 September 2013, on the 40th anniversary of the military coup and in a context known as a 'memory explosion' on the part of civil society, President Sebastián Piñera (2010 – 2014) criticized those who in their sector had been 'passive accomplices' of human rights abuses.

2.10 Transitional Justice Institutions

2.10.1 The National Truth and Reconciliation Commission

A few weeks after taking office on 25 April 1990, President Patricio Aylwin issued Supreme Decree No. 355, which created the National Truth and Reconciliation Commis-

sion, known as the 'Rettig Commission'. The constitutional decree established the need to know the truth about human rights violations that resulted in the deaths of thousands of people. The decree stated that the Commission would: a) establish the most complete picture possible of human rights violations; b) gather evidence to identify the victims and establish their whereabouts; c) recommend fair and just reparation measures; and d) recommend legal and administrative measures to be adopted in order to prevent human rights violations in the future. The Commission was not able to assume the functions of the courts, which meant that its report could not include the identities of government agents who took part in the acts under investigation. However, the Commission was able, based on the information it collected, to report 200 cases to the courts for investigation.

The Commission was composed of nine prestigious individuals who represented many sectors of Chilean society.[37] The forms of human rights violations cited in the report are those considered most serious: disappearances; executions in war councils with a lack of minimal guarantees of fair trial and conducted outside of any due process; undue use of force resulting in death; deaths occurring during curfew; deaths at the hands of government agents without political motivation, such as personal acts of vengeance; deaths resulting from torture; and deaths resulting from terrorist acts.

After almost a year of investigation, the Commission submitted its report in February 1991. It established two categories of victims: a) victims of human rights violations and b) individuals who died in armed confrontations who were victims of political conflict. The Commission received 3,550 cases, of which it found 2,298 cases to qualify under its mandate. In the development of proposals for reparations that would be symbolic and cultural, legal and administrative, and would provide assistance or benefits, it consulted with human rights organizations, the Catholic Church, universities and political parties.

The Commanders-in-Chief of the Army and Navy rejected its conclusions, claiming that they were the result of the Commission's lack of objectivity. The Air Force and Military Police (*Carabineros de Chile*) claimed the need to contextualize the acts. The judicial branch took four months to respond to the report's questioning of its failure to protect individuals, and, when it did respond, it defended its actions without denying the facts. President Aylwin asked for forgiveness in the name of the Chilean State (*Estado*), and the government began a gradual process of acknowledging the crimes that occurred under the dictatorship and reconstructing the collective memory under dispute.

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37 The members of the commission were: Raúl Rettig Guissen, jurist, former member of Parliament for the Radical Party; Jaime Castillo Velasco, a Christian Democrat and jurist; José Luis Cea Egaña, an independent jurist; Mónica Jiménez de la Jara, a political scientist close to the Christian Democrats; Ricardo Martín Díaz, former Supreme Court justice; Laura Novoa Vásquez, jurist; Gonzalo Vial Correa, conservative historian; José Zalaquett Daher, jurist and member of the Party for Democracy; and Jorge Correa Sutil, a Christian Democrat attorney (Secretary).

2.10.2 *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Board, CNRR)

The *Corporación Nacional de Reparación y Reconciliación* (CNRR) was created through Ley No. 19.123 on 8 February 1992 upon conclusion of the work of the Commission and the submission of the Rettig Report. The purpose of this body was to provide reparations to the victims, continue and complete the investigations of the Rettig Report, and provide legal and social assistance to the families of victims identified in the report. This process ended in 1994, identifying a total of 3,195 officially recognized fatal victims.

In 1996, at the end of its legal term, CNRR submitted its report on the 'Identification of Victims of Human Rights Violations and Political Violence' to President Eduardo Frei Ruiz Tagle (1994 – 2000).

The ongoing discussion regarding the location of detained-disappeared and people executed for political reasons led to the 1997 establishment of the Programme of Continuation of Ley No. 19.123 through Supreme Decree No. 1005. The Programme incorporates the family members of people executed for political reasons and actively participates in hundreds of legal cases held in courts throughout the country, either directly as a complainant or as an intervening party.

Meanwhile, in 1994, the Supreme Court convicted and ordered the arrest of Manuel Contreras for his responsibility in the Letelier case. Contreras, defying the judicial system and the government, refused to surrender. President Frei ordered the arrest, thus constituting the first direct confrontation with the perpetrators of human rights violations.

2.10.3 Round Table Dialogue on Human Rights

During the Eduardo Frei Ruiz Tagle (1994 – 2000) administration, groups representing victims and family members actively sought to expose the reality of torture and recover spaces that had been used as detention or extermination camps, such as Villa Grimaldi Park for Peace. The struggle of the victims thus extended beyond the establishment of truth about fatal cases to incorporate things that, as we will see, had until that time been denied: torture, memory, and the demand for justice.

On 16 October 1998 there was an unexpected development that would end the impunity that Augusto Pinochet had enjoyed up until that point. He was detained in London as a result of an order issued by a British judge in response to a request from Spanish judge Baltazar Garzón. Irrespective of the outcome of this episode, which is well known (he was released due to his poor health), it had a significant impact in Chile, reopening the debate over human rights violations and the responsibilities of then-appointed Senator for Life, Augusto Pinochet. This led the government to propose the creation of a Round Table Dialogue on 21 August 1999 and the

courts to make important changes in the handling of cases of human rights violations, as we will explain below.

The Round Table Dialogue included 24 people from the government, religious organizations, human rights organizations (though the groups of relatives of the disappeared refused to participate), the military and academia.[38] Its mission was to receive information about the fate of the detained-disappeared. The results of this exercise constituted progress towards the establishment of a vision of the historical context in which human rights violations took place and the expression of a commitment to ensure that such events would not occur again in the country. For the first time, the Chilean armed forces recognized institutional responsibility for human rights violations, abandoning the prior discourse of isolated occurrences or excesses and validating the contents of the Rettig Report. As a result of the agreements reached during the Round Table Dialogue, the military and police provided information on 180 detained-disappeared and 20 unidentified individuals. This information signaled acknowledgement of the detention and death of individuals and admission that their bodies had been thrown into the country's sea, rivers and lakes.

President Ricardo Lagos (2000 – 2006) stated that the information would allow the justice system to ascertain the fate of the disappeared. Based on that information, and at the request of the Executive Branch, the Supreme Court proceeded to appoint special judges exclusively to handle these cases and ordered some cases reopened. However, information soon emerged that called into question the veracity of the information provided by the armed forces.

2.10.4 National Commission on Political Imprisonment and Torture (Phases 1 and 2)

As part of the commemorations of the 30th anniversary of the military coup, President Ricardo Lagos established the 'There is no tomorrow without yesterday' policy. The measure mainly took up the demands of the victims' groups, government and opposition political parties, and moral thought leaders such as the Evangelical

38 The members of the Dialogue who signed the final agreement: Mario Fernández Baeza, Minister of Defense; Ángel Flisfisch, Under-Secretary of Education; Luciano Fouillioux Fernández, Under-Secretary of the Military Police; Sergio Valech Aldunate, Catholic Bishop; Neftalí Aravena Bravo, Methodist Bishop; Jorge Carvajal Muñoz, Grand Master of the Masons; León Cohen Delpiano, representative of B'nai B'rith; Rear Admiral Felipe Howard Brown, representative of the Navy; General Juan Ignacio Concha, representative of Aviation; General Reinaldo José Ríos Cataldo, representative of the Military Police; General Juan Carlos Salgado Brocal, representative of the Army; Pamela Pereira Fernández, human rights attorney; Jaime Castillo Velasco, jurist; Roberto Garretón Merino, human rights attorney; Héctor Salazar Ardiles, human rights attorney; Guillermo Blanco Martínez, journalist; Claudio Teitelboim (now Bunster) Wietzmann, scientist; Sol Serrano Pérez, historian; Elizabeth Lira Kornfeld, psychologist; José Zalaquett Daher, jurist; Jorge Manzi Astudillo, psychologist, Dialogue coordinator; and Gonzalo Sánchez García-Huidobro, attorney and Dialogue coordinator.

and Catholic churches, the Jewish community and the Masons, to investigate the fate of those who survived repression and other matters related to human rights. The policy's proposal contained four points: to fully disclose the truth, deliver justice, strengthen reparation measures and ensure full respect for human rights. The policy also established that the courts were free to interpret the amnesty law issued by the dictatorship, which was still in place. But the most important measure was the creation of the National Commission on Political Imprisonment and Torture, or Valech Commission, in 2003 through Supreme Decree No. 1040. The Commission was given six months to establish who had been imprisoned and tortured for political reasons by government agents between 11 September 1973 and 10 March 1990.

The Commission, which was presided over by former Vicar of Solidarity Bishop Sergio Valech, was defined as an advisory body to the President and was to be composed of eight individuals with human rights experience named by him.[39] It adopted a definition of torture which included elements from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture. The Commission collected the testimonies of nearly 35.000 people and produced a report that furthers the analysis of the institutional context in which systematic and generalized human rights violations took place. It concluded that there had been organized political repression on the part of the government, directed by its highest-ranking officials. It certified that 28,459 people suffered political imprisonment and torture in 1,137 facilities owned or operated by the police or security services of the dictatorship.

In May 2006, after the courts established that a significant number of remains of detained-disappeared individuals had been incorrectly identified, the *Comisión Asesora Presidencial para la Formulación y Ejecución de Políticas de Derechos Humanos* (Presidential Advisory Commission for the Formulation and Execution of Human Rights Policies; CPDDHH) was created through Ministry of the Interior Supreme Decree No. 533. The CPDDHH coordinated the efforts of a group of government agencies to create a forensic identification system that would provide family members and society with certainty regarding the identification of victims' remains. The results included the creation of an international committee of experts in the Legal Medical Service for the identification of victims' remains and a Genetic Database for victims and their relatives to facilitate the identification of remains. The CPDDHH also promoted the creation and installation of the Museum of Memory and Human Rights,

39 The members of the first Valech Commission were: Bishop Sergio Valech, who presided over the commission; María Luisa Sepúlveda Edwards, Executive Vice-President; Miguel Amunátegui, attorney; Luciano Fouilloux, attorney; José Antonio Gómez, attorney and former Minister of Justice; Elizabeth Lira, psychologist; Lucas Sierra, attorney; Álvaro Varela, attorney from the Pro Peace Committee; and Cristián Correa, attorney and Secretary of the Commission. The second Commission was presided over by María Luisa Sepúlveda following the death of Monsignor Valech and Mario Papi, attorney; Edgardo Riveros, attorney; and Carlos García Lazcano, attorney and Commission Secretary, were added.

pushed forward the bill to create the National Human Rights Institute, granted new reparation benefits to victims identified by the Valech Commission, and created the new Commission for Detained-Disappeared, Individuals Executed for Political Reasons, and Political Prisoners and Victims of Torture (Valech Commission 2).

The first administration of President Michelle Bachelet (2006 – 2010) made the decision to reopen the Valech Commission in order to hear new cases and evaluate and/or reevaluate testimony. The Commission submitted a report to President Sebastián Piñera (2010 – 2014) in 2011 with 30 additional cases of persons executed for political reasons and another 9,795 accredited cases of political imprisonment and torture.

According to the reports of the various commissions and investigative stages, the data on victims fully identified as having suffered human rights violations or political violence during the dictatorship is as follows (Tab. 2):

Tab. 2: Number of victims having suffered human rights violations or political violence during the dictatorship in Chile.

Human Rights Commissions	Persons detained-disappeared and executed	Victims of political violence	Victims of Political imprisonment and torture
Rettig Commission	2,130	168	
National Reparation Board	644	255	
Valech Commission I			28,459
Valech Commission II	30		9,795
Total	2,804	423	38,254

Source: Museum of Memory and Human Rights.

2.10.5 Other Relevant Institutions of Transitional Justice

– Supreme Court: Chile today is one of the countries with the most experience in processing crimes against humanity in local courts, as can be seen in the close to 350 sentences passed down between 2002 and 2019. In this sense, the Supreme Court and the Court of Appeals have played a decisive role by denying the applicability of the prescription of human rights crimes and the law of (self)-amnesty decreed in 1978 and assuming international legal standards on human rights issues, giving particular treatment to the cases of detained-disappeared persons and people executed for political reasons.

- Special Judges: Designated by the Supreme Court, currently (as of 2020) there are 13 visiting ministers designated to substantiate close to 1,500 cases throughout the country related to violations of the human right to life and/or physical integrity. An essential support to this task is undertaken by the recently created *Coordinación Nacional para causas de derechos humanos* (National Coordination of Human Rights cases), which reports to the Research Department of the Supreme Court.
- Inter-American Human Rights System: Both the Commission and the Inter-American Human Rights Court have acted to annul sentences of war councils and favour civil demands against the state of Chile. The relationship between the government and the court is not easy, and sometimes the government has claimed an invasion of attributes and spheres of competence that are exclusive to the Chilean courts. The current Chilean government, (Sebastián Piñera (2018–2022) together with the governments of Brazil, Argentina, Colombia and Paraguay, sent a letter drawing up these complaints, which was interpreted as an attempt to weaken the inter-American human rights system.
- The Constitutional Court has also played a significant role in human rights cases, having been used as a means of impunity, whereby the lawyers of people processed for crimes have presented applications of inapplicability due to unconstitutionality, arguing that the old justice system (there was a major reform to the criminal justice system in the 1990s) did not grant the necessary guarantees for due process. Some of these actions have been rejected by the court, and others have been declared admissible. The most serious issue has been the paralysis of the processes carried out by the courts of justice, which can sometimes be prolonged indefinitely, something the president of the Constitutional Court herself has denounced.
- Human Rights Programme: After the National Corporation for Reparation and Reconciliation (CNRR) reached the end of its remit and Ley No. 19.123 was passed, the Human Rights Programme of the Ministry of the Interior was created through Decree No. 1005 of 06.09.1997. This subsequently, in 2016, moved under the auspices of the Ministry of Justice and Human Rights.

The original functions of the programme were to assist victims of human rights violations in judicial and extrajudicial actions; provide social assistance to relatives and victims recognized in the Rettig Report and the CNRR so they could access reparation measures; preserve and guard the files generated by both instances; and promote cultural and educational actions to stimulate a culture of human rights.

Currently, the programme reports to the Human Rights Under-Secretary of the Ministry of Justice and Human Rights and is directed by an executive secretary. It is organized into a legal department, which follows the judicial processes for disappearances and executions; an archive and documentation department; a social department which deals with reparation policies; and a department that coordinates

memorial projects and institutional management, working on symbolic repair and the construction of memorial spaces.[40]

2.11 Victims' Associations

After the mass detentions began, following the military coup, the families of victims organized under the auspices of organizations associated with the Church (*Comité Pro-Paz, Vicaría de la Solidaridad* and *Fundación de Ayuda Social de las Iglesias Cristianas*; FASIC) or lay organizations (*Comisión de Defensa de los Derechos del Pueblo*, CODEPU, *Comisión Chilena de Derechos Humanos*) dedicated to the defence of human rights. The *Agrupación de Familiares de Detenidos Desaparecidos* (Group of Families of the Detained-Disappeared; AFDD) was particularly important. This organization began in 1977 under the leadership of Sola Sierra, wife of the detained-disappeared Waldo Pizarro. This group filed a series of complaints in the courts through legal appeals and undertook bold non-violent action on the streets to draw attention to the fate of their family members, whose photographs group members wore on their bodies. Another organization is the *Agrupación de Familiares de Ejecutados Políticos* (Group of Families of People Executed for Political Reasons; AFEP). Under the leadership of Alicia Lira, this group filed claims of extrajudicial executions using methods similar to those used by the AFDD. Since the transition to democracy, this group has been a fundamental player in filing claims on cases of people executed for political reasons, which are in the hands of the courts. Both the AFDD and the AFEP exist in Santiago and elsewhere in Chile. Both groups remain active and government initiatives on justice or reparation related to human rights are obliged to engage with them.

Other organizations have also arisen, such as 'former political prisoners', 'former female political prisoners', 'children of political prisoners', beneficiary groups of different reparation programmes (*Exonerados*, PRAIS), 'former female political prisoner victims of sexual violence', 'group of victims of La Moneda', among many other local and regional groups.

There are also diverse victims' organizations related to memorial sites in Santiago and regionally, which work on the conservation and management of the site concerned and in some cases develop initiatives with the courts and/or stimulate public participation in political or social debates. The most active of these are: the *Londres 38 Espacio de Memoria* memorial house, the Villa Grimaldi Park for Peace, the National Stadium memorial group, the *Memorial de Paine*, and José Domingo Cañas' house. The following are among the notable initiatives outside Santiago: the *Asociación por la Memoria y los DDHH Colonia Dignidad* (Dignity Colony Association for

40 Accessed 11 April 2022, https://www.minjusticia.gob.cl/area-juridica.

Memory and Human Rights), the *Palacio de la Risa* in Punta Arenas, as well as victims' organizations in La Serena, Concepción, Antofagasta and others.

2.12 Measures in the Educational System

As in other Latin American countries that have introduced human rights education in school, this has been done in Chile since the traumatic recent history. The recentness of these events may explain why this effort has sparked major controversy that has involved communities of historians and educators.[41] Despite the controversies, based on reliable opinion polls, 69 percent of Chileans strongly agree that the events that took place between 1973 and 1990 should be taught in schools.[42]

Human rights education in Chile has been incorporated into the school curriculum in 6th grade and 10th grade and includes chapters on the 1973 military coup and the democratic transition process. The current programme of study includes a review of recent history designed to boost students' appreciation of democracy, political pluralism and human rights.[43] In fact, in history and social sciences classes during the second year of high school, which focus on the history of Chile, the text specifies that its purpose is '(...) for students to develop a global vision on the development of national history and to understand that the current reality has its background in the historical processes that have shaped them.'[44] This study unit addresses 'The military regime and transition to democracy', which covers the political crisis in 1973 which led to the military coup and the ensuing transition to democracy starting at the end of the 1980s.

Even so, despite the option to incorporate human rights based on the experiences of individuals in the 1970s and 1980s, the testimony, and in a broader sense, the memory of people whose rights were violated have not been integrated to augment students' knowledge and comprehension of the recent past. The perspective has been historicist, assuming three theses as an explanatory framework of the military coup: the progressive crisis in Chile, the determinism and inevitability of violence and the Cold War.[45]

The exception has been the Museum of Memory and Human Rights, which recounts the events based on testimony and memory and which is visited on an ongoing basis by thousands of students from public and private schools, providing an al-

41 As a reference, see Abraham Magendzo and María Isabel Toledo, *Educacion en derechos humanos: curriculum historia y ciencias sociales del 2o año de enseñanza media: Subunit regimen militar y transición a la democracia* (Valdivia: Revista Estudios pedagógicos XXXV, 2009).

42 Bicentennial Survey, 2019. Universidad Católica de Chile.

43 Graciela Rubio, *La enseñanza del pasado reciente en Chile: Educación en Derechos Humanos en Chile* (Santiago: Red de Equipos de Educación en DDHH, 2014).

44 Ministry of Education, 1999.

45 Rubio supra 24, 97.

ternative way of opening a discussion about the period. The training schools of the police force (*Carabineros*) and investigations police (PDI) are also among the permanent audience of the museum. Likewise, the museum has, in conjunction with the Ministry of Education, participated in teacher-training cycles on human rights throughout the country.

Even so, the balance is not optimistic. The political and civic education of young people has significant gaps. Their understanding of the democratic system is weak and their perspective on the recent past is loaded with myths and taboos. In the meantime, teachers still prefer to avoid addressing the period so as to circumvent conflicts in the classroom.

2.13 Coming to Terms with the Past through the Media

Democracy arrived hand in hand with an intense debate on the role of the media and the policy that the new government should follow after 17 years of censorship and the predominance of an authoritarian account in the traditional written media and on television.

The Aylwin government overturned the principal provisions that were detrimental to freedom of expression and, to counter the recent policy of control over the press, assumed the thesis that the best communications policy for the government was the absence of a communications policy.

On the other hand, the transition to democracy in Chile temporarily coincided with a modernization and privatization process within the media that was already being felt in the latter years of the dictatorship. The traditional written press editorially supported the regime, but at the same time – in the later years – was sensitive to public opinion that, on the one hand, was critical of the military government and, on the other, sought to meet its expectations of information in increasingly broader fields. Meanwhile, in television, a privatization process began and two channels were acquired by Mexican and Venezuelan companies, which coexisted with state-run television. Currently, the main private channels available depend on the Chilean and North American station owners.

In parallel to this, from the 1980s onwards, various media arose that were in clear opposition to the regime, including the magazines *APSI*, *Cauce*, *Análisis*, *Hoy, La Bicicleta*, newspapers *La Época* and *Fortín Mapocho* and radio stations *Radio Chilena* and *Radio Cooperativa*.

Diverse trends converged during the post-dictatorship period: on one hand, the television privatization process was accentuated, while state television became public television. In other words, it became an autonomous company governed by a pluralist board, representative of the government and opposition currents, but without public financing. A second trend is the paradoxical disappearance of the written media that opposed the dictatorship. This is explained by their fragility, as they were basically supported by a political logic and with solidarity and support from

abroad. The government, on the other hand, made no efforts to sustain them, letting the 'invisible hand' of the market take care of them, causing them to disappear.[46] Finally, both the democratizing process and the modernization of the media drove a growing openness of information (this was not the case with the editorial lines, which were clearly conservative), especially in the field of politics. An example of this change in relation to the treatment of human rights issues is the fact that, during the authoritarian period, the press either denied the existence of detainees-disappeared or talked about 'alleged disappearances,' putting their existence into doubt, but after the Rettig Report it assumed the concept of 'detained-disappeared' persons.

Another relevant phenomenon is that contemporary technological advances at the time of democratic transition also notably influenced Chile's media scene. In fact, currently 92 percent of Chileans have a mobile phone, 82 percent know and use Facebook, and 55 percent know Twitter and consider the radio (44 percent) and Twitter (40 percent) to be the most reliable sources of information.[47] Chileans have redefined 'the relationship between the media and audiences and political players through the creation of new tools, which have enabled the diversification of sources of information and have provided more power and participation to the people.'[48] Proof of the power of social netwoks – Twitter, Facebook, Whatsapp and others – can be verified in Chile from the use of these netwoks by the student movements in 2006 and 2011, and most especially with the 'social outbreak' in October 2019.

2.14 Coming to Terms with the Past through Art

The dictatorial experience and critique of the transition have very much been present in the fields of literary and audio-visual creation, theatre, performance, cultural critique and visual arts. Although the shared diagnosis during the period from 1973 to 1990 was of 'cultural blackout' in Chile as a result of censorship, the exile of many creators and artists and the general cultural environment, it is also true that creative resistance was developed in music, theatre, literature and performance. A few comprised more noteworthy instances of these broader phenomena, whether through their mass impact or the artistic imprint they left. In popular music, Los Prisioneros became generational icons of the 1980s. In theatre, pieces that were critical of the dictatorship were noteworthy, from playwrights such as Marco Antonio de la Parra and Ramón Griffero to the groups ICTUS and Teniente Bello. In visual arts and performance, Gonzalo Díaz was noteworthy with his work *Lonquén*, as was the group

46 Eugenio Tironi and Sunkel Guillermo, *Modernización de las comunicaciones y Democratización Política* (Santiago: Revista Estudios Públicos, 1993).

47 Bicentennial Survey 2019.

48 Patricio Navia and Aturo Arriagada ed., *Intermedios: Medios y Democracia en Chile* (Santiago: UDP, 2013).

CADA, made up of visual artists and poets who used street performance to set the trend for the development of Chilean art. The memory of singer and theater director Víctor Jara, who was assassinated in the days following the military coup, and the presence in exile of groups identified with the UP such as El Aleph, Inti Illimani or Quilapayún, also played an important role in collective memory. These and other movements and groups should be considered at the base of the ulterior artistic development of the post-dictatorial era.

The arrival of democracy has brought about the development of state initiatives aimed at strengthening the cultural and artistic space, such as the setting up of competitive funds for artistic creation and the production and the development of infrastructure for the arts at both municipal and central levels.

The dictatorial experience, exile, memory and human rights have been recurring themes in the development of arts in Chile. Due to its popular impact, it is important to draw attention to the audio-visual terrain, both in the field of television and of fictional and documentary film. During the first decade, there was no production or space for issues related to the dictatorial experience on television. However, towards the end of the 2000s and especially in the 2010s, television began to engage the period of Chilean dictatorship. Noteworthy within this milieu were *Los 80* (the 80s), which addressed the experience of a middle class family in Chile in the 1980s, and *Los Archivos del Cardenal* ('The Cardinal's Files'), which was inspired by the experience of the *Vicaría de la Solidaridad* in defence of human rights. Both series reached record audiences and paved the way for journalistic reports on television that referred directly to cases of human rights violations.

In fictional film, the Chilean production with the largest audience was *Machuca*, a film that addresses the UP period and the military coup from the perspective of a group of children from a private school; also noteworthy was *NO*, inspired by the publicity campaign for the 1988 referendum, along with movies that addressed new issues for the country, such as *El Club* ('The Club'), which deals sexual abuse by priests, or *La Mujer Fantástica* ('A Fantastic Woman'), 2018 Oscar Winner for best foreign film, which addresses the conflicts of transsexuality.

The area with the most audio-visual production has been documentary film, a genre that by far facilitated the largest part of the historical memorial work. Production in this genre began as early as the 1980s, both in exile and in Chile, with informal distribution networks outside the state, such as *Teleanálisis* (clandestine opposition news channel, declared Memory of the World by UNESCO) or *la Red de Video Popular de ICTUS* (Ichthus popular video network). The following are among the authors and works of greatest impact: Patricio Guzmán with *La Memoria Obstinada* ('Chile, the Obstinate Memory') (1997), *El Caso Pinochet* ('The Pinochet Case') (2002) and *Nostalgia de la Luz* ('Nostalgia for the Light') (2010), among others; Ignacio Agüero with *El Diario de Agustín* ('Agustín's Newspaper') (2008); Carmen Luz Parot with *Estadio Nacional* ('National Stadium') (2001) and *El Derecho de Vivir en Paz* ('The Right to Live in Peace') (1999); Carmen Castillo and Guy Girard with *La Flaca Alejandra* ('The Skinny Alexandra') (1994); Silvio Caiozzi with *Fernando ha*

Vuelto ('Fernando is Back') (1998); Pedro Chaskel and Pablo Salas with *Operación Condor* ('Operation Condor') (2005). There are many others that delve into diverse issues associated with human rights violations, especially the cases of the detained-disappeared.

In the field of artistic video, during the dictatorship, critical works were made by noted artists such as Juan Downey, Eugenio Dittborn, Lotty Rosenfeld and Tatiana Gaviola, and they have continued into the democratic period, broaching topics related to forced disappearance and memory.[49]

It is impossible to refer to the democratic period without mentioning the presence of artists such as Pedro Lemebel, writer and performance artist, who uses his talent to shake things up on issues related to marginality and the sexual rights of minorities, a taboo topic in the political culture during the dictatorship, or the young playwright Guillermo Calderón and his works *Villa+Discurso* or *Clase*, which critically address essential topics related to the transition, or the Copal brothers and Visnu Ibarra, who through their work *Víctor sin Víctor Jara* ('Victor without Victor Jara') presented the most – watched theatre piece in the country in 2014.

In the area of poetry – always very important in Chile, which has produced two Nobel Prize winners in Literature – many voices have arisen, renovating poetic language, with names like Raúl Zurita, Elicura Chihaulaf, Rodrigo Lira, Enrique Lihn, Elvira Hernández, Soledad Fariña and obviously the antipoet Nicanor Parra.[50]

In literature, democracy saw a powerful voice arise, that of Roberto Bolaño, who from his self-imposed exile became the most relevant Latin American author of recent years, with works like *Los Detectives Salvajes* (*The Savage Detectives*) or *2666*. His influence on the education of young Chilean authors is notable, in terms of the topics addressed and his critical vision of the country, and for his renovating language. Germán Marín and his trilogy *Historia de una Absolución Familiar* (*Story of a Family Absolution*) is another noteworthy author who is representative of the themes of the transition.

The genre of testimony has also been important. Witnesses and the protagonists of stories from prison and struggles have left a vast body of work. I highlight two of these that recount the experience of two women activists who were converted into DINA collaborators and who after the dictatorship became a key part of complaints lodged against the truth commissions and the courts. By Luz Arce, the book *El Infierno* (*The Inferno*) and Marcia Merino *Mi Verdad* (*My Truth*). Added to these is the extraordinary tale of Hernán Valdés *Tejas Verdes: diario de un campo de concentración en Chile* (*Diary of a Chilean Concentration Camp*).

In the visual arts, the most relevant voices have delved into an art related to memory, the prison experience and exile: Gonzalo Díaz, Loty Rosenfeld, Gracia Bar-

49 Audiovisual Archive. Collection from the Museum of Memory and Human Rights. 2016.

50 See *Poesía Chilena en Dictadura y postdictadura*, varios autores (Santiago: Gramaje ediciones, 2020).

rios, José Balmes, Roser Bru, Guillermo Núñez and a new generation including Voluspa Jarpa, Enrique Ramírez, Máximo Corvalán and an accompanying long list of artists. Names from outside the country include Alfredo Jaar, Jorge Tacla, Iván Navarro and Cecilia Vicuña in New York and Fernando Prats in Barcelona.

3 Stocktaking: Successes and Failures of Transitional Justice in Chile

3.1 Successes in Coming to Terms with the Past and Their Causes

- Key Policies: Chile was able to end the dictatorship without bloodshed and to build a democratic regime thanks to i) the political unity of the forces opposed to the dictatorship, ii) the definition of a realistic strategy that used the institutional spaces available, and iii) the construction of politically and socially articulated solid majorities.
- Continuity and Rupture: The transition concentrated governmental effort in two key areas: 'rupture on human rights issues and continuity of economic policy. This was expressed, on the one hand, in the creation of the truth commission, and, on the other, in high levels of economic stability and growth.'[51] It produced results, but with low levels of participation by civil society.
- Armed Forces: The relationship between the government and the armed forces was marked by the retention of Pinochet as commander-in-chief of the army, creating moments of high tension. The main conflict revolved around the treatment of human rights. It was fundamental for the government to maintain a firm attitude regarding respect for institutions and the rule of law. The arrest of Manuel Contreras, who was held in contempt for resisting arrest as ordered by the Supreme Court, put an end to military actions that were openly divergent from institutionalized norms.
- Overcoming Poverty: Another key to success was that, despite the continuity of economic policy, the democratic governments of the *Concertación* installed strong social policies aimed at overcoming poverty. These policies resulted in a poverty reduction from 42 percent in 1990 to 8.6 percent in 2019.[52]
- The Truth Commissions were instances of moral reparation and justice. Their reports give dignity back to victims and recognize their families' fight for the truth. The repairs promoted in Chile are significant and large-scale, but always insuf-

51 Personal interview. Enrique Correa, former minister of the government of Patricio Aylwin. Santiago, September 2020.

52 Source: Ministry of Social Development.

ficient in the eyes of the victims. It must be assumed that the damage is irreparable, and these monetary or other compensations must never be presented as a total satisfaction given in exchange for not demanding justice.

- Reparation Measures: The climate in the country at the beginning of the nineties favored the discourse of reconciliation and overcoming violence and showed solidarity with the victims, especially those of forced disappearance. The reparation measures proposed by the Rettig Commission were adopted by the National Congress. The right wing supported the reparations, knowing there would be no criminal investigation.
- Forensic Identification: The development of a reliable forensic identification policy to identify without any margin of error bodies or body parts found over time was important for the victims. The creation of a DNA database of victims and their families has proven to be very efficient in the Chilean experience.
- Victims' Associations: The activism of the organizations of families of victims or of surviving victims themselves has been a key factor in pushing forth processes of justice and memory. These organizations have engaged with democratic governments, at times from a critical standpoint, at times from a collaborative one. It is important that they have managed to retain their autonomy so as to avoid being used politically and to conserve their vigilant and critical character.
- Transitional Justice: Transitional justice began with the coalition governments headed by the *Demócrata Cristiano* party, with an emphasis put on the most serious crimes in service of the search for truth. Government initiatives taken against the military sped up under socialist-led governments. However, this cannot be completely attributed to socialism. The most important changes were those that took place within the jurisprudence of the Supreme Court and those that accompanied the arrest of Pinochet in London, which put the country in an uncomfortable situation. Thus, from 2000 onwards, a solid body of jurisprudence has consolidated in the higher courts of justice to the effect that crimes of the state are tried as crimes without prescription or amnesty. Over the past few years, the higher courts of justice have cleared the way for establishing criminal responsibility and have normatively framed these criminal conducts as abominable events in light of international humanitarian law and human rights.
- Memory: The country has developed vast experience that has translated into memorials, memorial sites, events and commemorative dates. This policy, driven by victims with state support, has the merit of installing the memory of what happened into urban public space in response to a heartfelt need for symbolic repair on behalf of the victims. The creation of a state entity such as the Museum of Memory and Human Rights plays an important role in raising social awareness of the memory of the dictatorship beyond the victims' circle. This entity is managed by an autonomous foundation of the governments in office, integrated by people related to human rights, and has a publicly funded budget that is discussed on a yearly basis in Chile's budget law.

3.2 Failures in Coming to Terms with the Past and Their Causes

- Critiques of Democracy: Today, most Chileans – 76 percent according to the Bicentennial Survey – think that democracy is preferable to any other form of government, a number that has consistently been on the rise since 1990. However, the more politically active sectors of the population have been developing a critical discourse of the political transition process, some blaming human rights for difficulties in facing problems surrounding security and public order and others identifying the current democracy as a 'continuance of the dictatorship.' The new generation has raised critical voices around the failure to produce an insurrectionary exit from the military regime. In Cath Collins' words, 'the military regime exited, it did not fall. This was a pacted transition, which happened according to the rules that the outgoing dictatorship had set down in its own, authoritarian Constitution, imposed in 1980'.[53] The current presidential election (2021) has as options on the ballot the two candidates who represent the extremes of the political arc, both critical of the transition.
- Police: A need that the transitional process in Chile failed to address and for which it is now paying a high price is police reform. Preventing its autonomy, bringing transparency to its administration and a clear civil supremacy that includes its subordination to the political power are all essential if we are to avoid episodes of institutional corruption and excessive use of force, which carry serious political consequences,[54] as in fact happened in October 2019, when severe human rights violations were verified by the police in the context of the 'social outbreak' (*estallido social*).
- Human Rights: Contrary to what the country believed, human rights violations occurred once again at the hands of state agents in 2019, especially in police responses to demonstrators, which included practices of sexual abuse toward women, shooting at the faces of demonstrators and other practices that have been denounced by international organisms and the INDH.
- Ambiguity in the Behaviour of the State in the Recognition of the Right for Families to Receive Civil Compensation for Damages Caused: The behaviour of state organisms on this matter has been erratic. On the one hand, the position of the Council of Defence of the State is to systematically deny this right, and, on the other, the higher courts have not created a uniform jurisprudence that embraces the idea of integrally repairing the damage done.
- The Victims' Opinion: According to victims, the most significant progress depended on the courts. Despite the fact that since 2000 processes have been underway and the main responsible parties have been convicted, the victims' organizations 'regret that these processes have been slow and late, the

53 Cath Collins, *Lustration*, in *The Chilean Experience* (Prague: CEVRO, 2019), 24.

54 Claudio Fuentes, *Dismantling the State Security Apparatus* (Prague: CEVRO, 2019), 13.

convictions have been minimal and the existence of networks that protect the accused, as well as the granting of prison benefits to inmates such as reduced sentences or early parole. Critical voices have also been raised that auxiliary organisms of justice (for example, Legal Medical Service; SML) are weak and slow. Victims also remain critical of impunity.'[55] There is a social majority that supports punishing the perpetrators, but the general sense is that the punishment is too little, too late. Critical voices argue that there are no trials for civilians implicated in repression.

- Armed Forces: There is discontent among the armed forces and a sense of injustice or unilaterality. They maintain the discourse that they were fighting an enemy in defence of the homeland. There are periodic homages made to emblematic members of the military junta who are incarcerated.
- Reconciliation: Without self-critically assuming responsibility and assigning blame, there is no reconciliation. There is no interest in victims or perpetrators, no self-criticism; an entrenched and vindictive interpretation predominates.
- Elite Renovation: One of the probable causes of the crisis of representation in Chile's democracy and the critical assessment of the transition held by broad sectors of the population is probably the lack of renovation of the political and business elite, who are not only growing old but who also conserve their 'oligarchical' traits. The meritocratic promise that looks to place merit over inheritance in terms of social mobility, which should accompany the modernization of the country, does not appear to have been put into practice.
- Memorials: Despite a strong push towards commemorative initiatives and memorial sites, the memorials have no impact on society, but only serve to comfort the victims and their kin. They have become memorial sites and places of celebrations, with the exclusive exception of the Museum of Memory and Human Rights.
- Human Rights Lessons: There are no signs of a shared conscience within Chilean society regarding the political crisis prior to the military coup, nor an evaluation of the dictatorial period which is particularly evident among young people. This is because the educational system has not been able to address an issue that continues to divide Chileans, nor has it been able to provide adequate civic education to young people.

55 Personal interview, María Luisa Ortiz, family member of victims and collection supervisor at the museum of memory and human rights. September 2020.

Veit Strassner

Uruguay: Politics of the Past – The Dialectic of Forgetting and Remembering

1 The Experience of Dictatorship

Uruguay can be seen as a special case in many respects within the Latin American context. After independence (1828) and the adoption of the first constitution (1830), a relatively stable system of rule quickly established itself. Successful world market integration, based primarily on the export of agricultural goods, created economic prosperity. Thanks to progressive social legislation and welfare state elements, living conditions in Uruguay were among the highest in the world until the middle of the twentieth century.

The 1917 constitution created the instrument of *coparticipación*, through which the opposition party could be involved in governmental responsibility. Politically motivated coups such as were common in Argentina, for example, could thus be prevented.[1] The two major parties, the *Partido Colorado* and the *Partido Nacional*, also known as *Blancos*, were founded in the 1830s and still shape political life today. These are the oldest parties in Latin America that are still relevant. Traditionally, the *Colorados* were the party of the liberal bourgeoisie, the *Blancos* the party of the rural elites and large landowners. Over time, however, they developed into classic 'catch-all' parties. The stable two-party system was influential until the 1970s. In 1971 the *Frente Amplio* was founded. This was a left-wing alliance which provided a political home to all those who did not find their interests represented in the two major parties. The political spectrum of the *Frente Amplio* ranged (and still does) from communist groups to the Christian Democrats.

After the coup in 1973, the *Frente Amplio* was banned by the military and its activists were persecuted. In the first elections after the dictatorship, however, it gained around 20 percent of the votes. The *Frente* continuously built up its electoral success, became the strongest parliamentary group in the 1999 parliamentary elections and won the 2004 presidential elections with an absolute majority.[2]

Note: Translated by Kirsten Kearney.

1 Ronald H. McDonald and Martin Weinstein, 'Balancing Growth and Democracy in Uruguay,' in *Latin American Politics and Development*, ed. Howard J. Wiarda and Harvey F. Kline [5](Boulder: Westview Press, 2000), 295 – 311, 295 – 305.

2 Veit Straßner, *Die offenen Wunden Lateinamerikas: Vergangenheitspolitik im postautoritären Argentinien, Uruguay und Chile* (Wiesbaden: Verlag für Sozialwissenschaften, 2007), 169 f.

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In addition to party-political *coparticipación*, the Uruguayan political system is also characterized by distinct elements of direct democracy.[3] From 1917 to 2019 there were 30 national plebiscites and referendums.[4] In Uruguay, it was largely possible to channel political conflicts and resolve them through parliamentary or plebiscitary methods. Therefore, there was no significant experience of autocracy in the political history of Uruguay until the crisis in the 1970s.

1.1 Relevant Period

As opposed to the situations in Chile and Argentina, the Uruguayan military dictatorship did not begin with ostentatious military operations. Instead, a creeping erosion of democratic institutions occurred, which culminated in the dissolution of parliament by the democratically elected President Juan María Bordaberry by decree on June 27, 1973. Dieter Nohlen speaks of a 'cold coup' in this context.[5] Bordaberry's predecessor Jorge Pacheco declared a state of emergency as early as 1968.

Bordaberry initially remained in office as a puppet of the military, but the new centre of power was the National Security Council (*Consejo de Seguridad Nacional*; COSENA). Established in February 1973, this council, in addition to the President and the Cabinet, primarily included the commanders of the three branches of the armed forces (the Army, the Air Force and the Navy).

The dictatorship ended with a negotiated transition that lasted five years. After the elections in November 1984, *Colorado* politician Julio María Sanguinetti took over the presidency on 1 March 1985.[6]

1.2 Political Background

The political stability of Uruguay was based not least on the prosperous export-orientated economy, which also made it possible to finance the welfare system and social welfare programmes. From the middle of the twentieth century, however, the demand for Uruguayan agricultural products declined. The domestic industry reacted

3 Andrea Vargas Cárdenas, *Referéndum y plebiscito en Uruguay: Mecanismos de aplicación de la consulta popular y ejercicio en casos destacados* (Santiago and Valparaíso: Biblioteca del Congreso Nacional de Chile, Asesoría Técnica Parlamentaria, 2020), accessed 11 April 2022, https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/28313/1/Referendum__plebiscito_y_consulta_popular_en_Uruguay_Rev_BH.pdf.

4 Yanina Welp and Nadja Braun Binder, 'Initiativen und Referenden in Lateinamerika,' in *Jahrbuch für direkte Demokratie 2017*, ed. Nadja Braun Binder et al. (Baden-Baden: Nomos, 2018), 60 – 85, 75 f.

5 Dieter Nohlen, 'Uruguay,' *Handbuch der Dritten Welt*, Bd. 2: Südamerika, ed. Dieter Nohlen and Franz Nuscheler ³(Bonn: Dietz, 1992) 477 – 509, 482.

6 Straßner, *Die offenen Wunden Lateinamerikas*, 162 f.

slowly to this change; the gross national product fell and the inflation rate rose. At the same time, the exposure of cases of corruption damaged the credibility of the elites. The government had to react to these developments. The social and economic countermeasures led to public protests. In 1967 and 1968 alone, 1,400 work stoppages and strikes took place across the country.

What happened next was what is repeatedly described in the literature as the 'democratic path to dictatorship':[7] The government tried unsuccessfully to bring the situation under control using censorship, bans on left-wing groups and emergency laws. Faced with this situation, President Jorge Pacheco opted to use the armed forces to fight insurgency and break strikes. At the same time, he had the strikers drafted into military service. This militarization of the conflict is particularly remarkable when one considers that the armed forces had hardly played any political role in the history of Uruguay up to this point.[8]

This increase in power of the armed forces, unusual for Uruguay, shows the growing inability of the democratic institutions to respond appropriately to the crisis situation. And this crisis became even more acute. In the 1960s, militant leftist groups emerged in many Latin American countries. In Uruguay, the most important group was the *Movimiento de la Liberación Nacional – Tupamaro* (National Liberation Movement Tuparmaro; MLN-T).[9] The MLN-T, founded in 1966 and organized in a cell-like structure, was an urban guerrilla group who wanted to provoke the government through their campaigns. The aim was to expose the repressive character of the political system and thus encourage the people to revolt. Up to the end of 1969, the *Tupamaros* gained in popularity, mainly through attention-grabbing and sometimes humorous campaigns, which were used to highlight corruption and poke fun at the police and public dignitaries.[10] Their campaigns initially met with a very positive response. Martin Weinstein comments on this: 'Extolling them for their efficiency, wit,

7 José Miguel Busquets and Andrea Delbono, 'La dictadura cívico-militar en Uruguay (1973–1985): aproximación a su periodización y caracterización a la luz de algunas teorizaciones sobre el autoritarismo,' *Revista de la Facultad de Derecho* 41 (2016): 61–102, 76.

8 Wolfgang S. Heinz, 'Determinants of Gross Human Rights Violations by State and State-sponsored Actors in Uruguay 1960–1990,' in *Determinants of Gross Human Rights Violations by State and State-sponsored Actors in Brazil, Uruguay, Chile, and Argentina 1960–1990*, ed. Wolfgang S. Heinz and Hugo Frühling (Den Haag, Boston and London: M. Nijhoff cop., 1999) 219–387, 231–254.

9 Alfonso Lessa, *La revolución imposible: Los Tupamaros y el fracaso de la vía armada en el Uruguay del siglo XX* (Montevideo 2010: Fin de Siglo); Thomas Fischer, 'Die Tupamaros in Uruguay: das Modell der Stadtguerrilla,' in *Die RAF und der linke Terrorismus*, vol. 2, ed. Wolfgang Kraushaar (Hamburg: Hamburger Edition, 2006), 736–750.

10 Servicio Paz y Justicia, Uruguay, *Uruguay Nunca Más: Informe sobre la violación a los Derechos Humanos (1972–1985)* (Montevideo: SERPAJ, 1989), 60 f.; Lawrence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers* (New York: Penguin, 1990), 100–111. For example, once the MLN-T raided a casino. When the casino employees complained that their tips had been stolen, the *Tupamaros* refunded the lost money. In another action, they stormed an exclusive nightclub and smeared the walls with the slogan *O bailan todos o baila nadie* ('Either we're all dancing or no-one gets to dance').

and Robin Hood image, Uruguayans seemed proud of the fact that their guerrillas were the best in Latin America.'[11]

The government, on the other hand, reacted to these activities and to the worsening social situation by declaring a state of emergency in 1968 and, later, under the presidency of Bordaberry, an internal state of war, which went hand in hand with the suspension of basic civil rights.[12]

The *Tupamaros* intensified their actions, using raids to gain weapons and strategic materials. They wanted to secure the release of imprisoned *compañeros* by kidnapping important figures such as the British ambassador, the consuls of Brazil and Japan, politicians and industrialists. From the end of 1969 onwards, the clashes between the MLN-T and the security forces increased in severity. The 'Robin Hood phase' of the movement was over. The *Tupamaros* now relied on armed guerrilla combat. They executed police officers who were responsible for torture and carried out attacks on private homes and clubs belonging to the political and economic elites. With the increase in violence and the rising number of fatalities, public opinion turned more and more against the *Tupamaros*. A turning point was the murder of the CIA employee and father of nine, Dan Mitrione, who was in Uruguay to train the security forces in interrogation and methods of torture.[13] The situation detoriorated even further – attacks on high-ranking military personnel, high-profile prison breakouts and the emergence of paramilitary anti-guerrilla groups fuelled fears of a civil war-like situation.

In the run-up to the November 1971 elections, the *Tupamaros* paused their campaigns to support the new *Frente Amplio*. For the first time, this leftist party alliance offered a real alternative to the two major parties that had dominated for around 100 years.[14] During the ceasefire period, which the MLN-T maintained, the security forces did not remain idle but revised their anti-terror strategy. In November 1972, the *Tupamaros* were finally put down.[15] According to official sources, by this date 62 *Tupamaros* had died and 2,873 had been arrested. A further 844 faced arrest warrants; the special forces reported 18 dead and 25 wounded from their ranks.[16]

The real military coup actually took place *after* the *Tupamaros* were quashed. The armed forces, who now took on a *political* role, demanded more powers in order to be able to fight the social roots of subversion. On 27 June 1973, President Bor-

11 Martin Weinstein, *Uruguay: Democracy on the Crossroads* (Boulder and London: Westview, 1988), 40.

12 *Uruguay Nunca Más*, 39 – 80.

13 Marisa Ruiz, *La piedra en el zapato: Amnistía y la dictadura uruguaya: La acción de Amnistía Internacional en los sucesos de mayo de 1976 en Buenos Aires* (Montevideo: Universidad de la República, 2006), 107.

14 Ernst-J. Kerbusch, 'Die Wahlen vom 28. November 1971 in Uruguay,' *Verfassung und Recht in Übersee* 5 (1972): 387 – 398, 394.

15 Weinstein, *Uruguay*, 40 f.

16 *Uruguay Nunca Más*, 65 citing government information.

daberry dissolved the parliament and thus sealed the supremacy of the military over the political system. Although initially the facade of a civil-military government was maintained, with the civilian Bordaberry remaining in office as president until 1976, the actual power shifted more and more to the National Security Council COSENA, established in February 1973, in which the representatives of the three armed forces held the decisive positions. These representatives in turn saw legitimacy in their role in the fight against subversion. They systematically expanded the power of the military, as evidenced by the increase in members of the security forces, which grew from 43,123 in 1970 (including 21,267 soldiers) to 69,200 (including 42,764 soldiers) in 1985.[17]

The military, who were well-equipped in terms of personnel and logistics and whose power was not subject to any real institutional restrictions, subsequently tried to prevent any political activity in the country, in order to remove what they identified as the causes of the political, economic, social and moral crisis in Uruguay. After 1974, for example, the unions were dissolved, their assets confiscated and their leading members arrested. Likewise, the traditional *Universidad de la República*, at the time the only university in the country, was taken over by the military.[18] Political parties were banned. Only the two traditional parties (*Colorados* and *Blancos*) were allowed to continue, although they were forbidden from undertaking any political activities.[19]

1.3 Ideological Justification

In the 1970s and 1980s, with very few exceptions, the armed forces seized power in almost every country in Latin America. As such, in the context of the whole continent, Uruguay is no exception. However, what is exceptional is that this military intervention exists against the backdrop of Uruguayan history, in which the armed forces had never engaged in the politics of the country. As in other countries, the Uruguayan armed forces justified their intervention in the political process with the 'doctrine of national security'.[20] This is a pattern of interpretation that can be seen in the context of the Cold War. The National Security Doctrine assumes that Marxist subversives are trying to undermine the political order in the country and the consensus of values on which it is based. According to the narrative, the nation is in

17 Juan Rial, 'Militares y Redemocratización,' in *Cuadernos de Marcha* II/8 (1986): 26 – 39, 28, Fig. 1.
18 Cristina Contera, "La educación superior en Uruguay"' *Avaliação: Revista da Avaliação da Educação Superior* 13/2 (2008): 533 – 554, 538 – 540.
19 Gerado Caetano and José Rilla, *Breve historia de la dictadura (1973 – 1985)* (Montevideo: Grupo Editor, 1987); Virginia Martínez, *Tiempos de Dictadura: Hechos, voces, documentos: La represión y la resistencia día a día* (Montevideo: Ediciones de la Banda Oriental, 2006).
20 Herbert S. Klein, 'La Seguridad Nacional y la destrucción de regímenes democráticos en América Latina,' *Políticas de la Memoria* 18 (2018/2019): 49 – 63.

an internal state of war that differs from 'regular' wars in that the 'enemy' is not clearly recognizable, but rather infiltrates organizations and institutions. Any citizen could be an enemy and a threat to public order and national security. The armed forces, it is argued, therefore have the task of identifying these enemies within, exposing them and rendering them harmless. For this they need a free hand. If they were bound by strict legal requirements in their struggle against subversion, the only beneficiaires would be the actual subversives who want to destroy this order. For this reason, according to this narrative, basic and human rights as well as the principle of the rule of law can be subordinated to the higher goal of 'national security'.[21]

Three years after the coup, the commanders-in-chief of the Uruguayan armed forces published a two-volume, several hundred-page work based on intensive intelligence work, in which they explained the threat of subversion and therefore the need for military intervention. The guiding narrative of this document is that of global Marxism, which they claim is trying to infiltrate and undermine the societies of Latin America. This advance of Marxism, in which all possible measures including violence are used, threatens societies at their core. Communism would deliberately look for possible avenues to use its 'demoralizing and destructive techniques.'[22] By publishing this work, the armed forces wanted to respond to the 'smear campaigns from home and abroad' and prove they had no truth in them. This document makes clear the reasons why the armed forces and security forces had been given their task of fighting subversion.[23]

1.4 Structures of Persecution

The human rights organization *Servicio Paz y Justicia* (Service Peace and Justice; SERPAJ) aptly characterized the period of the military dictatorship in the foreword of its 1989 report on the crimes of the dictatorship when it wrote:

> The 'war' in Uruguay lacked anything spectacular like the bombardment of the seat of government by Pinochet in Chile or the genocide of thousands of people disappeared by the Argentinian military junta. But it was characterized by an unprecedented level of finesse. It was a silent and selective repression taking carefully-measured steps until the entire population was finally under control. Our country was occupied by our own troops.[24]

Uruguay had once been a shining example of a liberal state, but during the dictatorship its citizens were subjected to systematic control, oppression and persecution.

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21 José Comblin, *The Church and the National Security State* (Maryknoll: Orbis Books, 1979).

22 República Oriental del Uruguay, Junta de Comandantes en Jefe, *La Subversion: Las Fuerzas Armandas al Pueblo Oriental*, Bd. I (Montevideo, 1977), 334.

23 República Oriental del Uruguay, *La Subversion*, 2.

24 *Uruguay Nunca Más*, 7.

There are good reasons to say that the repression in Uruguay definitely affected the largest number of people in relation to overall population size.[25] All citizens were divided into three categories (A – B – C) according to their 'level of danger'. A-citizens were considered politically harmless and could, for example, work in public service. B-citizens were often observed by the security forces because they were viewed as ideologically suspicious. Their freedom of movement was restricted and they could only seek employment in the private sector. C-citizens, on the other hand, were considered enemies and lost nearly all their civil rights. The level of control exercised over the population went so far that even private birthday parties had to be registered and approved, elections in sports clubs were monitored, former officers ran schools, etc.[26] Over 16,500 Uruguayans lost their jobs for political reasons.[27]

In addition to the establishment of this surveillance state, the military also used concrete measures of repression against actual or alleged opponents of the regime. Detention and torture were the main instruments of political persecution. In the 1970s, Uruguay was regarded as the country with the highest rate of political prisoners. Around 6,000 people were officially detained for long periods of time for political reasons. In addition, there were countless illegal or short-term imprisonments. It can be assumed that there were around 25,000 political prisoners in total.[28] Detention – usually associated with ill-treatment and torture – was the main instrument of political repression. There were two main prisons: *Libertad* (Freedom) Prison for male prisoners and *Punta de Rieles* for female prisoners.[29] There were also numerous other places where political prisoners were held. A commission of historians set up by the government published an extensive study in 2008; this reckoned that there were around 60 other, sometimes clandestine, detention centres.[30]

Around 50 percent of the arrests were carried out by the army, 11 percent by the navy and a further 25 percent by the police.[31] The detainee's home was often ransacked or destroyed. Detention was frequently made worse by isolation: around 16 percent of inmates were held in solitary confinement for the entire period of their de-

25 Peter John King, 'Comparative Analysis of Human Rights Violations under Military Rule in Argentina, Brazil, Chile, and Uruguay,' *Statistical Abstract of Latin America* 27 (1989): 1043–1065, 1063.
26 Weschler, *A Miracle, a Universe*, 92.
27 Straßner, *Die offenen Wunden Lateinamerikas*, 165.
28 Jimena Alonso, 'La prisión masiva y prolongada en perspectiva de género: Mujeres presas durante la dictadura uruguaya (1973–1985),' in *El tiempo quieto: Mujeres privadas de libertad en Uruguay*, ed. Natalia Montealegre Alegría, Graciela Sapriza, María Ana Folle Chavannes (Montevideo: Facultad de Humanidades y Ciencias de la Educación, Universidad de la República, 2016), 53–73, 53.
29 For further information about *Libertad* prison and how it functioned see Walter Phillipps-Treby and Jorge Tiscornia, *Vivir en Libertad* (Montevideo: Editorial Banda Oriental, 2003). To learn more about the situation for female prisoners see Alonso, 'La prisión masiva'.
30 Álvero Rico, ed., *Investigación histórica sobre la dictadura y el terrorismo de Estado en el Uruguay 1973–1985*, 3 Bände (Montevideo: Universidad de la República Oriental del Uruguay – Comisión Sectorial de Investigación Científica, 2008), Bd. 2, 44–47.
31 *Uruguay Nunca Más*, 121, Tab. 31.

tention.[32] Detention was always associated with torture: only 1 percent of male and 2 percent of female inmates said they had not been tortured.[33]

The military courts were responsible for all 'political' offences. All other crimes continued to be tried in the ordinary courts. This dual system carried through into the penal system: while criminals continued to be imprisoned in the normal prisons, which were under the control of the *Servicio Penitenciario*, the police's penal system, there were prisons for the political prisoners that were run by the armed forces. Two separate penal systems thus developed during the dictatorship.

Due to the large number of political prisoners and the fact that periods of time in captivity were sometimes very long, organizational structures developed among the prisoners, especially in the main prisons. The military leadership feared political activity *within* the prisons. In order to discipline the prisoners, between 17 and 19 prisoners who were considered political leaders were held hostage by the regime in secret detention centres in the interior of the country and regularly transferred to other centres.[34]

Thousands of Uruguayans left the country to avoid imprisonment, torture and death. Uruguay had previously experienced immigration, but now, for the first time in its history, a mass exodus took place: between 350,000 and 500,000 people left the country. With a population of nearly 3 million (1980), this was a considerable proportion of the population.[35]

However, quite a few Uruguayans were not able to save their lives by fleeing across national borders. Due to the regional cooperation of the military governments within the framework of the so-called *Operación Cóndor*, many were arrested in neighbouring countries and, in some cases, killed.[36] A total of 183 Uruguayans 'disappeared' during the military dictatorship – the vast majority in Argentina.[37] It is probably Uruguay's liberal and constitutional tradition and the relative lack of war-mongering in Uruguayan history that is responsible for the relatively low number of deaths within the country itself: only 26 cases of Uruguayans who disappeared in their own country are documented. In addition, however, the Truth Commission es-

32 *Uruguay Nunca Más*, 121–141.

33 *Uruguay Nunca Más*, 152.

34 *Investigación histórica sobre la dictadura y el terrorismo de Estado*, Bd. 2, S. 13; *Uruguay Nunca Más*, 234–238.

35 Adela Pellegrino, 'Aspectos demográficos, 1963–1985,' in *El Uruguay de la dictadura (1973–1985)*, ed. Carmen Appratto et al. (Montevideo: Banda Oriental, 2004), 181–192.

36 For more information about *Operación Condor* see Gabriela Fried, Francesca Lessa and Felipe Michelini, 'Uruguay. El Cóndor en la bruma,' in *A 40 años del condor: De las coordinaciones represivas a la construcción de las políticas públicas regionales en derechos humanos*, ed. Javier Palummo, Pedro Rolo Benetti and Luciana Vaccotti (Buenos Aires: IPPDH, 2015), 157–203; Luiz Cláudio Cunha, *Operación Cóndor: El secuestro de los uruguayos: Un reportaje del tiempo de la dictadura* (Montevideo: SERPAJ, 2017).

37 Madres y Familiares de Detenidos Desaparecidos, *A todos ellos: Informe de Madres y Familiares de Uruguayos Detenidos Desaparecidos* (Montevideo: MFDD, 2004), 5–9.

tablished in 2000 confirmed the disappearance of six foreigners within Uruguayan territory.[38]

Human rights organizations assume that, as in Argentina, around 25 children born in prison or abducted with their parents then disappeared. In addition, around 150 people were murdered or executed for political reasons during the years of the dictatorship and in the repression that preceded it.[39]

Even if the actual number of victims appears low compared to other countries, it should be borne in mind that the total population of Uruguay at around 3 million is much smaller than that of Argentina (33 million) or of Chile (14 million).

1.5 Victim Groups

In numerical terms, political prisoners, usually also victims of torture and degrading treatment, make up the largest group of victims in Uruguay. Likewise, many people were subject to politically-motivated work bans or had to flee into exile. In the public consciousness and in political debate, however, these groups of victims play a lesser role compared to the adult *desaparecidos* and children who have disappeared or were born in prison.

1.5.1 The Victims of Political Imprisonment and Torture

For the Uruguayan military, the imprisonment of actual and alleged political opponents was their main instrument of political repression. The exact number of victims is hard to calculate. A commission of historians set up by the government in 2005 to investigate human rights violations documented cases of 5,925 male and 739 female long-term political prisoners who were held in the main prisons (*Libertad* for the men and *Punta Rieles* for the women). There were also 186 other female prisoners in inland detention centres. These are just the people who were convicted by the military justice system. In addition, there is an unknown number of people who were held informally or who were detained and mistreated for shorter periods of time.[40]

The human rights organization SERPAJ carried out a survey of 313 former political prisoners in 1987.[41] Even if it is not a representative survey in the strictest sense, it does give an insight into the characteristics of this group of victims. Most of the detainees were between 18 and 29 years old (62 percent) at the time of their arrest

38 Comisión para la Paz, *Informe Final* (Montevideo: Comisión para la Paz, 2003), No. 45 und 54.
39 Straßner, *Die offenen Wunden Lateinamerikas*, 165.
40 Carla Larrobla and Fabiana Larrobla, 'Las investigaciones históricas de la Universidad de la República,' *ILCEA – Revue de l'Institut des langues et cultures d'Europe, Amérique, Afrique, Asie et Australie* 26 (2016), accessed 11 April 20222, https://doi.org/10.4000/ilcea.3950, 1–11, 3.
41 *Uruguay Nunca Más*, 16–32.

and another 26 percent were in the 30 – 39 age group. Over half were married (56 percent) and 45 percent of those detained had children. A fifth worked in academic professions, 25 percent worked in administration, 17 percent were blue-collar workers and 12 percent were characterized as 'full-time activists' (full-time *militantes*). The vast majority of imprisonments took place in the years 1972 – 1974 (48 percent) and 1975 – 1977 (32 percent). About a third of those surveyed were detained more than once. The average length of detention was longer for men than for women (Tab. 1).[42]

Tab. 1: Length of detention of male and female political prisoners.

Length of Detention	Men (percent)	Women (percent)
Up to 2 years	7	16
Between 2 – 3 years	9	13
Between 3 – 5 years	24	24
Between 5 – 8 years	25	20
Between 8 – 10 years	12	9
Between 10 – 12 years	9	6
More than 12 years	14	12
Total:	100	100

Source: *Uruguay Nunca Más*, 118, Fig. 27 and 28.

The majority (48 percent) of people were arrested at home or in the private lodgings of third parties (13 percent). However, 23 percent of arrests took place on the street.[43] Only a tenth of those arrested came before a (military) judge within two weeks. In 34 percent of cases, it took between one and three months, in a further 30 percent three to six months passed, in 13 percent of the cases it took up to a year before first contact with a judge.[44] Likewise, in many cases the prisoners had to wait a very long time before they could see a lawyer (only 8 percent saw their lawyer within the first month of detention, 24 percent had to wait between 3 and 6 months, 23 percent more than 6 months and in 18 percent of the cases there was no legal assistance at all).[45] Almost all detainees were repeatedly subjected to abuse and torture during their detention.[46]

42 *Uruguay Nunca Más*, 116 – 117.
43 *Uruguay Nunca Más*, 121.
44 *Uruguay Nunca Más*, 179.
45 *Uruguay Nunca Más*, 184.
46 *Uruguay Nunca Más*, 152.

1.5.2 The Cases of the *Detenidos Desaparecidos*

Compared to other countries in the region, the absolute number of *Detenidos Desaparecidos*, i. e. the Disappeared, is relatively low. A total of 183 Uruguayans 'disappeared' during the dictatorship. Only in 26 cases is it assumed that these people were 'disappeared' in Uruguay itself. The vast majority fell into the clutches of the military in Argentina.[47] It should be noted that the coup in Uruguay took place almost three years before the coup in Argentina. Many Uruguayans therefore fled to Argentina, as it was supposedly safer, yet became victims of the military dictatorship there. In Uruguay, however, six people from other countries also disappeared during the dictatorship.[48]

The vast majority of the 32 people who disappeared in Uruguay were men (27). In comparison to the persecution patterns in other Latin American dictatorships, the following is significant: on the one hand, the people who disappeared in Uruguay were older on average; on the other hand, the range of ages stands out: seven people were younger than 30, 11 were between 30 and 40, three between 40 and 50 and five people were older than 50. The overwhelming majority were politically active. Most belonged to one of the communist groups, and many were unionized. Almost all those who disappeared were close to the *Frente Amplio*.[49]

Similar to Argentina, children in Uruguay who were either arrested with their parents or born while their mothers were in custody were also disappeared. These children were given up for adoption or passed off as their own children by members of the armed forces and security forces. The Historians' Commission documented the cases of 13 children who had been tracked down; three more children had not (yet) been found. In a fourth case, human remains were discovered.[50]

1.5.3 Other Fatalities

People were also killed in the context of the political violence leading up to the coup, as well as during the dictatorship itself. The Commission of Historians identified 124 people who were murdered or executed immediately before and during the dictatorship.[51] According to the report of the human rights organization SERPAJ, an estimated 33 people died due to torture between 1972 and 1984; eight political prisoners

47 Madres y Familiares de Detenidos Desaparecidos, *A todos ellos*, 5 – 9.
48 Comisión para la Paz, *Informe Final*, N° 45 und 54.
49 Álvaro Rico, ed., *Investigación histórica sobre Detenidos Desaparecidos: En cumplimiento del artículo 4° de la Ley No. 15.848*, 5 Volumes (Montevideo: IMPO, 2007), vol. 2 (*Datos de las Víctimas: Fichas personales*), 9 – 431.
50 Larrobla and Larrobla, 'Las investigaciones históricas,' 7.
51 Larrobla and Larrobla, 'Las investigaciones históricas,' 6.

committed suicide. Around 20 other people died in custody as a result of illness.[52] In a further 48 cases, people who resisted arrest (some even using weapons) died. The exact circumstances of death are mostly unclear. However, there are indications that some people were deliberately executed or that their deaths were caused by the withholding of emergency medical care.[53]

Of special significance (also for subsequent transitional justice processes) was the kidnapping and subsequent murder of two prominent Uruguayan parliamentarians in Buenos Aires on 18 May 1976, a few weeks after the military coup in Argentina. After the coup in Uruguay, the *Blanco* MP Héctor Gutiérrez Ruiz and the *Frente Amplio* senator Zelmar Michelini had fled to Buenos Aires, where they were closely involved in coordinating the activities of opposition forces. Both were kidnapped from their homes by heavily-armed civilian task forces consisting of Uruguayans and Argentinians. Several days later, their bodies were found in a car on the outskirts of Buenos Aires, along with those of two other Uruguayans who had been kidnapped in Argentina. The governments of both Argentina and Uruguay tried to attribute responsibility for this attack to 'subversion'. The murder caused widespread consternation, especially in Uruguay.[54]

This case is important for several reasons: firstly, these were very prominent personalities who were victims of repression. Secondly, the cross-border cooperation of the security forces within the scope of the *Operación Cóndor* became evident. A parliamentary commission was to investigate this case later. Two sons of the murdered senator Zelmar Michelini played and still play a central role in the post-authoritarian reappraisal of human rights violations, both as human rights activists and as members of parliament or senators of the *Frente Amplio*.

1.5.4 Exiles

Thousands of Uruguayans fled due to extensive surveillance, persecution and repression. Many sought protection in other Latin American countries. As well as the immediate neighbouring countries, many Uruguayans fled to Mexico. Many also fled to Spain or France. There was also an active Uruguayan diaspora in other European countries and in North America.[55] It is estimated that up to 350,000 – 500,000 Uru-

52 *Uruguay Nunca Más*, 256 and 280.

53 *Uruguay Nunca Más*, 284.

54 *Uruguay Nunca Más*, 333 – 336.

55 Magdalena Schelotto, 'La dictadura cívico-militar uruguaya (1973 – 1985): la construcción de la noción de víctima y la figura del exiliado en el Uruguay post-dictatorial,' *Questões do tempo presente* (2015), accessed 11 April 2022, https://journals.openedition.org/nuevomundo/67888, Vania Markarian, 'Uruguayan Exiles and Human Rights: From Transnational Activism to Transitional Politics, 1981 – 1984,' *Anuario de Estudios Americanos* 64 (2007): 111 – 140.

guayans had to leave the country for political reasons. With three million inhabitants (1980) this constituted almost a sixth of the total population.[56]

1.5.5 Societal Consequences

The complex and extensive repression and persecution had far-reaching societal consequences. Spying and control led to a culture of fear, reserve, and self-censorship. Some authors speak of the *insilio*, i. e. internal emigration, in contradistinction to *exilio*, exile. Living in fear of becoming the focus of the omnipresent state, many Uruguayans kept silent and tried to lead a life that was as anonymous and as compliant as possible.[57] This repression had far-reaching effects that extended far beyond the direct victims of violence and persecution.

1.6 Those Responsible

Political power and thus also political responsibility in Uruguay were not restricted to one person or to a clearly defined group of people, as was the case in other dictatorships. Rather, the 1974 military law (*Ley Orgánica Militar*) created institutions that served as centres of power and were staffed by changing personnel, primarily from the ranks of the armed forces and security forces.[58] Centralized decisions were made by the *Junta de Comandantes en Jefe*, the union of the commanding officers. The executive bodies were the Joint General Staff (*Estado Mayor Conjunto*) and the Information and Defence Service (*Servicio de Información y Defensa*). The National Security Council (COSENA), created in 1973, represented a civil-military body as the country transitioned to dictatorship; it posed so as to maintain the façade of democracy. Later the COSENA, to which civilian ministers still belonged, became the advisory body for the executive branch appointed by the military.[59] These power structures meant that where true political responsibility *during* military rule lay remained vague and lacking in transparency.[60]

56 Straßner, *Die offenen Wunden Lateinamerikas*, 165.

57 Fried, Lessa and Michelini, 'Uruguay,' 157–160.

58 Nadia Amesti et al., *La estructura del poder militar durante la dictadura* (Montevideo: Universidad de la República del Uruguay, 2018), accessed 11 April 2022, https://www.cruzar.edu.uy/wp-content/uploads/2019/02/Estructura.pdf.

59 The COSENA comprised (according to Art. 6 of the Ley Organica Militar of 1974): the President of the Republic as chairman, the ministers of the interior, defence, economy and finance, the foreign minister, the head of the central planning and budgetary authority as well as the Supreme Commanders of the Armed Forces as permanent members. In addition, other functionaries and experts could be called in.

60 An overview of the network of different means of repression can be found at, accessed 11 April 2022, https://sitiosdememoria.uy/organismos-represivos.

On the journey *to* dictatorship, however, the central political responsibility lay with the democratically elected President Bordaberry, who had been in office since March 1972. Faced with conflict and social tensions, he assigned the armed forces and security forces an active (domestic) political role. With Decreto No. 464 of 27 June 1973, Bordaberry dissolved the two chambers of parliament and authorized the armed and security forces 'to take all necessary measures to ensure the uninterrupted guarantee of essential public services.' This decision effectively began the military dictatorship, even though he formally remained in presidential office as a civilian until 1976. Bordaberry was sentenced in 2006 to 30 years, imprisonment due to his responsibility for the disappearance and death of several opponents. This he served under house arrest due to his advancing years. In 2010 he was further sentenced to another prison term, as he was held responsible for several murders and kidnappings as well as for the 'attack on the constitution'.[61] As in this prominent case, individual political responsibilities could also be demonstrated in some other cases as well.

Responsibility for specific human rights violations, on the other hand, is more difficult to determine. Repression was mainly carried out by the armed forces and security forces. For example, the majority of arrests were made by the armed forces (Army: 46 percent; Navy: 11 percent; Air Force: two percent). The police accounted for 23 percent of the arrests, and mixed task forces accounted for a further 13 percent.[62] Interrogations and torture were also carried out by members of the armed forces, but also by the various secret services.

The central institutions of persecution were the *Fuerzas Conjuntas* (mixed task forces consisting of members of the three branches of the armed forces and the police), the DNII (*Dirección Nacional de Información e Inteligencia*) and the military intelligence service SID (*Servicio de Información de Defensa*). Repressive actions were coordinated by the *Organismo Coordinador de Operaciones Antisubversivas* (OCOA), which was dependent on the General Staff of the Army.

The problem of allocating responsibility for human rights violations is particularly evident in the case of the Disappeared: the vast majority of Uruguayans did not 'disappear' in the country itself, but in Argentina or in other military dictatorships in the region. They can therefore be regarded as victims of the *Operación Cóndor*, the cross-border cooperation of military dictatorships in South America.[63]

On a website run by Uruguayan human rights activists with the support of the large victims' organizations *Madres y Familiares de Detenidos Desaparecidos* and

61 Walter de León Orpi, 'Juan María Bordaberry: el dictador latinoamericano condenado por delitos de lesa humanidad,' in *Luchas contra la impunidad: Uruguay 1985–2011*, ed. Gabriela Fried and Francesca Lessa (Montevideo: Trilce, 2011), 175–187.

62 *Uruguay Nunca Más*, 121.

63 Cunha, *Operación Cóndor*; Francesca Lessa, *Justice without Borders: Accountability for Plan Condor Crimes in South America* (Oxford: University of Oxford, Latin American Centre, 2016), accessed 11 April 2022, https://www.lac.ox.ac.uk/sites/default/files/lac/documents/media/policy_brief_eng.pdf.

CRYSOL, there is a list of people involved in the repression who are under investigation.[64] This list is neither exhaustive nor representative. However, it does allow conclusions to be drawn about responsibilities for human rights violations. The vast majority of the 54 people listed (as of December 2020) were members of the armed forces and security forces, especially the army. Quite a few people were (additionally) employees of the various secret services. The list also includes four civilians: two former presidents (one of whom was also an army general), a minister and an employee of the Foreign Ministry and the diplomatic corps. Of the 54 people mentioned, 22 were convicted, and in 25 cases the proceedings have not yet been concluded. Four people are on the run.

1.7 Places of Persecution

Control, persecution and oppression were everywhere during the dictatorship. Uruguay was considered the largest prison in South America.[65] The regional focus of the persecution was in Montevideo and the surrounding area. More than half of all Uruguayans lived there. The two main prisons were also located near the capital; *Libertad* and *Punta Rieles*. *Libertad* was under the command of the army, although members of other branches of the armed forces and the police were also active there. The prison was built in 1972 as a maximum security prison for political prisoners. Around 3,000 people were imprisoned there up until 1985. It currently continues to serve as a maximum security prison. *Punta Rieles* became a prison for female political prisoners in 1973. By 1985 around 700 women, some with their children, were imprisoned there. This prison was also subject to the armed forces. In Paso de los Torros further inland there was another women's prison run by the armed forces, in which around 160 women were detained.[66] In addition to these prisons, there were 16 other prisons across the country that held political prisoners (three of these for minors). As well as these formal prisons, some of which were located in the grounds of army barracks, there were 77 detention and torture centres (27 of which were secret *Centros clandestinos de detención y tortura*).[67]

Most Uruguayans who fell victim to the *desaparición forzada*, the 'enforced disappearances', disappeared in Argentina, especially in the greater Buenos Aires area. One of the emblematic places here was the *Automorores Orletti* Secret Detention and

64 Accessed 11 April 2022, https://sitiosdememoria.uy/represores.

65 Fried, Lessa and Michelini, 'Uruguay,' 159.

66 For more information on sex- and gender-specific dimensions, see *Las Laurencias: Violencia sexual y de género en el terrorismo de Estado uruguayo*, ed. Soledad González Baica and Mariana Risso Fernández (Motevideo: Trilce, 2012); Alonso, *La prisión*, 53–73.

67 Accessed 11 April 2022, https://sitiosdememoria.uy/tabla.

Torture Centre. At least 64 Uruguayans were detained and tortured there in 1976; eight of them are still considered 'disappeared', while another was murdered.[68]

1.8 The End of the Authoritarian Regime and Transition to Democracy

Since the armed forces did not historically play an active domestic political role in the country's political tradition, the Uruguayan military always attempted to convey, internally and externally, the image of civil-military cooperation which was only necessary in the short-term to stabilize the country. They also tried, wherever possible, to create the impression that government action was based on law and order. The timetable in which the government outlined steps towards a return to a 'protected' democracy in mid-1977 should also be seen in this context. Among other things, a referendum on constitutional reform was planned for November 1980, by which the armed forces wanted to formalize and establish their role in politics.[69]

The military felt safe: for years they had banned all opposition activities, and the media were strictly censored. A few months earlier, using a similiar process, the Chilean military had succeeded in ratifying a constitution that was tailored to the needs of the dictator Augusto Pinochet and that was to shape politics in Chile for over 40 years (another referendum held in October 2020 voted to draw up a new constitution).

But the calculations of the Uruguayan military, who felt encouraged by the proceedings in Chile, did not work out as planned: with a turnout of around 87 percent, only 42.8 percent approved the new constitution.[70] The plan to consolidate the dictatorship and give it a solid basis of legitimacy failed. Thus began the five-year transition to democracy: at the end of 1982, three parties (*Colorados*, *Blancos* and *Unión Cívica*) were allowed to hold internal party elections to fill the governing bodies. These should then serve as negotiating partners for the transition to democracy. At the start of 1983, the parties formed an inter-party coalition; the *Interpartidaria* and *Multipartidaria* alliance, in order to improve their position with regard to the military in the negotiations that took place from mid-1983.

When the negotiations stalled and threatened to fail, massive protests broke out. In September 1983 around 80,000 workers and students took part in a mass demonstration in Montevideo.[71] In November, around 400,000 demonstrators gathered at a

68 Fried, Lessa and Michelini, 'Uruguay,' 159, 186–188.

69 Weinstein, *Uruguay*, 74.

70 Jorge Leonel Marius and Juan Francisco Bacigalupe, *Sistema Electoral y Elecciones Uruguayas 1925–1998*, Montevideo: KAS, 1998), 82, Tab. 04.07.08.

71 Ronald H. McDonald, 'Redemocratization in Uruguay,' in *Liberalization and Redemocratization in Latin America*, ed. George A. Lopez and Michael Stohl (New York, Westport and London: Greenwood Press, 1987), 173–189, 186.

rally in the capital. In January 1984 a general strike paralysed the country.[72] Not least because of massive public pressure, the military agreed to new negotiations with the parties in June 1984. The *Colorado* politician Julio María Sanguinetti took the central role in these negotiations, which ended on 3 August 1984 in the so-called Pact of the Naval Club.

It was agreed, among other things, that elections should take place on 25 November 1984. Part of the compromise, however, was that some prominent politicians were not allowed to stand for election. The question of human rights violations was left out of the negotiations. However, there are good reasons to believe that (implicit) agreements were reached on this issue.[73] The military also saw no need to enact an amnesty law for crimes committed during the dictatorship.

The results of the November 1984 elections were remarkably similar to those of the last democratic election in 1971: The *Colorados* received 41.2 percent (1971: 41 percent), the *Blancos* 35 percent (40.2 percent) and the *Frente Amplio* 21.2 percent (18.3 percent).[74] On 1 March 1985, the 49-year-old lawyer Julio María Sanguinetti (*Partido Colorado*) took over the highest office of the state for the next five years.

2 Transitional Justice

Almost all of the factors that are raised in political science research on transitional justice[75] as inhibiting an active confrontation with the past applied to Uruguay: the military transferred power from a position of strength – not because of a regime collapse, but as the result of lengthy negotiations with the opposition movement. Even after they made a pact to hand over power, the armed forces retained their central role in politics during the (post-)transition period. The appointment of a general as defence minister ensured that their interests were represented at a governmental level. The democratic elites felt themselves bound by their commitments to the outgoing rulers, were primarily interested in a tension-free consolidation of democracy and did not want to strain relations with the army.

Against this backdrop in particular, how Uruguay has dealt with the dictatorship's human rights violations presents an interesting case. The first democratic governments were not particularly interested in giving the issue of human rights much airtime and therefore quickly tried to find a solution through amnesties. Resistance from civil society culminated in a referendum, in keeping with the Uruguayan polit-

72 Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile* (Oxford: Oxford UP, 1997), 70 f.

73 Weschler, *A Miracle, a Universe*, 155 – 158.

74 Dieter Nohlen, 'Uruguay,' in *Elections in the Americas: A Data Handbook*, Vol. II, ed. Dieter Nohlen (Oxford: Oxford UP, 2005), 487 – 534, 506, Tab. 2.7.1.

75 Nohlen, 'Uruguay,' 39 ff.

ical tradition. Amnesty for the military was confirmed by a very narrow margin, making it politically impossible to come to terms with the past for years.

Uruguay is especially interesting because, after 15 years of societal silence, since the second half of the 1990s, the past has again become the subject of public and political debate. A truth commission was set up. After 21 years, the first court judgements were pronounced in Uruguay for the crimes carried out by the dictatorship.[76] In 2020, 35 years after the return to democracy, the Uruguayan judiciary had convicted almost two dozen people for human rights violations, while proceedings are still ongoing in other cases.[77]

2.1 Political and Institutional Changes

At the negotiations that took place at the *Club Naval* in Montevideo, in which the military and opposition negotiators agreed on the steps to take toward a return to democracy, it was agreed that some prominent politicians would be deprived of the right to stand as candidates. The military wanted to prevent political figureheads like Wilson Ferreira Aldunate (*Partido Nacional*), Jorge Batlle (*Colorado*) and Líber Seregni (*Frente Amplio*) from running for the presidency. The winner of the November 1984 election was the politician Julio María Sanguinetti of the *Colorado* Party. His presidency started in March 1985.

With the return to democracy, the political parties were also able to restart their activities without restriction. Parliament resumed its work on 15 February 1985, almost twelve years after its dissolution by President Bordaberry; President Sanguinetti took office on 1 March. During the election campaign, he had spoken of the fact that the military should be held accountable in court.[78] In his inaugural address, however, he did not mention human rights violations at all. David Pion-Berlin aptly describes him when he writes:

> If there is anything about Sanguinetti's character that could explain his decision, it is his pragmatism. Unlike Alfonsín and Aylwin [the presidents of Argentina and Chile] who both had moral agendas to fulfil, Sanguinetti did not. He was fully prepared to suspend principles in order to achieve desired ends.[79]

76 A chronological overview sorted by year is provided by Jimena Alonso, Fabiana Larrobla and Mariana Risso, *Avanzar a tientas: Cronología de las luchas por verdad y justicia 1985 – 2015* (Montevideo 2016).

77 Accessed 11 April 2022, https://sitiosdememoria.uy/represores.

78 Madres y Familiares de Detenidos Desaparecidos, *El Referendum desde Familiares* (Montevideo: MFDD, 1990), 23.

79 David Pion-Berlin, 'To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone,' *Human Rights Quarterly* 16/1 (1994): 105 – 130, 118.

For him, the human rights violations were primarily a political problem that had to be worked on and solved, not a moral dilemma. His primary concern was the country's political stability. In his inaugural address he said: 'My greatest goal is to hand over the office to the new constitutionally elected president on 1 March 1990.'[80]

This statement must also be viewed against the backdrop that the armed forces did not have to accept any fundamental structural or personnel changes due to the transition pact and that they thus continued to be decisive actors in the post-authoritarian power game. Even if there were no open threats of coups or military rebellions, as was the case in neighbouring Argentina, it was implicitly clear that governing against the interests of the armed forces would involve high political risks. Sanguinetti appointed former General Hugo Medina, who had represented the armed forces in the *Club Naval* negotiations, as Minister of Defence. This ensured that military interests were always heard at the cabinet table.

Constitutional changes or far-reaching legislative reforms were not necessary because the military had not succeeded in changing the constitution in their favour. The succeeding democratic governments were able to build on the democratic and constitutional tradition of the country. The judges in the highest courts were changed, but no comprehensive judicial reforms were carried out. There was also no urgent need, since the military had not abused the judiciary, as was the case in Argentina and Chile, for example. Rather, the courts could act with relative autonomy even during military rule.[81]

2.2 Prosecution

After the return to democracy, there were neither judicial nor practical obstacles to the criminal justice process: there was no amnesty law, the judges at the highest courts had been replaced and the judiciary was functional. However, there were political reasons why there were still no actual prosecutions.[82]

2.2.1 The Release of Political Prisoners from Prison

Since the Uruguayan military had mainly relied on imprisonment as a method of political persecution, after the end of the dictatorship, the primary demand was for the

80 Julio M. Sanguinetti, quoted in Benjamín Nahum, *Manual de Historia del Uruguay, Tomo II: 1903–2000* (Montevideo: Banda Oriental, 2004), 365.

81 Elin Skaar, 'Un análisis de las reformas judiciales de Argentina, Chile y Uruguay,' *América Latina Hoy* 34 (2003): 147–186, 167–178.

82 Elin Skaar, 'Uruguay: Reconstructing peace and democracy through transitional justice,' in *After Violence: Transitional Justice, Peace, and Democracy*, eds. Elin Skaar, Camila Gianella and Trine Eide (London and New York: Routeledge, 2015), 67–95.

release of political prisoners. At the very first session of the newly-elected parliament, even before President Sanguinetti officially took office, a corresponding legal solution was debated. They disputed whether all prisoners should be given an amnesty or only those who had not committed any '*hechos de sangre*', i. e. bloody acts of violence.[83]

After some controversy, the parliamentarians were able to agree on a regulation that was passed on 8 March 1985, one week after Sanguinetti took office and three weeks after the opening of the parliament, which became the *Ley de Pacificación Nacional* (National Pacification Act, Ley No. 15.737).[84] This compromise solution provided for the immediate release of all political prisoners, with the exception of those detained for homicides. On this basis, almost 200 people were given an amnesty and were released within two days of the law being passed. The cases of the remaining prisoners were to be reviewed within 120 days. In the case of unjustified sentences, release was immediate. In the other cases, each day of imprisonment previously served was counted as three days, so that these prisoners were also released de facto after their cases had been reviewed, even if their previous convictions were still on record. Existing arrest warrants and restrictions on entry into the country were also lifted. The law explicitly excluded crimes committed by members of the armed forces and security forces (Art. 5). The last political prisoners were released within a few weeks.[85] In a certain sense, the opening of the prisons symbolized the end of the dictatorship. One of the most important demands of the human rights movement and of civil society seemed to be fulfilled.

2.2.2 Criminal Proceedings against Members of the Armed Forces

The freed political prisoners reported on their experiences in the press, which was now free from censorship. This cast light on the system of human rights violations and state-controlled repression. As a result, calls for these crimes not to go unpunished grew louder. The Uruguayans also looked to the other bank of the Río de la Plata, where the *junta* trials were taking place in Buenos Aires. In December 1985, former Argentinian *junta* members were sentenced to life or long periods of imprisonment for murder, torture, deprivation of liberty, robbery and coercion. In April 1985, the organization *Madres y Familiares de Uruguayos Detenidos Desaparecidos* (MFDD, Mothers and Relatives of the Uruguayan Disappeared), together with the

83 For the prehistory of the law, see Barahona de Brito, *Human Rights and Democratization*, 27 ff.
84 This law, as well as all other laws mentioned in this study, are available online and can be easily found by quoting the law number with the addition 'Uruguay'. Since the URLs under which the laws can be found change frequently, the exact addresses are not given.
85 Louise Mallinder, *Uruguay's Evolving Experience of Amnesty and Civil Society's Response* (Working Paper No. 4 from Beyond Legalism: Amnesties, Transition and Conflict Transformation) (Belfast: Institute of Criminology and Criminal Justice, Queen's University, 2009), 34.

human rights organizations SERPAJ and IELSUR (*Instituto de Estudios Legales y Sociales del Uruguay*, Uruguayan Institute for Legal and Social Studies) in Montevideo, filed the first lawsuit against the Uruguayan military for the disappearance of 36 Uruguayans (31 in Argentina and five in Uruguay). This was the first lawsuit of its kind in Uruguay and the start of the struggle to address the human rights violations through criminal proceedings. By the time the Amnesty Act (*Ley de Caducidad*) was passed at the end of 1986, the number of lawsuits had risen to over 700.[86]

The Sanguinetti government reacted to the complaints with a lack of understanding. Sanguinetti argued that it was inconsistent to provide an amnesty for political prisoners and then bring criminal proceedings against members of the armed forces and security forces.[87]

Since the accused were members of the armed forces, the military justice system claimed jurisdiction. Sanguinetti agreed to this demand. The defence minister supported those officers who refused to appear in court.[88] Even if all proceedings were discontinued, this development still caused unrest among the troops.

In June 1986, when the Supreme Court of Justice gave civil courts jurisdiction over human rights claims, Sanguinetti criticized the decision, accusing the civil courts of bias and thus questioning the legitimacy and independence of the judiciary. In the context of the debates over court summons for the military and questions over jurisdiction, calls for a political solution grew louder. The military demanded an amnesty similar to that of the political prisoners. They found support from the government for this demand. A broad political debate ensued, in which the opposition leaders of the two opposition parties Wilson Ferreira Aldunate (*Blancos*) and Líber Seregni (*Frente Amplio*) no longer ruled out an amnesty *after* the facts had been clarified. A certain consensus based on responsible ethics was emerging among the parties: in the service of democratic stability, comprehensive prosecution should be avoided.

2.2.3 The *Ley de Caducidad* – The Amnesty Law for Members of the Military

(i) The search for a political solution

The debates about a political solution were conducted in the context of various tensions: the military made it clear that they were unwilling to appear in civil courts. They could count on the backing of the government, which in turn was accused of obstructing the work of the proper judiciary and thus of endangering the rule of law. The defence minister had to defend himself against attacks from the ranks of the armed forces, who accused him of inappropriately advocating the interests of

86 Skaar, 'Uruguay,' 72.

87 Straßner, *Die offenen Wunden Lateinamerikas*, 175 f.

88 Barahona de Brito, *Human Rights and Democratization*, 130 ff.

the troops. There was always the implicit threat that the high-ranking generals might refuse to obey him.[89]

Although Sanguinetti and his *Colorado* party advocated an amnesty similar to that for political prisoners, there was no unity within the opposition parties (*Blancos* and *Frente Amplio*). Although they saw the need for a political solution, they knew that some parliamentarians as well as the grassroots members of the party had serious reservations about using an amnesty as the solution.

For months, various bills were discussed and rejected in heated parliamentary debates.[90] On 22 December 1986, two days before Christmas, the ruling *Colorados* and the opposition *Partido Nacional* voted for the so-called *Ley de Caducidad de la Pretensión Punitiva del Estado* (Law of Expiry of the Punitive Claim of the State, Ley No. 15.848) and found a political solution.[91]

(ii) The *Ley de Caducidad* in practice

In its first article, the law refers explicitly to the *Club Naval* negotiations, during which the framework conditions for a return to democracy were established in 1984. However, to this day, the specific content of these agreements has never been made public. Article 1 of the *Ley de Caducidad* states that offences committed by members of the armed forces and security forces for political reasons or while carrying out official duties will not be prosecuted.

The amnesty mechanism is regulated in Art. 3. The investigating judge must hand over the relevant documents to the executive in the event of questionable crimes committed by members of the military or police, so that the president can decide within 30 days whether the offences fall under the provisions of Art. 1 of the amnesty law. This constitutionally questionable mechanism was strategically an extremely clever move: the final decision about a possible criminal prosecution was thus in the hands of the executive. The judiciary could only become active in human rights trials if the president personally approved it. It can safely be assumed that developments in Argentina were being closely monitored while the law was being drafted. There, attempts by the government to limit the number of trials against military personnel initially failed because of the self-confident and autonomous judiciary. With the amnesty mechanism, as laid down in Article 3 of the *Ley de Caducidad*, the executive had control of the judiciary in these politically sensitive issues.

At the same time, this regulation could serve as a bargaining chip for the president against the armed forces. Whether they had to answer before the courts de-

89 Raúl Olivera Alfaro, 'Memoria, verdad y justicia en Uruguay: la gestión del pasado en un escenario de luces y sombras,' *ILCEA – Revue de l'Institut des langues et cultures d'Europe, Amérique, Afrique, Asie et Australie* 26 (2016), accessed 11 April 2022, https://journals.openedition.org/ilcea/3905, 1–22, 4–8.

90 Straßner, *Die offenen Wunden Lateinamerikas*, 176 f.

91 Barahona de Brito, *Human Rights and Democratization*, 132–145.

pended on his benevolence and upon his personal decision. The presidents therefore had an efficient means to exert pressure that could also be used to discipline the armed forces if necessary. They were the personal guarantors that no member of the military would be prosecuted.

The regulation provided for in Article 4 was of central importance for the further debates around clarifying the fate of the Disappeared. Cases that dealt with 'people presumed disappeared' had to be passed from the respective judge to the president, along with all supporting documentation; the president then had to take 'immediate action to clear up these cases'.

Just after the law was passed, President Sanguinetti ended all live proceedings by ruling that they were covered by the amnesty regime. In order to meet the requirements of Article 4, he commissioned the military prosecutor to investigate the cases of the 'presumed disappeared'. However, the armed forces claimed they had no information. In no case could it be clarified what had happened to the person who had disappeared and who was involved in the operations or who was responsible. The investigations were all discontinued with no results.[92]

(iii) The campaign for a referendum to abolish the *Ley de Caducidad*

The human rights movement and the victims of dictatorship did not want to accept this amnesty law. On the day the *Ley de Caducidad* was adopted, the MFDD declared: 'There is no law that can be used to order to forget them: neither the Disappeared, nor the tortured, nor the dead.'[93] The human rights movement had gained political experience by taking part in the debates about the amnesty law; it had succeeded in creating a broad base of support for its cause.

Along with other civil society actors, the *Comisión Pro Referendum* was founded shortly after the law was passed with the aim of overriding the *Ley de Caducidad* through a referendum. The constitution (Art. 79) provides for this plebiscitary element if, within one year, 25 percent of those eligible to vote express their support for a referendum through their signatures. The collection of the required signatures represented a social mobilization that Uruguay had never seen before: groups and committees were organized across the country that went door to door to convince the citizens of the need for a referendum. Students, church groups, trade unions, members of housing cooperatives, civic and professional associations and political parties took part in the collection of signatures. Contrary to the intentions of the government and the armed forces to quickly close the pages on this dark chapter of the dictatorship, the human rights movement managed to have this topic dominate the agenda for months.

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92 Straßner, *Die offenen Wunden Lateinamerikas*, 176 ff.

93 Declaration of the *Madres y Familiares de Uruguayos Detenidos y Desaparecidos*, 22. December 1986, published in Madres y Familiares de Detenidos Desaparecidos, *El Referendum desde Familiares*, 10.

On 17 December 1987, almost a year after the adoption of the *Ley de Caducidad*, 643,702 signatures were submitted to the relevant authority – 90,000 more than required. In January 1988, the counting and verification of the signatures began.[94] After the majority of the signatures had already been checked, the validity criteria were changed so that numerous signatures were subsequently rendered invalid. The *Comisión Pro Referendum* protested unsuccessfully against this government U-turn, which was attributed to pressure from the army. After eleven months, the responsible electoral authority finally announced that 22,956 signatures were missing to prove the required support from 25 percent of those eligible to vote. However, 36,834 signatures were considered 'open' and could still be verified between 17–19 December 1987. The *Comisión Pro Referendum* started a second campaign to find the people concerned and to get them to confirm their signatures. They succeeded at this seemingly impossible task: on 19 December, the path to the referendum on the amnesty law was now clear. The human rights movement had collected 216 more signatures than needed.[95]

The referendum took place on 16 April 1989. The army performed a large-scale military exercise in March; rumours of coups did the rounds, which seemed all the more threatening against the background of the military uprisings in neighbouring Argentina. The government and leading *Blanco* politicians spoke out in favour of maintaining the amnesty law. They said it was important to look ahead and face the challenges of the future instead of remaining trapped in the past. For its part, the human rights movement tried to make clear the consequences of the amnesty for the country and for the victims of the dictatorship. The human rights movement ran their campaign under the motto *Para que el Pueblo decida* – 'So that the people may decide'. And the people decided: with a turnout of 82.4 percent, 55.44 percent of the population spoke out in favour of retaining the *Ley de Caducidad* in a climate marked by fear.

(iv) Consequences of the referendum confirming the *Ley de Caducidad*

The result had far-reaching consequences for the human rights movement. The amnesty law had now been given the highest possible democratic legitimation and – despite the narrow outcome – had to be regarded as a direct expression of the will of the people. The remaining scope of the human rights movement had thus been reduced to a minimum. For years the criminal investigation had remained at a standstill. In general, the issue of human rights violations seemed to have disap-

94 Servicio Paz y Justicia, Uruguay, *Informe: Derechos humanos en Uruguay/1988* (Montevideo: SERPAJ, 1988), 35ff.

95 Michael Seligmann, 'Uruguay: Volksbewegung und Parlamentarismus,' in *Vom Elend der Metropolen*, ed. Dietmar Dirmoser et al. (Hamburg: Junius, 1990), 269–281, 269–272.

peared not only from the political but also from the public agenda as a result of this referendum.[96]

Even recourse to internationally binding standards of human rights did not change anything: the government was able to reject both an admonition by the Organization of American States in 1991 and the criticism of the *Comisión Interamericana de Derechos Humanos* in 1992 as interference in internal affairs. The *Ley de Caducidad* was – the government stated – not only established democratically, but was also confirmed by a decision of the Constitutional Court and a referendum.[97]

Since the procedural basis of the *Ley de Caducidad* meant that the decision as to whether a possible crime was covered by the amnesty law was the responsibility of the executive, there were no notable criminal proceedings during the time of the centre-right governments that ruled the country from the return to democracy. A change only became apparent when the *Frente Amplio* with Tabaré Vázquez took over government in 2005. However, it took numerous political and legal efforts even under the subsequent centre-left governments before prosecution became possible and the *Ley de Cadudicad* finally lost its effectiveness (see 2.2.5).

The human rights and victim groups had accepted the outcome of the referendum. They deeply regretted that it meant that crimes that Uruguay had never previously experienced in its history would go unpunished.[98] Nevertheless, along with their lawyers, in the years after the 1989 referendum, despite the existing amnesty regulation, they at least tried to advance the investigation and clarification of human rights violations and to use (and expand) the limited scope that still remained despite the amnesty.

96 A clear sign of this is also the amount of attention that this topic merits in SERPAJ's annual human rights report. The report was first published in 1988. The page breakdown according to the years of each president results in the following distribution: Sanguinetti I (1985 – 89): 10.7 percent, Lacalle (1990 – 95): 3.3 percent, Sanguinetti II (1995 – 2000): 7.5 percent, Batlle (2000 – 05): 30.3 percent (my own calculations based on the annual reports from 1988 to 2004. The data on Sanguinetti I refers to the reports from 1988 and 1989).

97 After the *Comisión Interamericana de Derechos Humanos* had received several complaints against the Uruguayan state between 1987 and 1989, the Inter-American Human Rights Commission sharply criticized it in its report 29/92. The report, which received little attention in Uruguay, stated that Uruguay had violated its international obligations with the *Ley de Caducidad*, since it was incompatible with Art. XVIII (Right to Justice) of the *Declaración Americana de los Derechos y Deberes del Hombr*e and Articles 1, 8 and 25 of the *Declaración Americana sobre Derechos Humanos*. Uruguay was asked to adequately compensate the victims, investigate the cases and clarify individual responsibilities. The investigations carried out by the military prosecutor were viewed as insufficient.

98 Straßner, *Die offenen Wunden Lateinamerikas*, 184 f.

2.2.4 The search for Truth (and Justice) in the Context of Impunity

After the human rights movement and its civil society allies had invested all their energy and resources in the campaign for the referendum, it took some time after the defeat before they were able to open up new perspectives and develop new strategies. Although they disagreed with the content and despite their doubts about the moral legitimacy of the amnesty law, they accepted the outcome of the referendum as an expression of the will of the people. Instead of continuing to fight against this law, they now advocated that it be implemented not only partially (in the sense of the amnesty of Art. 1) but comprehensively, i. e. that the investigations provided for in Art. 4 should be carried out conscientiously. At the same time, the lawyers tried, despite the amnesty regulation, to continue dealing with the past through judicial processes.

(i) Civil proceedings as a substitute for criminal proceedings

Since the *Ley de Caducidad* closed down all ways of using criminal legal proceedings to clarify human rights violations and obtain recognition of these crimes by the state, lawyers from the IELSUR looked for other options on behalf of the victims. They initiated civil proceedings against the Uruguayan state and demanded compensation payments, as the state had responsibility under civil law for crimes committed by members of the armed forces, the secret service and the police. In contrast to criminal law, the judges in the civil chambers do not have extensive investigative powers, so that the burden of proof rested on the injured parties.

The first of such proceedings were initiated during Sanguinetti's time in power (1985 – 1990). The Interior and Defence Ministries, against whom the lawsuits were directed, lodged numerous appeals. Nevertheless, during the presidency of Luis Alberto Lacalle (1990 – 1995) it became apparent that the court decisions would not go in the state's favour.[99] The idea that military personnel – despite the amnesty law – would have to testify in court or that site inspections would take place on military grounds created unrest in the ranks of the armed forces and caused the government to make out-of-court settlements with the victims. These out-of-court settlements meant that the state, which agreed to make payments, recognized the crimes and assumed responsibility for them. Around 2.5 million US dollars in compensation was distributed among the plaintiffs, on whose behalf the IELSUR lawyers had acted. Even before the settlement negotiations were concluded, judgments were passed against the Uruguayan state in two cases, so that the responsibility of the state was confirmed not only by the state's own admission, but also by court decisions.

The human rights movement was therefore able to use civil law procedures to persuade the state to recognize those offences that had been shelved and partially

99 Jorge Eduardo Pan, 'Una brecha a la impunidad,' *Revista de IELSUR* 9 (1994): 7 – 18, 15 ff.

denied in the course of the criminal investigations under Article 4 of the *Ley de Caducidad*, following the investigations by the military prosecutor's office and with the backing of the government.

(ii) *Operación Zanahoria:* criminal proceedings for disturbing the peace of the dead

Another attempt to make judicial inquiries into the fate of the Disappeared despite the existing amnesty law was in connection with *Operación Zanahoria* ('Operation Carrot'). The *Frente Amplio* Senator Rafael Michelini, one of the sons of Senator Zelmar Michelini (also *Frente Amplio*), who was abducted and killed in Argentina in 1976, had learned in talks of an operation in which, during the transition period between dictatorship and democracy, the remains of people buried on a military site were exhumed in order to destroy them or to bury them again in another location. The aim was to prevent the bodies of the alleged Disappeared from being discovered.

Senator Michelini therefore filed a criminal complaint in March 1997 for disturbing the peace of the dead. He called on the judiciary to clarify the facts and investigate the whereabouts of the bodies. He also requested clarification on the question of whether the exhumations took place after 1 March 1985, in which case they would not have been covered by the amnesty law.[100]

After the lawsuit was, surprisingly, initially accepted, there were a number of government interventions, which ultimately led to the case being shelved.[101] Even if the plaintiffs had expected this outcome from the start, this legal manoeuvre served, on the one hand, to increase the pressure on the government, while, on the other hand, it helped to keep the issue in the public consciousness. This criminal case was also an initiative that initially followed political and strategic considerations. In the context of this case, it involved engaged discussions about the establishment of a truth commission to clarify the fate of the Disappeared.

In the course of time, investigations took place into *Operación Zanahoria* and later excavations were carried out by forensic archaeologists and anthropologists. It is believed that these are the bodies of 23 people who were abducted in Argentina and brought on a plane together to Uruguay, where they were murdered. The bodies were initially buried on the site of a paratrooper battalion.[102] In this case, which con-

100 Accessed 11 April 2022, https://www.observatorioluzibarburu.org/causas/142.

101 Mallinder, *Uruguay's Evolving Experience*, 61 f.; Straßner, *Die offenen Wunden Lateinamerikas*, 192.

102 Grupo de Investigación en Antropología Forense (GIAF), *Investigaciones antropológicas sobre Detenidos Desaparecidos en la última dictadura cívico-militar. Informe de actividades año 2011 – 2012*, (Montevideo: GIAF 2012), 22 ff.; José López Mazz, 'The concealment of bodies during the military dictatorship in Uruguay (1973 – 84), 'in *Human remains and identification: Mass violence, genocide, and the 'forensic turn,'* ed. Élisabeth Anstett and Jean-Marc Dreyfus (Manchester: Manchester University Press, 2017), 83 – 97, 88 f.

tinues to move the Uruguayan public to this day, no legal sentences were passed. The accusation was repeatedly made that Julio María Sanguinetti had been informed about the exhumations during his first term as president and had, in fact, supported them.

(iii) The first prison sentence for human rights violations: the case of Elena Quinteros

In October 2002, a prison sentence was issued for the first time for human rights violations during the dictatorship. The former Foreign Minister Juan Carlos Blanco was convicted. As a civilian, he was not protected by the *Ley de Caducidad*.[103] He was sentenced for assisting in the kidnapping of the teacher Elena Quinteros, who was active in the left-wing *Partido por la Victoria del Pueblo* and was arrested in Montevideo in July 1976.[104] She was able to convince the military that she was planning to meet a *compañero* who was also on the wanted list, and she offered to lead the military to this meeting point in order to enable the wanted person to be arrested. She chose a location for this fictional meeting near the Venezuelan embassy.

Quinteros managed to reach the embassy premises in order to claim political asylum. The agents followed her onto the embassy grounds, where there was a struggle with embassy staff. The agents dragged Quinteros into a car. Since that point she has been considered one of the Disappeared. The government of Venezuela protested against this violation of their national territory and demanded the return of the woman, but the Uruguayan government denied her arrest. Until the end of the dictatorship, diplomatic relations between the two countries were fractured.

Because of this international dimension, Sanguinetti commissioned the Ministry of Foreign Affairs to investigate this case in his first term (rather than the military prosecutor, as in the other cases). The conclusions of these investigations were kept secret, yet fell by chance in 1999 into the hands of human rights activist Raúl Olivera, a party colleague of the missing Elena Quinteros. The documents included handwritten minutes of a meeting that dealt with the future fate of Quinteros, who had been abducted from the Venezuelan embassy. Using graphological analysis, it was proven that the foreign minister responsible at the time, Juan Carlos Blanco, was involved in the meeting. The mother of the Disappeared filed a criminal complaint against the civilian Blanco in 2000. The court agreed with the prosecution, in-

103 Raúl Olivera and Sara Méndez, *Secuestro en la embajada: El caso de la maestra Elena Quinteros*, 2da. ed. (Montevideo: Fundación Editorial El Perro y la Rana, 2004), 285 – 291.

104 Pablo Chargoñia, 'Caso Elena Quinteros: El ex canciller de la dictadura y el Batallón 13 en el centro de las investigaciones,' in *Derechos Humanos en el Uruguay: Informe 2004* (Montevideo: SERPAJ, 2004), 119 – 125.

terpreting the disappearance of Elena Quinteros as an ongoing kidnapping. Blanco was sentenced to prison as an accomplice.[105]

A grotesque turn of events came about after the truth commission set up by President Batlle in 2000 came to the general conclusion that all of the Disappeared were dead. Blanco's lawyers applied for his release from prison, as the verdict for aiding and abetting kidnapping and deprivation of liberty was therefore rendered invalid. The court followed this line of reasoning. Another complaint for complicity to murder was filed. Finally, in 2010, Juan Carlos Blanco was sentenced to 20 years in prison for an accessory to the murder and his involvement in the disappearance of Elena Quinteros, whose remains have not yet been found.[106]

(iv) Further progress in criminal justice

The examples presented here represent events that had an impact on the public perception of the crimes of the dictatorship. Maintaining the *impunidad* (impunity) came with increasing political costs. International developments also impacted the Uruguayan way of coming to terms with the past: in particular, the imprisonment of the Chilean ex-dictator Augusto Pinochet in London (1999) and the debates about the amnesty laws in Argentina were followed with great interest in Uruguay.

In this changed political climate, the human rights movement's lawyers succeeded time and again in getting the judiciary to act, even though it would take years before judgements were pronounced. The plaintiffs pursued different strategies in order to initiate judicial investigations despite the validity of the *Ley de Caducidad:*

- They formulated lawsuits against civilians who could not invoke the amnesty law.
- They brought complaints about offences committed outside the time period covered by the *Ley de Caducidad*.
- They brought charges that were allegedly economically motivated.
- They also brought charges about crimes that were *not* committed due to a political motivation or in fulfilment of an order and could therefore be regarded as 'normal' crimes that were therefore not covered by the amnesty law.
- In cases of disappeared persons, they interpreted enforced disappearance as kidnapping that continues to this day, a crime that continues beyond the period of validity of the *Ley de Caducidad* and therefore does not fall under the amnesty.

105 Pablo Chargoñia, 'Avances, retrocesos y desafíos en la lucha judicial contra la impunidad,' in *Luchas contra la impunidad: Uruguay 1985–2011*, ed. Gabriela Fried and Francesca Lessa (Montevideo: Trilce, 2011), 163–174, 165 f.

106 Secretaría de Derechos Humanos para el pasado reciente, Ficha perteneciente a QUINTEROS ALMEIDA, Elena Cándida, accessed 11 April 2022, https://www.gub.uy/secretaria-derechos-humanos-pasado-reciente/comunicacion/publicaciones/ficha-perteneciente-quinteros-almeida-elena-candida.

– Finally, they argued that the human rights violations of the dictatorship were crimes against humanity, which, according to international legal norms that are also binding for Uruguay, cannot be covered by amnesty.

Even if these trials did not initially lead to convictions, they did have the consequence that, on the one hand, limited investigations were carried out. On the other hand, they created political pressure to act – not least because the public followed the developments with great interest.[107]

2.2.5 The slow erosion of the *Ley de Caducidad*

The *Ley de Caducidad*, issued in 1986 and confirmed in the referendum of 1989, blocked almost every form of judicial proceedings for years. It was for the government to decide whether any possible criminal offences would be covered by the amnesty regulations. It was also up to the government to initiate investigations. The first four governments after the end of the dictatorship interpreted the *Ley de Caducidad* very broadly and were mostly satisfied with the superficial (and usually inconclusive) investigations by the military prosecutor's office. On the one hand, the governments did this because the amnesty law was endowed with the greatest possible democratic legitimacy thanks to the failed referendum. On the other hand, they did not want to strain their relationship with the armed forces, which had never undergone any real reforms.

The human rights movement and its lawyers had to fight continuously against the political will of the executive. That was to change – at least in part – when in 2005, 20 years after the end of the dictatorship, the centre-left alliance *Frente Amplio* with the socialist Tabaré Vázquez as president took power and, after him, the former *Tupamaro guerrillero* José 'Pepe' Mujica became president.

(i) The (partial) facilitation of trials by the *Frente Amplio* governments (since 2005)

Right from the start, in his inaugural address, President Tabaré Vázquez announced a different approach to the *Ley de Caducidad*. In the course of his time in power, he allowed legal proceedings to commence in around 25 cases. These were mainly cases involving crimes committed outside of Uruguayan national territory, crimes that were economically motivated or in which people were involved who could not invoke the *Ley de Caducidad*.[108]

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107 *Derechos Humanos en el Uruguay: Informe 2004* (Montevideo: SERPAJ, 2004), 119 – 145.

108 Álvaro de Giorgi, 'El "Nunca Más" uruguayo: Política ritual hacia el pasado reciente en el gobierno del Frente Amplio,' *Izquierdas* 42 (2018): 63 – 96, 69 f.

President Pepe Mujica, the successor to Tabaré Vázquez, behaved in a similar way. He largely gave the judges free rein in investigating the cases for prosecution. In this context, two former rulers in Uruguay were sentenced to long terms in prison: Juan María Bordaberry, the civilian and ex-president who, by dissolving parliament, had made the cold coup by the military possible and who had previously been convicted of breaching the constitution. In February 2010 he was sentenced again to 30 years in prison for his responsibility for political murders and for the disappearance of nine people. Likewise, the former *de facto* president and retired general Gregorio Álvarez was sentenced to 25 years in prison for his responsibility for the murder of 37 Uruguayans kidnapped in Argentina. Other military and police officers, some of them high-ranking, were convicted in 2009 of the disappearance of 28 Uruguayans in Buenos Aires.[109]

In general, the two *Frente Amplio* presidents respected the amnesty rule but abandoned the generous application that had been customary for years among their predecessors.

(ii) The attempt to repeal the *Ley de Caducidad* through a second referendum (2009)

The undeniable progress made in the area of criminal justice in the first years of the *Frente Amplio* governments was not sufficient for the victims and human rights groups. They saw the repeal of the *Ley de Caducidad* as the only way to end the impunity that still prevailed. Although *Frente Amplio* held the parliamentary majority, there was no political majority in favour of abolishing the law – especially since it was not only passed by parliament at the time but had also been confirmed by a referendum.

In November 2006, the *Coordinadora Nacional por la Nulidad de la Ley de Caducidad*, a national coordination for the abolition of the *Ley de Caducidad*, was founded from the human rights movement and from civil society groups. In the following year, they began to gather the signatures necessary to bring a fresh referendum.[110]

Even though there was no unified position on this initiative within the different groupings of the *Frente Amplio*, the powers that be within the *Frente Amplio* decided to support this cause. In June 2009 the responsible body, the *Corte Electoral* confirmed that there were sufficient signatures to allow a referendum to be held.

Over the following months the human rights movement and civil society groups used wide-ranging campaigns to attempt to rally a majority for the repeal of the amnesty law. The referendum took place on the same day as the presidential election in

109 Francesca Lessa, '¿Justicia o impunidad? Cuentas pendientes a treinta años del retorno a la democracia,' *ILCEA – Revue de l'Institut des langues et cultures d'Europe, Amérique, Afrique, Asie et Australie* 26 (2016): 6, accessed 11 April 2022, https://doi.org/10.4000/ilcea.3874 1–16.

110 Ana Buriano, 'Ley de Caducidad en Uruguay y esencia ético-política de la izquierda,' *Perfiles Latinoamericanos* 38 (2011): 173–203, 185–192.

October 2009. This day produced paradoxical political decisions. On the one hand, the Uruguayans elected an ex-*Tupamaro* politician as president: José Mujica, a former *Guerillero* and long-term political prisoner. At the same time, however, only 47.98 percent of the electorate voted for the repeal of the *Ley de Caducidad*. Once again, the initiative narrowly missed the required majority. Thus the law was confirmed for a second time by a referendum. However, it would be short-sighted to interpret the result as meaning that a majority supported impunity for those responsible for human rights violations. Rather, the view was justified – also within the left – by arguing that substantial progress had been made since 2005 within the existing legal framework and therefore that it was not necessary to repeal the *Ley de Caducidad*.[111] Rather, the process of coming to terms with the past should be pursued within this normative framework. In contrast to the 1989 referendum, the issue did not disappear from the public and political agenda. As a result, the human rights movement subsequently made great gains and indeed achieved broad support, especially from young Uruguayans.[112]

(iii) Constitutional concerns about the *Ley de Caducidad*

A peculiarity of the Uruguayan legal system is that the Supreme Court can only carry out a constitutional review of a law on a case-by-case basis. The declaration of unconstitutionality therefore only affects that particular case. A corresponding decision by the Supreme Court therefore does not result in a general repeal of a law.[113]

In 2009, the Supreme Court declared the *Ley de Caducidad* unconstitutional for the first time in the case of the murder of Nibia Sabalsagaray, as it violated several articles of the constitution (Art. 4, Art. 82 and Art. 233) and thus undermined the basic principle of the separation of powers. The law was also declared incompatible with numerous international legal norms that are binding for Uruguay.[114]

This decision was followed by other cases in which the *Ley de Caducidad* was not used, as the Supreme Court had decided on a case-by-case basis that the amnesty law was incompatible with the constitution of the Republic of Uruguay.

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111 Ana Buriano and Silvia Dutrénit, 'A 30 años de la ley de caducidad uruguaya ¿Qué y cómo debemos conmemorar?,' *Antíteses* 10/19 (2017): 351–375, 364 f.

112 Gabriela Fried Amilivia, 'Sealing and Unsealing Uruguay's Transitional Politics of Oblivion: Waves of Memory and the Road to Justice, 1985–2015,' *Latin American Perspectives* 43/6 (2016): 103–123, 113 f.

113 Mirtha Guianze, 'La Ley de Caducidad, las luchas por la Justicia y por la jurisdicción universal de los derechos humanos en Uruguay,' in *Luchas contra la impunidad: Uruguay 1985–2011*, ed. Gabriela Fried and Francesca Lessa (Montevideo: Trilce, 2011), 189–202, 193–195.

114 Lessa, '¿Justicia o impunidad?,' 6.

(iv) The law interpreting the *Ley de Caducidad*

Given existing concerns about the moral legitimacy of the *Ley de Caducidad*, as the number of cases grew in which constitutional doubt around the amnesty law was very evident, calls for a political solution became louder once again. In 2011, therefore, elected members of the *Frente Amplio* launched the initiative for a *ley interpretativa*. The *Frente Amplio* supported this project. However, there were major debates, even within this party alliance, about whether a law that had been confirmed in two referendums could *de facto* be overridden by a parliamentary resolution.

After extended discussions, Ley No. 18.831 with the title *Pretension punitiva del Estado* (clearly based on the title of the *Ley de Caducidad de la Pretension punitiva del Estado* but cleverly avoiding the word *Caducidad*, i. e. expiry) was adopted in October 2011. Article 1 restored the 'state's intention to punish'[115] and refers explicitly to the 'crimes committed by the practice of state terrorism up to 1 March 1985' and which had been exempted from prosecution by Article 1 of the *Ley de Caducidad*. The law also stated that no statute of limitations or forfeiture periods apply to these offences. The offences are declared to be 'crimes against humanity' (*crímenes de lesa humanidad*) in the sense of the international treaties applicable to Uruguay.

This law appeared to effectively abolish the *Ley de Caducidad*. However, constitutional complaints were brought against this law for years to come. In 2013, for example, the Supreme Court ruled that it was not permissible to generally suspend the statute of limitations for human rights violations and to classify all acts as 'crimes against humanity'.[116]

In other cases, legal debates were held about whether the *Ley de Caducidad* and/or the *Ley interpretativa* could be used. The scope for clarification and criminal proceedings was expanded significantly, so that criminal trials and judgements became possible. However, it still had to be decided on a case-by-case basis which legal norm and which interpretation applied.

2.2.6 The Gelman Case and the End of the '*Ley de Impunidad*'

The *Caso Gelman* is of great importance for the criminal investigation of human rights violations, as it brought the issue of the Disappeared, the missing children and continuing impunity into the focus of national and international interest. At the centre of this case were the son and daughter-in-law of the well-known Argentinian poet Juan Gelman. In August 1976, Marcelo Ariel Gelman (23 years old) and his

115 In Spanish this reads 'Se restablece el pleno ejercicio de la pretensión punitiva del Estado para los delitos cometidos en aplicación del terrorismo de Estado hasta el 1 de marzo de 1985, comprendidos en el artículo 1 de la Ley No. 15.848, de 22 de diciembre de 1986.'

116 Francesca Lessa and Elin Skaar, 'Uruguay: Halfway towards accountability,' in *Transitional Justice in Latin America: The uneven road from impunity towards accountability*, ed. Elin Skaar, Jemima García-Godos and Cath Collins (London and New York: Routledge 2017), 77–102, 85 f.

wife María Claudia García Iruretagoyena (19 years old), who was seven months pregnant, were in Buenos Aires when they were kidnapped by agents of the Argentinian secret service. They were held in the secret *Automotores Orletti* Detention and Torture Centre in Buenos Aires. Marcelo Ariel was murdered; his body was found in October 1976 but could not be identified at that point. The remains were buried in a cemetery in an unmarked grave. It was not until 1989 that forensic anthropologists were able to determine the identity of these unknown remains during their investigations. María Claudia has not been seen since she was abducted and is regarded as disappeared.[117]

After much research, Juan Gelman came to the reasonable assumption that the unborn child was still alive and living under a false identity in Uruguay. In May 1999, Gelman asked the then Uruguayan President Sanguinetti, while he was still incumbent, to initiate investigations to find his grandchild. However, after Sanguinetti did not take any action, Gelman again wrote a public letter to the President in October 1999, explaining in brilliant language the experience of pain and uncertainty among the relatives of the Disappeared. He found international support – including from Günter Grass, the German novelist who won the Nobel Prize for Literature in 1999, who also addressed an open letter to Sanguinetti.[118] Finally, in November 1999, Sanguinetti responded by stating that there was no evidence that the heavily pregnant María Claudia had given birth and that the child was in Uruguay. He went even further and underlined that there were no missing children in Uruguay.[119]

A change of government took place on 1 March 2000. Jorge Batlle, from the *Colorado* Party, took over the presidency. One month after inauguration, Batlle informed the Gelmans that their grandchild had been found – a girl living in Montevideo who had been passed off by a police officer and his wife as their own child. It has been possible to reconstruct the facts that María Claudia García Iruretagoyena was secretly brought from Buenos Aires to Uruguay in 1976 while pregnant, was held there in a facility of the military intelligence service and finally gave birth to her daughter in the military hospital. While the child could be found and identified, the mother is still regarded as one of the Disappeared.[120]

In July 2002, Juan Gelman finally filed a criminal complaint for the deprivation of liberty and the murder of his daughter-in-law and the kidnapping of his granddaughter. A lengthy to and fro between the court, the public prosecutor and the government ensued over the question of whether this complaint fell under the amnesty reg-

117 Ariela Peralta, 'El caso Gelman y los desafíos a la Ley de Caducidad,' in *Luchas contra la impunidad: Uruguay 1985–2011*, ed. Gabriela Fried and Francesca Lessa (Montevideo: Trilce, 2011), 203–215, 207.

118 The open letters can be found reproduced in Carlos Liscano, *Ejercicio de la Impunidad: Sanguinetti y Batlle contra Gelman* (Montevideo: Ediciones del Caballo Perdido, 2004).

119 *La República* (29.01.2000).

120 Alonso, Larrobla and Risso, *Avanzar a tientas*, 65.

ulation of the *Ley de Caducidad*. The government eventually decided that the amnesty law applied here, so the case was closed in December 2003.

Juan Gelman continued his fight and initiated a constitutional lawsuit in 2004 with the aim of declaring Article 3 of the *Ley der Caducidad* unconstitutional. He also tried in 2005 to have the investigations reopened. Here, too, there was a to and fro between the various judges involved and the public prosecutor, which ultimately resulted in the case being closed again in December 2005.[121]

As all legal means in Uruguay had been exhausted, Juan Gelman and his granddaughter María Macarena Gelman then appealed to the Organization of American States and the Inter-American Court of Human Rights in May 2006. In the lawsuit, which was drawn up with the support of the *Center for Justice and International Law*, they argued that the *Ley de Caducidad* made it impossible to provide any information about the disappearance of María Claudia or of the circumstances surrounding the birth of María Macarena Gelman and her illegal adoption. The law also prohibits prosecution of those responsible for these crimes. In 2011, the Inter-American Court of Human Rights ruled in favour of the plaintiffs.[122] The *Corte Interamericana de Derechos Humanos* demanded in its judgment that the Uruguayan state should carry out a 'comprehensive, independent, effective and immediate investigation of the events' with the aim of 'establishing and sanctioning the intellectual and actual responsibilities of all persons involved' (No. 250).[123]

The judgement continued:

> the *Ley de Caducidad* is therefore without effect and legal consequences because of its incompatibility with internationally binding human rights norms, such as the *Convención Interamericana sobre Desaparición Forzada de Personas*, as it prevents the investigation and possible punishment of those responsible for serious human rights violations. The state must ensure that the *Ley de Caducidad* does not constitute a further obstacle to investigations and prosecutions in this case, as in other similar cases (No. 253). The state is also obliged to prevent other legal mechanisms such as statutes of limitations, bans on retroactive effects or *ne bis in idem* regulations – i. e. the ban on judging the same matter twice – from hindering an investigation and prosecution (No. 254).

The Inter-American Court of Human Rights stressed that the fact that this law had been passed by a democratically elected parliament and confirmed by two referen-

121 Alonso, Larrobla and Risso, *Avanzar a tientas*, 65.

122 Jo-Marie Burt, Gabriela Fried Amilivia and Francesca Lessa, 'Civil Society and the Resurgent Struggle against Impunity in Uruguay (1986 – 2012),' *The International Journal of Transitional Justice* 7 (2013): 306 – 327, 319 – 322.

123 Corte Interamericana de Derechos Humanos, 'Caso Gelman vs. Uruguay, Sentencia de 24 de febrero de 2011,' accessed 11 April 2022, https://www.corteidh.or.cr/docs/casos/articulos/seriec_221_esp1.pdf, German translation: Inter-Amerikanischer Gerichtshof für Menschenrechte (IAGMR). Urteil vom 24. Februar 2011, 'Gelman vs. Uruguay, aus dem Spanischen ins Deutsche,' *Europäische Grundrechte-Zeitschrift* (2012): 702 – 713.

dums did *not* give the law any legitimacy in the international legal system.[124] The Inter-American Commission on Human Rights had already argued in a similar way in its 1992 report. At that time, however, the government was largely able to ignore this report.

2.2.7 Criminal Legal Proceedings – An Interim Review

For years, the *Ley de Caducidad* made any form of criminal investigation into human rights violations impossible. Nevertheless, the human rights movement and its lawyers succeeded time and again in finding gaps in the amnesty, exploiting them and even widening them. Often, lawsuits and judicial investigations have been strategically used to create political pressure to act.

The *Observatorio Luz Ibarburu*, an observation centre for human rights in Uruguay supported by human rights and victims' associations, lists all human rights processes in connection with the military dictatorship on its homepage. There are a total of 339 cases. The first judicial inquiries were launched in 1975. The complaints reached an initial high point after the end of the dictatorship in 1985 and 1986 (46 complaints). After the adoption of the *Ley de Caducidad* in 1986, the number dropped significantly. From 1987 to 2005, only 24 lawsuits were filed. There was a significant increase in 2011 and 2012, when 164 lawsuits were filed; from 2013 to 2020 there were a further 23 lawsuits.

Judgements were only pronounced and enforced in 5 percent of the lawsuits, i. e. in 15 cases. Almost half of the lawsuits (48 percent) are in the process of preliminary judicial investigations (*presumario*) – and most of them have been at this stage for many years without any progress. Of the total 339 proceedings, 102 have been closed and archived.[125]

The offences to which the complaints relate were committed between 1969 and 1985. There were noteable clusters in 1972 and 1973 (a total of 24 cases) and 1975 and 1976 (a total of 48 cases). Of the 339 complaints, 104 cases relate to torture, 61 cases to deprivation of liberty, 30 cases to kidnapping, 43 cases to enforced disappearance and five to child abduction.[126]

Between 2002 and 2020, a total of 45 people were convicted of human rights violations during the dictatorship in Uruguay. Of these people, 33 were still alive at the

124 Karina Theurer, 'Durch Referenden bestätigte Amnestiegesetze in Fällen gewaltsamen Verschwindenlassens unvereinbar mit der Amerikanischen Menschenrechtskonvention: Das Urteil des Inter-Amerikanischen Gerichtshofs für Menschenrechte in der Sache Gelman v. Uruguay,' *Europäische Grundrechte-Zeitschrift* (2012), 682–693, 687; Peralta, El caso Gelman, 213; Leonardo Filippini, 'Reconocimiento y justicia penal en el caso Gelman,' *Anuario de Derechos Humanos* (2012): 185–193.

125 See the website https://www.observatorioluzibarburu.org/causas/?text=&case_state=&court__region=&court=&o=file_date, accessed 11 April 2022, for detailed information about each of the cases.

126 Accessed 11 April 2022, https://www.observatorioluzibarburu.org/reportes.

end of 2020, 20 of them are serving their sentences in prison and 13 are under house arrest for reasons of age and health.[127]

These developments are remarkable – especially in light of the fact that criminal prosecution was prevented for almost two decades. Another important step in utilizing criminal investigations to deal with the past was the establishment of a special unit for human rights cases in 2015, which was intended to support the General Public Prosecutor's Office in making the proceedings around human rights violations more efficient.[128] Nevertheless, there is still no clear legal line in dealing with human rights violations: the *Ley de Caducidad* is still in use. It must be decided on a case-by-case basis whether the statute of limitations applies or whether the offences are to be classified as crimes against humanity and therefore cannot be statute-barred and amnestied.[129]

2.3 The Replacement of the Elites

The return to democracy brought with it a near complete – exchange of political elites. During the dictatorship, political parties – with the exception of the two traditional larger parties, the *Blancos* and *Colorados* – were banned. However, the major parties were prohibited from undertaking any activities. With the loosening of the military regime, these restrictions were lifted, so that a party alliance could be formed, which ultimately negotiated the transition to democracy with the military.

After the parliamentary elections, the MPs consisted of the two traditional parties and the *Frente Amplio*. None of these parties were close to the military and they represented their interests at parliamentary level. Some of the *Frente Amplio* MPs had, in fact, been active in the resistance against the dictatorship.[130]

There was a high level of continuity in the area of administration. Comprehensive lustration measures were not carried out.[131] In the field of justice, the Supreme Court judges who had been appointed by the military government were replaced. In addition to this exchange of the functional elite, only a few personnel changes were carried out in the lower ranks. There was less need to replace staff, since the ordinary judiciary at the operational level had acted with far-reaching autonomy even during

127 Email correspondence between the lawyer Pablo Chargoñia from the *Observatorio Luz Ibarburu* and the author on Dec. 18, 2020.

128 Alonso, Larrobla and Risso, *Avanzar a tientas*, 156.

129 Alicia Castro, 'Derechos humanos y delitos de lesa humanidad: Un análisis de la jurisprudencia de la Suprema Corte de Justicia sobre imprescribilidad de delitos de la dictadura,' *Revista de Derecho Público* 27 (2018): 7–34.

130 Eduardo Bottinelli, 'Las carreras políticas de los senadores en Uruguay: ¿Cambios o continuidades ante el triunfo de la izquierda?,' *Revista de Sociologia e Política* 16/30 (2008): 29–43, 32.

131 Pablo Galain Palermo, 'Uruguay,' in *Justicia de Transición: Informes de América Latina, Alemania, Italia y España*, ed. Kai Ambos, Ezequiel Malarino and Gisela Elsner (Berlin and Montevideo: Konrad-Adenauer-Stiftung, 2009), 391–414, 395.

the dictatorship. Unlike in other countries in the region, the judges in the ordinary (civilian, i.e. non-military) courts were not suspected of being accomplices to the dictatorship. The trials for 'political' crimes were brought before the military courts during the dictatorship. With the return to democracy, the military courts' jurisdiction again became limited to members of the armed forces.[132]

As a result of the pact-based transition, the armed forces remained largely unaffected. Although they could not depend on parties with an affinity for them to represent their interests in the legislature, their influence on actual politics was secured by the Ministry of Defence. There were also no personal consequences beyond the leadership level: the military involved in human rights violations not only went unpunished, but were also able to pursue their careers within the armed forces and were even promoted.[133] This only changed with the increasing influence of the *Frente Amplio* and when Tabaré Vázquez came to power in 2005. Since then, possible implications from the time of the dictatorship have played a more important role in decisions relating to promotions.

2.4 Reparations

In Uruguay's process of dealing with the past, different phases or categories of reparations policies can be identified: (1) compensation payments that were introduced immediately after the end of the dictatorship, (2) compensation payments that follow the recommendations of the Truth Commission (see 2.10.3) and (3) compensation payments awarded to victims by national or international courts.[134]

2.4.1 The First Compensation Payments After the End of the Dictatorship (1985 onwards)

After the end of the dictatorship, the first measures were taken that can be understood as reparations in a broader sense. It was – as Louise Mallinder writes – about reversing some of the damage. In the 1980s, however, no compensation in the strictest sense was awarded for victims of human rights violations.[135]

(i) The rehabilitation of the *Destituidos*

The *Ley de Pacificación Nacional* (Ley No. 15.373), regulating the amnesty and release of political prisoners, was passed immediately after Sanguinetti took office. This also

132 Skaar, 'Uruguay,' 70; Skaar, 'Un análisis de las reformas judiciales,' 167.
133 Galain, 'Uruguay,' 395.
134 Skaar, 'Uruguay,' 79.
135 Mallinder, *Uruguay's Evolving Experience*, 1; Lessa and Skaar, 'Uruguay,' 91.

addressed the professional rehabilitation of civil servants who had lost their jobs for political reasons (Art. 25).

In a further rehabilitation act (Ley No. 15.783) in the same year, other *Destituti-dos*, i.e. those dismissed for political reasons, were allowed to return to their former jobs or to equivalent positions. Possible promotions and levels of seniority were also to be taken into account when reinstating employees. For periods of political unemployment, the full pension entitlement was credited or – in the event of the death of the beneficiary – transferred to the relatives (Ley No. 15.783, Art. 1–27). This law enabled around 10,500 workers who had been laid off to return to their jobs, and around 6,000 pensions were approved. In the years that followed, different laws expanded the circle of recipients. These were mainly workers from the meat processing companies, which were important for the Uruguayan economy and were publicly owned (*Frigorífico Nacional*).[136]

(ii) Support for those returning from exile

In response to the fact that around 350,000 Uruguayans, around 12 percent of the population, had gone into exile during the dictatorship, the *Ley de Pacificación Nacional* made arrangements to make life easier for returning exiles.[137] Article 24 provided for the establishment of the *Comisión Nacional de Repatriación* (CNR), embedded within the Ministry of Education and Culture. The CNR, active from 1986 to 1989, supported the return and reintegration of exiles. Specifically, they helped with customs matters, consular issues, school registration for children, questions about healthcare insurance, etc. Loans and funding programmes for professional reintegration were also initiated.[138] The return of highly qualified workers was to be encouraged through special incentives. The CNR programs were financed by the UNHCR and UNDP, among others, as well as through donations.[139]

2.4.2 Compensation Payments in the Context of the *Comision para la Paz* (2000 onwards)

In the years after the adoption and confirmation of the *Ley de Caducidad* via referendum, coming to terms with the past played a minor role with less of a priority. In the context of this collective silence in relation to the past, the *Corte Interameri-*

136 For example, compare Ley No. 16.102, Ley No. 16.163, Ley No. 16.451, Ley No. 16.561 and Ley No. 17.449.

137 Ministerio de Educación y Cultura. Comisión Nacional de Repatriación, *Programa de la Comisión Nacional de Repatriación: Salud – Vivienada – Trabajo: Año 1986*, (Montevideo: MEC, 1986), 1f.

138 Ministerio de Educación y Cultura, *Programa de la Comisión Nacional de Repatriación*, 4–13.

139 Jorge Errandonea, 'Justicia transicional en Uruguay,' *Revista Instituto Interamericana de Derechos Humanos* 47 (2008): 13–69, 48.

cana de Derechos Humanos (29/92) report, in which the Uruguayan state was asked to adequately compensate the victims of human rights violations, received hardly any attention.[140]

It took the work of the Truth Commission *Comisión para la Paz* set up by President Batlle in 2000 to legally regulate further compensation measures (see 2.10.3). In its final report, the *Comisión para la Paz* spoke of the state's 'irrefutable duty' to 'alleviate or repair as far as possible the damage caused by the illegal and illegitimate conduct of its employees' (No. 77 and No. 79 respectively).[141] Specifically, the commission recommended the creation of a successor institution, the clarification of the legal status of the Disappeared and compensation that was to be 'integral and comprehensive' and would 'aim not only at satisfactory economic provision for the victims, but also at moral and emotional reparation' (No. 79). The Commission found that the Uruguayan President should officially recognize the results of the investigations and ensure that they were enforced. Appropriate compensation measures for the families of those affected should also be initiated.

The work of the Truth Commission had created a political and societal climate where people were aware of the crimes of the military dictatorship and of the need to seek legal and criminal redress for them. This opened the door for discussions about compensation measures for other groups of victims.

(i) Further regulation of pensions rights

Because the end of active employment was approaching for many of those who had been affected by work bans, there was a need for regulation with regards to the recognition and crediting of periods in which those affected had *not been allowed* to be employed. With this in mind, further legal regulations were made to offset those times against pension entitlements, in the same way as the existing regulations. For example, Ley No. 17.449 (2002) regulated the recognition of years in exile in relation to retirement benefits. Ley No. 18.033 (2006) expanded the circle of recipients and regulated the recognition of those people who had left the country for political reasons, who had been imprisoned or had been forced to go underground. This law also included people who had lost their jobs in the private sector for political reasons.[142] Finally, in Ley No. 17.949 (2006), the pension entitlements of those members of the armed forces who had been dismissed, sanctioned or demoted for political reasons during the period of state terrorism were regulated. Ley No. 17.620 (2003) expanded the group of beneficiaries of Ley No. 15.783 (1985) to include teachers in the public education sector.

140 Accessed 11 April 2022, http://www.cidh.oas.org/annualrep/92span/Uruguay10.029.htm.
141 Comisión para la Paz, *Informe Final*; the citations refer to the numbering of this document.
142 Rafael Giambruno, 'A mitad de camino: El gobierno de izquierda ante el desarrollo de políticas reparatorias en Uruguay (1985 – 2015),' in *Servicio Paz y Justicia – SERPAJ Uruguay, Derechos Humanos en el Uruguay: Informe 2016* (Montevideo: SERPAJ, 2016), 76 – 83, 76 – 78.

(ii) The clarification of the legal status of the 'Disappeared' (2005)

The 'disappearance' of people not only had serious social and psychological consequences for relatives. The uncertainty of the situation also gave rise to a number of property and civil law problems. For example, it was not easy to dispose of the property titles of the disappeared person or to remarry.

In order to achieve legal certainty and the capacity to act, relatives were often only given the option to have the disappeared person declared dead in relation to the relevant authorities. This was always particularly difficult for the families: they had to apply for a document from the state to prove the alleged death of the disappeared person. This same state they also held responsible for the disappearance of their relatives. The state had also long denied any responsibility for the disappearance, denied that their relatives had disappeared and had refused to provide any clarity about the disappearance.

In its follow-up report, the *Comisión para la Paz* called for a judicial clarification on the legal status of the Disappeared and explicitly referred to the regulation that had already been created in Argentina in 1995 for the cases of the Disappeared.[143]

In 2005, the legislature reacted to this precarious situation and established the Ley No. 17.894, which created the legal status of 'absence due to forced disappearance' (*declaración de ausencia por desaparición forzada*), by which the disappeared person was considered deceased in terms of civil and property law, without the relatives having to apply for a legal death certificate.

(iii) The Compensation Pension for Former Political Prisoners (2006)

From 2000 onwards, former political prisoners began to organize and demand their rights.[144] Up to that point they had not received any compensation, with the exception of their periods of imprisonment counting towards their retirement benefits. They therefore called for a *reparación integral*, which, in addition to financial compensation, included comprehensive recognition measures and extensive compensation for the damage caused.

After much debate, Ley No. 18.033 was finally adopted in 2006. This law provided for a small compensation pension for former political prisoners or exiles from the age of 60 onwards. Under certain conditions, this pension could also be transferred to relatives in the event of the death of the person concerned. However, this benefit was of a lower value than other pension payments and could not be combined with them, i.e. if they already received a pension greater than the compensation amount, then they did not receive the compensation. If their pension was less than the compensation amount, then they only received the difference between the two.[145] This

143 Comisión para la Paz, *Informe Final*, No. 76.

144 Lessa '¿Justicia o impunidad?,' 11.

145 Errandonea, 'Justicia transicional,' 48f.

'reparations law' therefore fell far short of the demands and expectations of those affected. Even when measured against international standards, its scope is rather limited.[146]

(iv) The Law for Integrated Compensation for Victims of the Dictatorship (2009)

In 2009, 24 years after the end of the dictatorship, a law on compensation for the victims of state terrorism was finally passed, which represents an actual law on *compensation* in the sense of a *reparación integral*.

The law formally recognized the 'breakdown of the rule of law,' which occurred from 1973 to 1985 and which 'hindered the realization of the fundamental rights of the person by violating human rights and the norms of humanitarian law' (Art. 1). The law also recognized the period from 1968 – 1973 as a state of emergency, when the state was responsible for the 'systematic practice of torture, forced disappearance, illegal imprisonment, murder, the destruction of the physical and mental integrity of persons and for political exile (Art. 2).' The law speaks clearly about the the 'ideological framework of the national security doctrine' or refers explicitly to 'state terrorism'.

In Article 3, the text of the law explicitly mentions the right to a 'reparación integral' for all those who have become victims due to the direct actions of the state or due to the state's failure to take action. The law also explicitly mentions the aspects of a *reparación integral* that are considered fundamental in an international context: restitution (*restitución*), compensation (*indemnización*), rehabilitation (*rehabilitación*), satisfaction (*satisfacción*) and a guarantee that these things will never happen again (*garantías de no repetición*).

The law defines a victim as all those persons whose 'right to life, to physical and psychological integrity, to freedom both inside and outside the national territory has been violated', either 'for political or ideological reasons' or because they belonged to certain groups. As a further prerequisite, the law states that the acts must have been committed with the participation of '*agentes del Estado*', i. e. state employees, or by people who acted with state authorization, support or consent. The period in which the prosecutable acts were committed extended from 1968 (i. e. the imposition of the state of emergency) to 1985 (Art. 4 and 5).

The law provides for the following distinct measures:

- Moral reparation through material and symbolic measures by which the dignity of the victims is restored and through which the state recognizes its responsibility for terrorism (Art. 7).
- Placing memorial and information boards at places where human rights violations have been committed (Art. 8).

146 The amount is adjusted to the relevant pricing trends. Those affected received around 470 euros (12/2020). This corresponded roughly to twice the minimum wage.

- Formal recognition of being a victim of state injustice in the form of an official document (for former prisoners; people who died in custody; the Disappeared; people who died as a result of illegitimate actions by the state; children who were born while their parents were in custody or who were imprisoned with them; disappeared children; political refugees, etc.) (Art. 9).
- Free and lifelong healthcare (including psychological, psychiatric and dental treatment) for people who were incarcerated for more than six months without sentencing or who were severely ill-treated while in detention, as well as for children who were detained or who were born in detention (Art. 10).
- One-off compensation payment for relatives of the Disappeared of 500,000 accounting units (UI – approx. 43,000 euros).[147] Victims of severe abuse receive a one-off payment of 250,000 UI (around 21,500 euros); disappeared children receive 375,000 UI (around 32,250 euros); Children who were born while their parents were in custody or were incarcerated with them for longer than 180 days receive 200,000 UI (17,500 euros).

The law also provided for the establishment of a *Comisión Especial*. This institution was to be embedded in the Ministry of Education and Culture (which also includes the Department of Justice) and was responsible for ensuring that the provisions of the law were implemented quickly.

As part of the implementation of the provisions of this Compensation Act, certain progress was made, especially with regard to the recognition of injustice, the policy of remembrance and commemoration, as well as the moral rehabilitation of the victims.

With regard to financial compensation, however, five years after the law was passed the balance sheet was still rather modest. According to Pablo de Greiff, the UN Special Rapporteur for the Promotion of Truth, Justice and Reparations, by mid-2014 only 360 applications for financial compensation had received a positive response. Furthermore, only 517 documents were issued that acknowledged and identified individuals as victims of state terrorism. De Greiff also criticized the fact that the newly created *Comisión Especial* did not have sufficient staff and infrastructure and that the staff were not adequately trained.[148]

147 The value of these 'unidades indexadas' (UI) is measured against the purchasing power of the Uruguayan peso and therefore varies. The euro amounts specified here were calculated on the basis of the value of a UI and the current exchange rate (as of 12/2020).

148 Pablo de Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non recurrence, Mission to Uruguay,' *Human Rights Council*, 27th session, A/HRC/27/56/Add. 2 (New York: United Nations, 2014), No. 42–51.

2.4.3 Reparations Received through Judicial Processes

After the adoption of the *Ley de Caducidad*, victims had take action to force the state to carry out further investigations and to admit guilt by means of civil suits. In some of these cases, it enabled victims or their relatives to obtain compensation payments (see 2.2.4).

The compensation payments for which the Uruguayan state was made responsible in the Gelman vs. Uruguay proceedings were of great public importance (see 2.2.6). The *Corte Interamericana de Derechos Humanos* demanded that Uruguay, among other things, carry out thorough investigations and bring those responsible to account. Likewise, the state was required to publicly recognize its responsibility for its crimes. The writer Juan Gelman had repeatedly called for an appropriate public act. In addition, the state was obliged to erect a plaque with the names of the victims who had been held in the secret service branch.[149]

As a result of this ruling, the Republic of Uruguay paid María Macarena Gelman compensation of 513,000 US dollars.[150] In March 2012, a public ceremony took place in the Uruguayan parliament, at which, in addition to the parliamentarians, the commanders-in-chief of the armed forces, the judges of the Supreme Court, Juan and Macarena Gelman, as well as representatives of human rights and victims' organizations and other civil society groups were present. In his 20-minute speech, President José Mujica acknowledged the responsibility of the state for the crimes committed against the Gelman family. He also underlined the victims' right to compensation.[151] While this act of moral rehabilitation and admission of guilt made explicit reference to the Gelman case, its meaning was far, far greater.

2.4.4 Symbolic Compensation

From the outset, the victims and victims' organizations demanded much more than simply financial compensation. They also demanded symbolic compensation, recognition of their victim status and of the responsibility of the state for the injustice that had affected them. A qualitative step here was the recognition of the final report and the conclusions of the *Comisión para la Paz* by President Jorge Batlle (Decreto No. 146/2003). In the following years, the politics of commemoration gained in importance and memorial sites were established etc. (see 2.8). The official apology by

149 Peralta, 'El caso Gelman', 210 – 213.

150 Debbie Sharnak, 'The Gelman Case and the Legacy of Impunity in Uruguay,' in *40 Years are Nothing: History and memory of the 1973 coups d'état in Uruguay and Chile*, ed. Pablo Leighton and Fernando López (Cambridge: Cambridge Scholars Publishing, 2015), 33 – 55, 43.

151 Francesca Lessa, 'Elusive Justice, Changing Memories and the Recent Past of Dictatorship and Violence in Uruguay: An Analysis of the 2012 Public Act in the Gelman Case,' *International Journal for Conflict and Violence* 8/1 (2014), 75 – 90, 81 f.

President José Mujica in the Gelman case (see 2.4.3) also represented a form of symbolic reparation that went beyond the specific case.

It is also of great symbolic importance that, in 2012, the *Servicio de Información de Defensa*, the military intelligence service building that also served as a detention and torture centre during the dictatorship, became the headquarters of the National Human Rights Institute (INDDHH). Again and again (local) initiatives of symbolic or moral reparation took place. In 2009, for example, the city of Montevideo declared ten children of those who had disappeared honorary citizens of the city.[152] Likewise – initially hesitantly, but from the year 2000 onwards more and more frequently – streets, schools or public institutions were named after people who were victims of state terrorism or who are particularly connected to the recent history of Uruguay. In Montevideo, for example, two streets and a square now bear the names of the two murdered parliamentarians Zelmar Michelini and Héctor Gutiérrez Ruiz.[153]

2.5 Reconciliation

The concept of reconciliation does not play a major role in how Uruguay is trying to come to terms with the past. It is not as if there is fundamental rejection of the concept, as is the case with many Argentinian human rights and victim organizations. The term reconciliation is hardly mentioned within political and social discussions. The term or concept that comes closest to reconciliation and that is used again and again in Uruguayan discourse (especially from the official perspective) is *pacificación*, i.e. rebuilding societal peace.

The reason for the limited uptake of the concept of reconciliation may be partially located in the religious connotations surrounding the concept. Uruguay is a nation where laicism plays a central role in its concept of self. The Catholic Church had acted cautiously during the dictatorship and had itself become a target of state repression.[154] With the exception of SERPAJ, the victims' and human rights organizations had no particular affinity with church and religion. In some early documents and declarations by SERPAJ, the term 'reconciliation' is used, which ties in with

152 Alonso, Larrobla and Risso, *Avanzar a tientas*, 107.

153 Virginia Martínez Guidolin, *Políticas de Memoria del pasado reciente en las ciudades de Montevideo y Buenos Aires* (MA-Thesis, Montevideo: Universidad de la República de Uruguay, Facultad de Ciencias Sociales, 2015), 68 – 78.

154 Veit Straßner, 'Uruguay,' in *Kirche und Katholizismus seit 1945*. Bd. 6: Lateinamerika und Karibik, ed. Johannes Meier and Veit Straßner (Paderborn: Schöningh, 2009), 433 – 446; Amy Edmonds, 'Moral Authority and Au- thoritarianism: The Catholic Church and the Military Regime in Uruguay,' *Journal of Church and State* 56/4 (2014): 644 – 669, 656 – 657.

the basic Christian orientation of this particular human rights organization.[155] Over time, however, the term came to be used less often within SERPAJ documents.

In terms of content, too, for years it seemed inappropriate to speak of 'reconciliation'. The armed forces made no significant effort to question their role during the dictatorship, to recognize institutional responsibility or indeed to ask for forgiveness. It was not until the end of 2020 that the commander-in-chief of the Army announced a 'process of historical analysis' of the Army's role during the dictatorship.[156]

2.6 Laws Relating to Transitional Justice

The issue of dealing with the past, and, in particular, issues around compensation, have always been dealt with in Uruguay in a legal manner. Since the origins, content and context of the development of the reparation laws have already been presented in more detail at relevant points in this study, a tabular overview of the relevant legal norms should suffice here in order to avoid duplication and repetition (Tab. 2).

Tab. 2: Laws relating to Transitional Justice in Uruguay.

Legal Norm	Year	Content
Ley No. 15.737	1985	*Ley de Pacificación Nacional:* Amnesty for political prisoners; Establishment of the National Repatriation Commission; Reinstatement of civil servants dismissed for political reasons, etc.
Ley No. 15.783	1985	Professional rehabilitation for individuals who had been dismissed for political reasons.
Decreto No. 127/985	1985	Renaming of the *Día de los Caídos en la Lucha contra la sedición* (Memorial Day for the Fallen in the Fight against the Insurrection) *to Día de los Caídos en la Lucha por la Defensa de las Instituciones Democráticas* (Memorial Day for the Fallen in the Struggle to Defend Democratic Institutions).
Ley No. 15.848	1986	*Ley de Caducidad de la pretensión punitiva del Estado:* Amnesty Law for the Members of the armed forces.
Ley No. 16.102	1989	Regulations surrounding the professional rehabilitation and awarding of pensions credits for workers in the publicly owned meat processing industry (*Frigorífico Nacional*).
Ley No. 16.163	1990	Regulations surrounding the professional rehabilitation and awarding of pensions credits for workers in the publicly owned meat processing industry (*Frigorífico Nacional*).

155 Stephan Ruderer and Veit Strassner, 'Ecumenism in National Security Dictatorships: Ecumenical Experiences in the Southern Cone,' in *A History of the Desire for Christian Unity*, Vol. III, ed. Alberto Melloni (Paderborn: Brill, forthcoming).

156 Ejército: el comandante pide asumir responsabilidad por dictadura, *El Observador* (07.11.2020).

Tab. 2: Laws relating to Transitional Justice in Uruguay. *(Continued)*

Legal Norm	Year	Content
Ley No. 16.451	1993	Regulations surrounding the professional rehabilitation and awarding of pensions credits for workers.
Ley No. 16.561	1994	Expansion of the scope of the beneficiaries covered by Ley No. 15.783 to include workers in the publicly owned meat processing industry (*Frigorífico Nacional*).
Ley No. 16.724	1995	Ratification of the *Convención Interamericana Sobre Desaparición Forzada de Personas* (Inter-American Convention on the forced disappearance of people).
Resolución No. 858/000	2000	Establishment of the Truth Commission *Comisión para la Paz*.
Ley No. 17.449	2002	Crediting of periods of exile towards pension entitlements.
Ley No. 17620	2003	Regulation of pension entitlements for teachers in the public education system who were banned from working during the dictatorship.
Decreto No. 146/2003	2003	Recognition of the final report of the *Comisión para la Paz* (includes recognition of state responsibility for human rights violations) .
Resolución No. 449/2003	2003	Establishment of the *Secretaría de Seguimiento* der *Comisión para la Paz*, the successor secretariat of the Truth Commission.
Ley No. 17.894	2005	Clarification of the legal status of the Disappeared through the *declaración de ausencia por desaparición forzada*.
Ley No. 17.949	2006	Regulation of pension entitlements for members of the military who had been sanctioned for political reasons.
Ley No. 18.033	2006	Regulation of pension entitlements for people who were excluded from gainful employment for political reasons due to work bans, exile, etc.
Ley No. 18.220	2007	Establishment of the *Sistema Nacional de Archivos* (National Archives System).
Ley No. 18.435	2008	Creation of the *Archivo Nacional de la Memoria* (National Memory Archive).
Ley No. 18.446	2008	Creation of the *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* (INDDHH) (National human rights institution and ombudsman).
Ley No. 18.596	2009	Comprehensive Law on Compensation for Victims of the Military Dictatorship.
Decreto No. 297/010	2010	Establishment of the *Oficina de Atención a las víctimas del terrorismo de Estado* (Office for the Care of Victims of State Terrorism) to implement the health services provided for in the Compensation Law Ley No. 18.596.
Ley No. 18.831	2011	Interpretation law for Ley No. 15.848 (*Ley de Caducidad*).

Tab. 2: Laws relating to Transitional Justice in Uruguay. *(Continued)*

Legal Norm	Year	Content
Resolución No. 450/011	2011	Establishment of a *Comisión Interministerial* to ensure compliance with the requirements of the judgement against the Uruguayan state in the Gelman case.
Resolución No. 548/012	2012	Rededication of the former military intelligence building as a memorial and the seat of the National Human Rights Institute.
Resolución No. 463/013	2013	Establishment of the *Secretaría de Derechos Humanos para el Pasado Reciente* (Human Rights Secretariat for the Recent Past).
Decreto No. 131/015	2015	Establishment of the working group for Truth and Justice (*Grupo de Trabajo por Verdad y Justicia*).
Ley No. 19.641	2018	Establishment of Memorials for the Remembrance of State Terrorism; Establishment of a memorials commission in the *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* (INDDHH).
Ley No. 19.822	2019	Transfer of responsibility for the search for the *detenidos desaparecidos* to the *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* (INDDHH).

Note: All the laws, decrees and ordinances listed here are now available online, but the URLs change frequently. See https://www.gub.uy/secretaria-derechos-humanos-pasado-reciente/institucional/normativa, accessed 11 April 2022, for details on many of the laws. The laws can also be easily found by a simple online search with the number of the law or decree (if necessary with the additional search criterion 'Uruguay').

2.7 Access to Files

2.7.1 State Archives

As in other countries with a comparable history, the question of the existence and accessibility of archives is of great relevance – both for investigating and coming to terms with the past and for possible legal proceedings.[157]

As in other countries, the armed forces initially denied the existence of archives from the time of the dictatorship. In the case of Uruguay, however, the demands for access to such archives were relatively muted, largely due to the position of strength held by the armed forces in the nation's post-authoritarian setting and the support of the governments. In addition, the referendum supporting the amnesty law also tied the hands of the judiciary.

157 Giulia Barrera, 'Of condors and judges: archival musings over a judicial investigation,' *Archival Science* 9 (2009): 203–214.

A change was already apparent during Jorge Batlle's time in power, but was only consolidated with the change of government in 2005.[158] In the course of the work of the Commission of Historians established by President Tabaré Vázquez (see 2.10.4), 19 archives referring directly and indirectly to the military dictatorship were discovered and evaluated. From an archival point of view, most of these archives were in a critical condition. In addition, they were incomplete and there was reason to believe that archival holdings had been destroyed. However, many documents were shared among the various institutions to increase mutual knowledge and were consequently archived several times. Historians were able to prove the existence of archives that were and are of crucial importance for legal proceedings, such as the archives of the military intelligence service SID or the *Organo Coordinador de Actividades Antisubversivas* (OCOA), the Office of Coordination for Anti-Subversion Activities. These archives, which fall under the responsibility of the Ministry of Defence or the armed forces, have not yet been located. The historians involved in transitional justice are of the opinion that these and other archives do exist and that the state must make more effort to locate them.[159]

In order to improve the situation with the archives, some laws were passed during President Vázquez's first term in power.[160] At the end of 2007, Ley No. 18.220 created the *Sistema nacional de Archivos* under the direction of the *Archivo General de la Nación*, part of the Ministry of Culture and Education. This archival system is intended to contribute to the 'conservation and organization of the documentary heritage of the nation and the documents of governmental administration' and thus to 'support the civil administration, culture, academic development' as well as serving as evidence for the courts (Art. 1). This archival system should include public and private archives that want to be included in the system (Art. 6).

The establishment of this archival system represented a significant step forward, since it not only regulated the financing of the archives, but also their accessibility for a broader public. However, more than ten years after the law was passed, it is still in the implementation phase – although significant parts of the law have already been put into practice.[161]

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158 Vania Markarian, 'Los documentos del pasado reciente como materiales de archive: Reflexiones desde el caso uruguayo,' *Contemporanea – Historia y problemas del siglo XX* 7/7 (2016): 178–190; Vania Markarian, 'Mal de archivos,' *La diaria* (25.04.2017).

159 Gerardo Caetano, 'Los archivos represivos y el debate sobre los criterios para su mejor utilización como instrumento de justicia y de derechos,' *Claves: Revista de Historia* 3/5 (2017): 155–183, 161–167.

160 Gerardo Caetano, 'Los archivos represivos en los procesos de "justicia transicional": una cuestión de derechos,' *Perfiles Latinoamericanos* 37 (2011): 9–32, 20.

161 Liliana Gargiulo Silvariño and Fabián Hernández Muñíz, 'Archivos y derechos humanos en Uruguay: Estado de la cuestión: La Secretaría de Derechos Humanos para el Pasado Reciente de la Presidencia de la República Oriental del Uruguay: génesis y acciones archivísticas actuales,' *Informatio* 23/1 (2018): 95–117, 100; Mauricio Vázquez Bevilacqua, 'A diez años de la creación del Sistema Na-

In connection with the restructuring of the archival system, the *Archivo Nacional de la Memoria*, the National Memory Archive, was created in 2008 (Ley No. 18.435). The archive is intended to contribute to underlining the importance of human rights and democracy and to realizing the 'individual and collective legal right to truth, memory and access to public information about state human rights violations' (Art. 2). Documents and (physical) archival materials and artifacts from the years 1973 to 1985, but also from the years before or after, should be included if they are relevant to an understanding of the military dictatorship. Art. 10 of the law stipulates that all public bodies are obliged to submit certified copies of any required documents to the *Archivo Nacional de la Memoria*. The *Ministerio de Educación y Cultura* is responsible for all resources necessary to run the archive.

However, after the law was passed, it was not possible to enact the relevant implementing provisions and secure funding, so the memory archive actually still has yet to come into existence.

2.7.2 Civil Society Initiatives

In addition to state archives, there are also archives relating to the human rights movement. The archive of the MFDD, organized with the support of students from the *Universidad de la República*, as well as the archives of SERPAJ, IELSUR and the human rights secretariat of the PIT-CNT, are of particular importance here.

(i) Digitizing and linking archival holdings

Lecturers and students from various faculties (including I.T./Computer Science and Communications) at the *Universidad de la República* have been involved in the *Cruzar* ('Crossing') project for a number of years, with the task of capturing and digitizing the holdings of public and civil society archives and making them accessible for computer-aided analysis. The research focus of this digital humanities project involves how the regime functioned.[162]

(ii) A Uruguayan Human Rights Wiki

In cooperation with MFDD, CRYSOL, SERPAJ and INDDHH, an initiative began in 2018 with the aim of improving the accessibility of reliable information on Wikipe-

cional de Archivos en Uruguay: Análisis de la Ley 18220,' *Revista de la Facultad de Derecho* 44 (2018): 1–32, 15, accessed 11 April 2022, http://dx.doi.org/10.22187/rfd2018n44a6.

162 Accessed 11 April 2022, https://cruzar.uy.

dia.[163] An extensive list of Wikipedia entries still waiting to be created was drawn up.[164] This initiative is explicitly motivated by the politics of remembrance, since the aim is to support certain perspectives on the recent past by providing reliable information.

(iii) The *Archivo Oral de la Memoria*

In the *Museo de la Memoria*, founded in 2006 (see 2.8.3), an *Archivo Oral de la Memoria* was created, in which around 70 filmed eyewitness interviews with victims of state repression and abuse, exiles and human rights activists, etc. are kept.[165] Access to this particular archive has to be specifically requested and justified. The idea behind the oral history archive stemmed from the conceptual preparatory work of the Argentinian initiative *Memoria Abierta*.[166]

2.8 Memorial Sites

After the return to democracy, questions of commemoration and remembrance did not initially play a significant role. Rather, the focus was on freeing the prisoners, the return of exiles and the integration of victims back into everyday life. The search for the Disappeared and the fight against the amnesty law were also central.

As the *Ley de Caducidad* had been supported by the people's referendum, criminal investigations and the clarification of human rights violations initially seemed impossible. Thus *Memoria* gained in importance as a substitute for the *Verdad y Justicia* that the people were denied. Despite this, it took a long time for the first commemorative initiatives to come into being in Uruguay.

2.8.1 The *Memorial* for the Disappeared

In 1998, under the leadership of the *Madres y Familiares* (see 2.11.2), together with the *Intendencia* (city government) of Montevideo, a project commenced to create a memorial for the *Detenidos Desaparecidos*. Mariano Arana, the mayor of Montevideo, himself an architect from the *Frente Amplio* party, supported the project. Public fig-

163 Rodrigo Barbano, 'Wikipedia y derechos humanos: construyendo memoria en territorios digitales,' in *Servicio Paz y Justicia – SERPAJ Uruguay*,' *Derechos Humanos en el Uruguay. Informe 2018* (Montevideo: SERPAJ, 2018), 293–296.

164 Accessed 11 April 2022, https://es.wikipedia.org/wiki/Wikipedia:Encuentros/Editat%C3%B3n_Wiki_DDHH_Uruguay_2018; accessed 11 April 2022, https://derechoshumanos.wikimedia.org.ar.

165 Martina Eva Garcia, 'Archivo, Testimonios y Memorias en Uruguay,' *Aletheia* 10/20 (2020): 1–13, 5 f., accessed 11 April 2022, https://doi.org/10.24215/18533701e051.

166 See Strassner's chapter on Argentina in this volume.

ures and representatives of civil society groups participated in the *Comisión Nacional Pro-Memorial*. The tender was issued in 1999, and a beautifully-situated area on the Bay of Montevideo was selected as the location.[167]

The *Memorial* was opened on 10 December 2001, International Human Rights Day. The glass wall contains the names of the Disappeared, which was a cause of difficulty during its creation, as there was, and still is, no definitive list of all the names of the Disappeared.[168] The production costs of around 300,000 US dollars were covered by the city of Montevideo and through public donations.[169]

2.8.2 *Marcas de la Memoria* – Traces of Memory

From 2005 onwards, on the initiative of the *Asociación Memoria de la Resistencia* 1973 – 1985 (see 2.11.2), the trade union confederation PIT-CNT and the Faculty of Architecture, commemorative plaques were set in the ground in various places in Montevideo that are emblematic of resistance against the dictatorship. Public seating invites lingering at the sites. The project has been continuously expanded over the years. Some of the paths to these memorial sites are signposted so that individuals can follow the 'footsteps of memory'.[170]

2.8.3 The *Museo de la Memoria*

The *Museo de la Memoria*, created in 2006 and opened on International Human Rights Day 2007, is maintained by the City of Montevideo. It is housed in a stately home that had been owned by a senior member of the military from the end of the nineteenth century. The house is located near the secret detention and torture centre known as *300 Carlos – Infierno grande* ('Great Purgatory') in a district of Montevideo. The initiative for this museum came from civil society as well as from the city and government. Victims and human rights organizations such as *Madres y Familiares*, CRYSOL, SERPAJ and the human rights secretariat of the PIT-CNT were involved in the specific design.

In the entrance area one can see the concrete slab under which the remains of Fernando Miranda, found on a military site by forensic archaeologists in 2005, were

167 See the following link for a visual representation, accessed 11 April 2022, http://concursos.fadu.edu.uy/index.php/concursos/memorial-en-recordacion-a-los-detenidos-desaparecidos/.

168 Eugenia Allier Montaño, 'Recordar para reparar: la imagen de los desaparecidos uruguayos en el "Memorial a los detenidos-desaparecidos",' *ILCEA – Revue de l'"Institut des langues et cultures d'Europe, Amérique, Afrique, Asie et Australie* 26 (2016): 1 – 21, 9 f., accessed 11 April 2022, https://doi.org/10.4000/ilcea.3968.

169 Martínez, *Políticas de Memoria*, 49 – 51.

170 Martínez, *Políticas de Memoria*, 51 – 53.

hidden.[171] In addition to documents and photos, the museum mainly contains physical objects from the dictatorship period, video installations and sound recordings. The permanent exhibition consists of several rooms with different themes: the beginning of the dictatorship, resistance against the dictatorship, the prisons (mainly with exhibits from the *Libertad* prison and other prisons); the exile; the Disappeared; the return to democracy.[172]

The museum is mainly visited by school classes, educators and influencers, but also by tourists and other interested parties. In addition to the permanent exhibition, the museum also regularly hosts relevant cultural events, workshops, lectures and film screenings, etc. The museum also provides touring exhibitions that are shown in other locations, especially inland. In 2018, the *Museo de la Memoria* had almost 40,000 visitors (including around 12,000 visitors to their touring exhibitions).[173]

2.8.4 The Establishment of Memorials in Places Relevant to the Dictatorship

Across the whole country there were almost 100 places where people were imprisoned, ill-treated and tortured during the dictatorship. Often, these locations were (or are still) located on sites that were run by the armed forces. In many cases, however, these places and buildings have changed function over the course of time.[174]

As a result of local initiatives, several of these sites of repression were converted into memorial sites over time. In some cases, small exhibitions were set up, but often only notices or information boards were erected.[175]

2.8.5 The Memorials Act and the Memorials Commission (2018 Onwards)

In 2015, former inmates of the Detention and Torture Centre *300 Carlos – Infierno grande* and the *Museo de la Memoria* submitted a proposal to intensify and coordinate the activities of the different memorial sites. The steering group drew up a

171 Fernando Miranda's son, the lawyer Javier Miranda, is one of the leading activists in the MFDD and is an active member of the *Frente Amplio* political party.

172 Martínez, *Políticas de Memoria*, 53–61.

173 Museo de la Memoria, *Informe 2019* (Montevideo: Museo de la Memoria, 2019), 14.

174 Magdalena Broquetas, *Huellas de la repression: Identificación de centros de detención del autoritarismo y la dictadura (1968–1985)* (Montevideo: Centro Municipal de Fotografía, 2008); Mariana Risso and Manuela Abrahan, 'Desde el fondo del tiempo otro tiempo: Apuntes sobre el proceso de identificación y recuperación para la memoria de los espacios represivos del terrorismo de Estado uruguayo,' *Aletheia* 8/16 (2018), accessed 11 April 2022, https://www.aletheia.fahce.unlp.edu.ar/article/view/ATHv8n16a06/10778.

175 Martínez, *Políticas de Memoria*, 61–68.

draft law that was passed by parliament, discussed for the first time in the Senate in 2017, and finally passed as law in 2018 as Ley No. 19.641.[176]

This law regulates the erection of memorials in places 'where people became victims of state terrorism or of illegitimate state action'. These memorials should serve as 'publicly accessible places of recovery, for the creation and communication of memories' and should represent 'a homage (*homenaje*) and compensation' for the victims and their communities (Art. 3).

The concept of 'places of remembrance' was defined in the law. It refers to physical places where (a) human rights violations were committed, or (b) where resistance against the dictatorship took place or (c) places that were created with the declared aim of preserving and passing on memories (e. g. memorials, museums etc.) (Art. 4).

The law provided for the establishment of a *Comisión Nacional Honoraria de Sitios de Memoria*, an honorary National Memorial Commission, which is based at the INDDHH and is composed of representatives from government agencies and ministries as well as civil society groups. This commission decides on the applications for the construction of memorials, ensures their functionality and promotes the establishment of local groups to look after the memorials, etc.

The law also provided for the creation of a *Red Nacional de Sitios de Memoria*, a national network of memorials by which the local memorial commissions are organized, and which exists to promote activities such as research, memorial work and human rights education.[177] A memorial site guide published by the *Grupo de Trabajo por Verdad y Justicia* (see 2.10.5) and the Human Rights Secretariat in 2019 lists 179 different memorial sites across the country.[178] They range from large-scale memorials such as the Memorial for the Disappeared or the *Museo de la Memoria* to small memorial plaques. There have been repeated attacks on and desecration of memorial sites in recent years. Most of the time, however, the motivations of those responsible remain unknown.

176 Manuela Abrahan and Mariana Risso, 'Llena de hondos silencios: Los debates en torno a la aprobación de la ley de Sitios de Memoria Histórica del Pasado Reciente N° 19.641,' in *Servicio Paz y Justicia – SERPAJ Uruguay, Derechos Humanos en el Uruguay: Informe 2018* (Montevideo: SERPAJ, 2018), 50 – 65.

177 Malena Laucero and Efraín Olivera, 'Memoria y sitios de memoria: el pasado en disputa,' *in Servicio Paz y Justicia – SERPAJ Uruguay, Derechos Humanos en el Uruguay: Informe 2019* (Montevideo: SERPAJ, 2019), 100 – 114.

178 *Guía de Lugares de Memoria del Pasado Reciente del Uruguay* (Montevideo: GTVJ/Secretaría de Derechos Humanos para el Pasado Reciente, 2019).

2.9 Commemorative Events

2.9.1 Commemorative Event in the Human Rights Movement: The *Marchas de Silencio*

The Uruguayan human rights movement regularly utilized and continues to use established memorial days such as 30 August (The International Day of the 'Disappeared') or 10 December (International Human Rights Day) to raise awareness through events and press releases. In addition, there are other dates when the human rights violations of the dictatorship and its victims are remembered in different ways. Of central importance here is 20 May, the day on which senator Zelmar Michelini and MP Héctor Gutiérrez Ruiz were murdered.

With the referendum against the *Ley de Caducidad* in 1989, the concerns of the human rights movement disappeared from the public consciousness for years. It was not until the mid-1990s that social awareness of these topics increased again. This was due not least to developments in Argentina, where a former officer gave an interview about his involvement in the 'death flights,' in which prisoners were thrown out over the Río de la Plata or into the open sea. These confessions drew new attention to the human rights violations of the dictatorship in Argentina, but also on the other side of the river: in Uruguay.

The charismatic Senator Rafael Michelini (*Frente Amplio*), son of the Uruguayan politician Zelmar Michelini, who was murdered in Buenos Aires in 1976, recognized the shift in public consciousness and made the most of it. On the 20th anniversary of the murder of his father and of Héctor Gutiérrez Ruiz, he called for a *Marcha de Silencio*, a silent march. He especially invited human rights organizations, trade unions, political parties and civil society organizations to attend. In order to avoid any (party) political monopolizing of the purpose of the event and of the event itself, he asked all attendees not to carry party flags or other political symbols. As it was to be a silent march, speeches would not take place. At the end of the *Marcha*, after singing the national anthem, the gathering should simply quietly dissolve. Everything should be avoided that would water down the simple but insistent demand for *complete* compliance with the amnesty law. Initially, it was not a question of questioning the Amnesty Act, but of criticizing its partial implementation, namely that all proceedings were discontinued (or not even started) without the state fulfilling its obligation under Article 4: the clarification of the fate of the *Desaparecidos*.

50,000 people took part in this first silent march, although the two traditional parties had advised against it.[179] This *Marcha* marked a turning point in Uruguay's politics of the past: this silent accusation of the armed forces' and the government's

179 Aldo Marchesi, '¿"Guerra" o "Terrorismo de estado"? Recuerdos enfrentados sobre el pasado reciente uruguayo,' in *Las conmemoraciones: Las disputas en las fechas 'in-felices"*, ed. Elizabeth Jelin (Madrid: Siglo XXI, 2002), 101–147, 134–138.

policy of stalling made it clear that, for large parts of society, the process of coming to terms with the past had not come to an end with the referendum of 1989.

These *Marchas de Silencio* have been held annually since 1996. The motto of the first silent march was *Verdad, memoria, nunca más* (Truth, Memory, Never Again). In the following years, the topics of truth, clarification and remembrance also dominated.[180]

A notable turning point can be seen in 2005, the year in which the left-wing *Frente Amplio* politician Tabaré Vázquez came to power. From that year on, the demand for *Justicia* appeared in the mottos of the silent march:

- *Para el pasado: verdad; en el presente: justicia; por siempre: memoria y nunca más* (2005; For the past: truth; For the present: justice; Forever: to be remembered and never repeated)
- *Basta de impunidad. Justicia para los crímenes de lesa humanidad* (2006; Enough with impunity. Justice for crimes against humanity)
- *Verdad y justicia. Derechos de todos. Responsabilidad del Estado* (2011; Truth and Justice. The Rights of All. Responsibility of the State)
- *En mi patria no hay justicia. ¿Quiénes son los responsables?* (2013; There is no justice in my homeland. Who are those responsible?)
- *Son memoria. Son presente. ¿Dónde están?* (2020 in virtual form because of the COVID pandemic; They are memory. They are present. Where are they?).[181]

The changes in the mottos chosen for each year show how the demands have expanded: from the modest demand for comprehensive implementation of the amnesty law to direct criticism of the government to the clear demand for the punishment of the perpetrators and for the amnesty to be lifted.

2.9.2 The Struggle for a Day of National Remembrance

Unlike in other countries, the Uruguayan military had not made the day of the coup a commemorative or even a public holiday. In 1975, however, 14 April was declared the *Día de los caídos en la lucha contra la sedición*, the 'Day of the Fallen in the Fight against the Insurrection'. On that day in 1972, four members of the armed forces and security forces belonging to a death squad were murdered by the *Tupamaros*. On the same day, another eight *Tupamaros* were killed in response to the attack.

From 1975 to 1985, this day officially commemorated those who had died in the fight against subversion. In 1985, after the return to democracy, President Sanguinetti declared the day the *Día de los Caídos en la Lucha por la Defensa de las Instituciones*

180 Alonso, Larrobla and Risso, *Avanzar a tientas*, 186 f.

181 Micaela Boiani et al., 'Otro 20 de mayo,' in *Servicio Paz y Justicia – SERPAJ Uruguay*, *Derechos Humanos en el Uruguay. Informe 2020* (Montevideo: SERPAJ, 2020), 41–44.

Democráticas, the 'Day of the Fallen in the Struggle to Defend Democratic Institutions' (Decreto 127/985). The military actually refused to accept this rededication and for years continued to celebrate the day of remembrance for those killed in the anti-subversion struggle.[182] President Tabaré Vázquez abolished this memorial day in 2006, which caused the armed forces great annoyance. He announced that he would make suggestions for a more suitable day of remembrance. Since 2007, 19 June, the birthday of the national hero and 'father of Uruguayan independence' José Artigas, has been the *Día del Nunca Más* in memory of the victims of state terrorism and of guerrilla activities.[183] While President Vázquez was accompanied by high-ranking politicians at the laying of the wreath on the first official *Día del Nunca Más*, his deputy took over this task the following year. When José Mujica came to power, this day of remembrance quietly disappeared from the government's official calendar.[184]

2.10 Transitional Justice Institutions

In the context of Uruguayan ways of dealing with their authoritarian past, a large number of different methods were used: parliamentary investigative commissions, civil society information initiatives, a presidential truth commission, an investigative commission made up of forensic archaeologists, anthropologists and historians, etc. Those following the work of each institution were clear that the actual *number* of bodies set up to investigate the past was itself not a definitive mark of quality. More important was the extent to which the state had now fulfilled its moral and legal obligations to investigate and clarify the fate of the Disappeared, as set out in Article 4 of the *Ley de Caducidad*.

2.10.1 The Parliamentary Investigative Commission

Shortly after the return to democracy, the Chamber of Deputies set up two parliamentary investigative commissions on the initiative of the *Frente Amplio* and the *Blancos:* the *Comisión Investigadora sobre Situación de Personas Desaparecidas y los Hechos que la motivaron* (Investigative Commission on the Fate of the Disappeared and the Motivation behind it) and the commission to investigate the kidnapping and sub-

182 Eugenia Allier Montaño, 'Lugar de memoria: ¿un concepto para el análisis de las luchas memoriales? El caso de Uruguay y su pasado reciente,' *Cuadernos del CLAEH* 2/31 (2008): 87–109, 103f.
183 de Giorgi, 'El "Nunca Más" uruguayo,' 63–96.
184 A diez años, '¿nunca más el Día del Nunca Más? La conmemoración no figura siquiera en la agenda oficial de la Presidencia de la República,' *El País*, 19 June 2017, accessed 11 April 2022, https://www.elpais.com.uy/informacion/diez-anos-nunca-dia-nunca.html.

sequent murder of the two Uruguayan parliamentarians Héctor Gutiérrez Ruiz and Zelmar Michelini in Buenos Aires in 1976.[185]

Neither commission could count on the support of the executive, nor did they have investigative powers, so they had to rely on the cooperation of possible witnesses and, above all, of the armed forces. The results were therefore limited in range.[186] The findings of the commission investigating the murders of Héctor Gutiérrez Ruiz and Zelmar Michelini were not published, but, rather, were handed over to the military judiciary in May 1986. This crime was never solved and those responsible were not convicted.

The commission set up to investigate the fate of the Disappeared prepared a final report after seven months of work, but this was not made available to the public. The main results of the commission's work were presented in parliament.[187] The commission documented 164 'forced disappearances' from 1973 to 1978 (118 men, 38 women and 8 children). In 32 cases the individuals disappeared in Uruguay itself, but the majority of Uruguayans disappeared in Argentina (127), whereby testimonies could prove that Uruguayan forces were involved in these *desapariciones*.

The commission underlined the cruelty behind these acts and characterized them as 'crimes against humanity'. The report concluded that although the armed forces were involved in these crimes, it was not possible to assign responsibility to the armed forces or to claim that these acts represented an institutional practice. The report also states: 'It is not up to the commission to assess the documents submitted. Another state authority empowered to do so by the constitution will be the one that will definitively condemn the guilty.'[188] The commission recognized the limited scope of its own areas of responsibility, but spelled out that the judiciary was 'equipped with the appropriate technical and constitutional powers to swiftly and conclusively establish the facts, clarify the responsibilities and punish the guilty and will be given the appropriate technical and constitutional powers. Quickly and finally clarify the facts, assign responsibility and punish the guilty.'[189]

Human rights organizations that had managed to get hold of the full report alleged that the published conclusions contradicted the facts gathered in the report, which led them to conclude that the commission had been subject to strong political interference.[190]

The work of these two commissions can only be seen as a genuine contribution to the search for truth to a very limited extent. As their powers were restricted, the

185 Marchesi, '¿"Guerra" o "Terrorismo de estado"?,' 124–127.

186 Felipe Michelini, 'La experiencia del Cono Sur en materia de comisiones de la verdad,' in *Verdad y Justicia: Homenaje a Emilio F. Mignone*, ed. Juan E. Méndez, Martín Abregú and Javier Mariezcurrena (San José de Costa Rica: Instituto Interamericano de Derechos Humanos, 2001), 173–206, 186 f.

187 Diario de sesiones de la Camara de Representantes, 07 November 1985, 511–517.

188 Diario de sesiones de la Camara de Representantes, 07 November 1985, 516.

189 Diario de sesiones de la Camara de Representantes, 07 November 1985, 517.

190 Straßner, *Die offenen Wunden Lateinamerikas*, 175.

results were not made available to the nation and it can be reasonably assumed that political interests influenced their work. Instead of forwarding the results of the commission's work to the judiciary, as the commission had requested, these were subsequently submitted to the President so that he could decide how to proceed. He then ordered the military prosecutor to investigate the incidents or actually decided that no investigations should take place. In both cases, however, the result was the same: there was no criminal investigation of the human rights violations.[191]

2.10.2 *Uruguay Nunca Más* – Civil Society's Attempted Search for Truth

After the adoption of the *Ley de Caducidad* led to the expectation that there would be no judicial clarification or criminal investigations, and after it became clear that the parliamentary commission of inquiry could (or would) not make a substantial contribution to the search for the truth, the human rights organization SERPAJ took up an idea that had already been around for some time: the creation of a Uruguayan *Nunca Más*. This was the title of the report of the Argentinian truth commission CONADEP, which, at the end of 1984, presented its report on the dictatorship's human rights violations, on the disappearance of people and on the systematic nature of the repressive system.[192]

SERPAJ Uruguay wanted to produce a report on the systematic violations of basic human rights during the dictatorship and thus make a contribution to collective memory. The report was not drawn up by an official commission, but by a network of SERPAJ employees, lawyers and an external polling institute. SERPAJ could not fall back on extensive human or material resources, nor did they have access to official or military sources and archives. The investigation was therefore based on the documentation of human rights and victims' organizations, newspaper reports, testimonies and around 300 qualitative interviews.[193] In contrast to the Argentinian *Nunca Más* report, for example, the SERPAJ study did not focus exclusively on the Disappeared, but also focused on the imprisoned and the exiles.[194]

The 442-page report is divided into three parts: the first part analyses the historical background; the second examines the various aspects of Uruguayan state terror-

191 Skaar, 'Uruguay,'73.

192 Emilio Crenzel, 'Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice,' *The International Journal of Transitional Justice* 2 (2008): 173 – 191.

193 Straßner, *Die offenen Wunden Lateinamerikas*, 178.

194 Alberto Aldo Marchesi, *"Las lecciones del pasado", memoria y ciudadanía en los informes "nunca más"* (Informe final del concurso: Culturas e identidades en América Latina y el Caribe. Programa Regional de Becas CLACSO, 2001), 18 – 21, accessed 11 April 2022, http://bibliotecavirtual.clacso.org.ar/ar/libros/becas/2000/marchesi.pdf.

ism and human rights violations. The third part looks at the consequences of the repression for the population and for the exiles.[195]

With an initial print run of 1000 and two other editions of the same size, the spread and impact of the report were rather limited.[196] Nevertheless, *Uruguay Nunca Más* is still one of the most in-depth works on human rights violations during the Uruguayan dictatorship.

The report was presented to the public in March 1989 – a few weeks before the referendum on the *Ley de Caducidad*. It was initially received with interest by the general public and by those who had an affinity for human rights, and its findings supported their arguments against the amnesty solution. The other side largely ignored the report in order to avoid wider public debate. When the amnesty law was confirmed by the referendum, the effect of *Uruguay Nunca Más* also evaporated. In the years that followed, there was widespread silence about the dictatorship's human rights violations. It was not until the change of government in 2000 that new opportunities for transitional justice opened up.[197]

2.10.3 *Comisión para la Paz*

When the *Colorado* politician Jorge Batlle came into power on 1 March 2000, a new phase began in terms of dealing with the past. He recognized that – especially in view of the importance that the issue had acquired in the region – continuing the government's refusal to address the demands of the victims of the dictatorship was not appropriate.

Coming to terms with the past is necessary in order to 'seal peace among the Uruguayans' – according to the motto of his politics of the past. In April 2000, he announced a package of measures for 'national pacification' which would create a solution to the issue of the Disappeared and put in place compensation measures for former political prisoners and exiles. Batlle was also the first president to seek direct dialogue with victims and to meet with representatives from *Madres y Familiares*.[198]

In August 2000, 15 years after the end of the dictatorship, the truth commission, *Comisión para la Paz*, was finally set up. Just a few years earlier, such a development would have been unthinkable due to the political situation and the preferences of the

195 *Uruguay Nunca Más*.

196 Luis Roniger, 'Olvido, memoria colectiva e identidades: Uruguay en el contexto del Cono Sur,' in *La imposibilidad del olvido: Recorridos de la memoria en Argentina, Chile y Uruguay*, ed. Bruno Groppo and Patricia Flier (La Plata: Al Margen/Bibliothéque de Documentation Internationale Contemporaine, 2001), 151–178, 164.

197 Skaar, 'Uruguay,' 73.

198 Carlos Marín Suárez and Azul Cordo, 'Políticas de memoria en Uruguay: entre el control, la acción y la pasión,' in *Servicio Paz y Justicia – SERPAJ Uruguay, Derechos Humanos en el Uruguay: Informe 2015* (Montevideo: SERPAJ, 2015), 39–47, 40.

elite. The commission, made up of six voluntary members, had four months to complete the task of collecting information to clarify the fate of the Disappeared. To try to meet this deadline, the commission members held talks with relatives and possible informants and evaluated the documentation from the human rights organizations and relatives. However, they were denied access to the military archives. President Batlle himself led the discussions with the military leadership.

The mandate was extended several times, so that, in the end, the work of the commission lasted over 32 months. The delays were due to the difficulties posed to investigations and the limited amount of time allocated to the task. In addition, the commissioners were all voluntary, were not investigative specialists and struggled to deal with the heavy demands of the role alongside their other jobs and obligations. In addition, the armed forces, who were the only ones who had in-depth information, showed little willingness to cooperate. Despite the extended period of time involved, the population took an active part in the work of the commission.[199]

In April 2003, the *Comisión para la Paz* finally presented its results.[200] As the commission itself had to admit, the results were simply the *verdad posible*, that is, the only *likely* truth that it could come to under the given circumstances. It could not reconstruct the fate of the Disappeared, but could only 'confirm the veracity of the facts which – although often denied – must now be recognized as part of official history' (No 42). The commission confirmed the disappearance of 26 Uruguayans in Uruguay; it was also possible to (partially) confirm that 126 Uruguayans in Argentina and a further 13 in other countries had disappeared. In the course of the commission's work, only the remains of one *Desparecido* were found. The commission reproduced the statements of the armed forces without adopting them: i. e. that the corpses were exhumed before 1984, the remains burned and the ashes dumped into the Río de la Plata (No 52).

The relatives of the Disappeared thanked the commissioners for their commitment and praised the fact that, for the first time, what had always been disputed was now officially recognized. The claim that the bodies could not be found, however, they rejected as politically and strategically motivated. The *Madres y Familiares de Uruguayos Detenidos Desaparecidos* (MFDD, Mothers and Relatives of the Detained Disappeared) demanded that the government make comprehensive reparations to the victims which, in addition to the complete clarification of the still-unanswered questions, must also include the punishment of the perpetrators. This demand represented a turning point in the attitude of the MFDD. Previously they had held back from making this demand – largely out of respect for the result of the 1989 referendum.[201] The organization had realized that the new social and political climate now allowed this sensitive question to be raised and with it the demands for justice. It did

199 Straßner, *Die offenen Wunden Lateinamerikas*, 200 f.

200 *Comisión para la Paz*, *Informe Final*. The information on the following quotations refer to the numbers in that document.

201 Straßner, *Die offenen Wunden Lateinamerikas*, 210 ff.

so without disrespecting the *Ley de Caducidad*, but by citing the latest developments in international case law on human rights issues, which provided for the guilty to be punished in the event of a violent disappearance despite existing amnesty laws.[202] For the MFDD, the work of the commission was the first step, but many others had to follow.

President Batlle, on the other hand, came to a different conclusion. To the astonishment of even the commissioners, he declared that once the commission's work was completed, the state's obligations to clarify the fate of the *Desaparecidos* in accordance with Article 4 of the *Ley de Caducidad* had been fulfilled. The human rights movement felt betrayed by the Batlle government, with which it had so far maintained a constructive relationship, as it was never mentioned in advance that the Truth Commission would draw a definitive line under the past.

It can be assumed that the government tried to minimize the level of conflict in order to avoid further difficulties with the military. The potential political costs of further investigations or even criminal proceedings against members of the armed forces appeared to be higher than the expected political benefits.

2.10.4 Historical Investigations and the Search for Truth: The Historians' Commission

Unlike his predecessors, the *Frente Amplio* politician Tabaré Vázquez, president from 2005 to 2010 after his historic left-wing election victory, felt that the duties of Article 4 of the *Ley de Caducidad* had not been adequately fulfilled. He commissioned a team of forensic archaeologists and anthropologists to carry out investigations and excavations on the site of *Batallón 13*, as well as in cemeteries and at other places where it was suspected that there were remains of the Disappeared.[203]

In addition to the *Grupo de Investigación en Antropología Forense* study, a Historians' Commission was set up to use historical means to review the years of the military dictatorship and to support the work of the forensic scientists. In 2005, an agreement was signed with the *Universidad de la República* in Montevideo.[204] The 20 or so historians involved first worked on the documentation from the *Comisión para la Paz* and, on this basis, created datasets for each individual who had disappeared, into

202 There are several possible arguments. The disappearance can be interpreted as a kidnapping that has continued to this day if the remains have not been found. If so, the offence is still in existence now and therefore falls outside of the period covered by the amnesty. Another option is to invoke international human rights norms that take precedence over national law.

203 *Investigaciones Arqueológicas sobre Detenidos Desaparecidos en la última dictadura cívico-militar.* Informes de Actividades, by Grupo de Investigación en Antropología Forense (GIAF Uruguay) (Montevideo: GIAF, 2006), accessed 11 April 2022, https://www.gub.uy/secretaria-derechos-humanos-pasado-reciente/tematica/antropologicas.

204 Larrobla and Larrobla, 'Las investigaciones históricas,' 1–11.

which the findings from other archives were then incorporated. Historians were given access to archives that were not accessible to the public (and in, some cases, are still not), such as the archives of the secret service, the interior and foreign ministries, the military health service and even the military justice system. Other public and private archives were also evaluated. On this basis, a five-volume documentation was created about the Disappeared, which was presented to the public in 2007. The report runs to well over 3,000 pages, which offer detailed information on each disappeared individual but also on the system of repression. There are many transcripts of archival material in these volumes.[205] These historical works are also relevant for the criminal investigation of human rights violations.

While the study *Investigación Histórica sobre Detenidos Desaparecidos* focused on the Disappeared, the three volumes published in 2008 dealt with the dictatorship and with state terrorism itself, with further human rights violations and the consequences of repression for Uruguayan society. Here, too, there is an extensive compilation of original documents and archival materials that allow fresh insights into state terrorism.[206]

However, the work of the Historians' Commission did not end with the publication of the aforementioned volumes. Rather, additions and updates were and are constantly being made – especially when new archives are discovered or made accessible.[207]

2.10.5 The *Grupo de Trabajo por Verdad y Justicia* (Truth and Justice Working Group), 2015 – 2019

At the beginning of his second term in 2015, President Tabaré Vázquez set up a Truth and Justice Working Group, *Grupo de Trabajo por Verdad y Justicia* (GTVJ), in order to pursue the investigation of human rights violations. Its main task, mentioned in its founding decree, was 'to investigate the crimes against humanity' committed by state forces from 1968 to 1985. The work of the group should help 'to shed light on these events, drawing on historical truth and to promote justice in accordance with the rule of law and on the basis of international norms and standards of truth, justice, remembrance and guarantees that this will never happen again' (Decreto 131/015, Art. 1).

The group consisted of seven people who were known and valued for their personal integrity and their commitment to human rights. Among them were Felipe Michelini, María Macarena Gelman and two other representatives of the MFDD. The GTVJ received institutional support from the *Secretaría de Derechos Humanos para*

205 *Investigación histórica sobre Detenidos Desaparecidos.*
206 *Investigación histórica sobre la dictadura y el terrorismo de Estado.*
207 Larrobla and Larrobla, 'Las investigaciones históricas,' 5 – 8.

el Pasado Reciente (SDHPR). It was hoped that the fact that the GTVJ was affiliated with the government would speed up processes and thus advance the investigations.

Although the establishment of this working group was initially welcomed – not least because of the moral and political weight of its members – critical voices soon became apparent. The annual report of SERPAJ from 2016 says:

> Something about this group reminds us of the *Comisión para la Paz*. 18 months have passed since it was founded, there has been little communication with citizens and even less information has been made public. We all know that untying the knots that hinder investigation is a difficult task. Nobody expects the truth in two days. But what we are demanding – and that is our civic duty – is greater transparency.[208]

It did actually take a long time before the GTVJ was organized and found its rhythm in working in partnership with the SDHPR. The group worked out a suggestion for improving compensation measures, maintained contacts with the relevant ministries, tried to gain access to the archives and coordinated the work of the forensic experts, etc.

In 2018, however, *Madres y Familiares* declared their withdrawal from the group. They justified this, amongst other things, by citing the fact that bureaucratic procedures had made the work effectively impossible. Their main criticism, however, was directed at the armed forces, whose refusal tactics had blocked the search for the Disappeared. More than that, the *Madres y Familiares* criticized the government itself for being reluctant to make use of its right to issue instructions and to force the armed forces to surrender the necessary files and information. As *Madres y Familiares* wrote in their press release:

> The responsibility to investigate, ensure justice and find our loved ones was, is, and will always be a state responsibility – regardless of whether or not *we* as an organization participate in institutions or in working groups. Finding the Disappeared should not just be the fight of the relatives. It is the right of every citizen of a free country not to be kidnapped, not to be tortured, not to be murdered or to be disappeared.[209]

The decision of the most important victims' association to withdraw from the GTVJ and other obvious problems caused the group to be disbanded in 2019.[210] The human rights lawyer Pablo Chargoñía and others refer to the 'obvious failure" of

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208 Malena Laucero, 'Los Centros clandestinos: Núcleo duro de la Política Terrorista del Estado,' in *Servicio Paz y Justicia – SERPAJ* Uruguay, *Derechos Humanos en el Uruguay: Informe 2016* (Montevideo: SERPAJ, 2016), 84–99, 93.

209 Madres y Familiares de Detenidos Desaparecidos, *Comunicado a la opinión pública* (1 May 2018).

210 Grupo de Trabajo Por Verdad y Justicia, *Informe final* (Montevideo: GTVJ, 2019), accessed 11 April 2022, https://www.gub.uy/secretaria-derechos-humanos-pasado-reciente/sites/secretaria-derechos-humanos-pasado-reciente/files/documentos/noticias/Informe%20final%20Grupo%20de%20Trabajo%20por%20Verdad%20y%20Justicia.pdf.

this initiative.[211] The tasks of the GTVJ were assigned to the *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* (INDDHH). However, this is true only in part: according to its founding decree, the GTVJ still had the task of investigating 'crimes against humanity'; Ley No. 19.822 only assigns to the INDDHH the task to take over the search for the Disappeared.

2.10.6 The Creation of a Central Human Rights Institution

For years, the victims of Uruguayan state terrorism had no central institutional point of contact. There was no specific person or body within the government to whom people who had been affected by state terrorism could turn. That only changed after the work of the *Comisión para la Paz* was completed. In its final report, it recommended the establishment of a successor secretariat (*Secretaría de Seguimiento*). From then on, this institution and its successor institutions served as points of contact for the victims.

(i) The *Secretaría de Seguimiento* of the *Comisión para la Paz*

Following the presentation of the results and recommendations of the *Comisión para la Paz*, Resolución N° 449/03 created the *Secretaría de Seguimiento* in 2003, the successor secretariat of the *Comisión para la Paz*. According to the commission's recommendations, it was to be a purely administrative body to support live processes and proceedings.[212] One of its tasks was to keep communication with the relevant authorities and institutions needed to clarify the cases of the Disappeared. It was also responsible for cooperating with the forensic scientists and historians of the *Universidad de la República* (see 2.10.4).

In 2006, President Vázquez declared in a resolution (Resolución No. 832/006) the end of the first stage of the *Secretaría*'s work with the completion of the tasks of the forensic archaeologists and anthropologists and the Historians' Commission. The *Secretaría* should, however, continue to exist as an institution. Javier Miranda, an activist of the MFDD and himself the son of the Disappeared, was put in charge. In the following year, the *Secretaría* was given more resources to further clarify the fate of the Disappeared.[213]

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211 Pablo Chargoñia, Leonardo Di Cesare and Fiorella Garbarino, 'Después de la disolución del Grupo de Trabajo por Verdad y Justicia: Comentarios sobre la Ley No. 19.822 que comete la búsqueda de personas detenidas desaparecidas a la Institución Nacional de Derechos Humanos y Defensoría del Pueblo,' in *Servicio Paz y Justicia – SERPAJ Uruguay, Derechos Humanos en el Uruguay. Informe 2019* (Montevideo: SERPAJ, 2019), 70 – 78, 71.

212 Comisión para la Paz, *Informe Final*, No. 74.

213 Accessed 11 April 2022, https://www.gub.uy/secretaria-derechos-humanos-pasado-reciente/institucional/creacion-evolucion-historica.

In August 2011, as a result of the Inter-American Court of Human Rights' judgment against the Uruguayan state in the Gelman case (see 2.2.6), a *Comisión Interministerial* (inter-ministerial commission) was set up to ensure that the demands included in the judgement be fulfilled. This role was entrusted to the *Secretaría* on behalf of the President. The Ministry of Education and Culture (where the Justice Department is also located), the Ministry of Foreign Affairs and the Ministry of Defence (Resolución No. 450/011) were also involved.

During José Mujica's time in power, in 2013, the *Secretaría* was renamed *Secretaría de Derechos Humanos para el Pasado Reciente* (Human Rights Secretariat for the Recent Past – in contrast to the 'regular' Human Rights Secretariat, which deals with current human rights issues).

(ii) The *Secretaría de Derechos Humanos para el Pasado Reciente*

Resolución presidencial No. 463/013 transformed the *Secretaría de Seguimiento* into the *Secretaría de Derechos Humanos para el Pasado Reciente*. Compared to the initial organization, its area of responsibility had been expanded. It too had the task of receiving, analysing and collating information and testimonies; of conducting further research into the dictatorship's crimes against humanity and thus of contributing to historical clarification and legal proceedings. In this context, the *Secretaría* works closely with the judicial authorities and with the *Unidad Especial para causas de Derechos Humanos* (Special Unit for Human Rights Cases) of the Ministry of the Interior. In addition, the *Secretaría* was responsible for working with and supporting the *Grupo de Trabajo por Verdad y Justicia* (2.10.5).[214] The *Secretaría* is currently divided into four departments: archives, historical research, (forensic) anthropology, and communication and information.

(iii) The *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* (INDDHH)

While the *Secretaría de Seguimiento* of the *Comisión para la Paz* and the *Secretaría de Derechos Humanos para el Pasado Reciente* were or are institutionally located within the executive, the INDDHH, created at the end of 2008, sits within the legislature. It acts autonomously and is not bound by precept. According to Ley No. 18.446, the *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* (National Human Rights Institution and Ombudsman; INDDH) is responsible for the 'defence, promotion and full protection of human rights' as prescribed by the constitution and in international law (Art. 1). The INDDHH is based in a building in the centre of Montevi-

214 Accessed 11 April 2022, www.gub.uy/secretaria-derechos-humanos-pasado-reciente/institucional/creacion-evolucion-Historica.

deo, which was previously used by the military secret service as a detention and torture centre during the dictatorship.

Although the focus of the INDDHH is on contemporary human rights issues (the implementation of international human rights agreements, human rights situations in prisons and psychiatric institutions, gender justice, etc.), the human rights violations of the military dictatorship also play a role.

The 2018 Ley No. 19.641 transfers responsibility for state terrorism memorials to the INDDHH. The *Comisión Nacional Honoraria de Sitios de Memoria* (National Voluntary Commission for Memorials) founded for this explicit purpose is both led by and based at the INDDHH.

After the failure of the *Grupo de Trabajo por Verdad y Justicia* (GTVJ, see 2.10.5), in September 2019 Ley No. 19.822 gave the INDDHH the task of continuing the search for the Disappeared during the dictatorship. In addition, the archives and documentation of the GTVJ were transferred to the INDDHH.

(iv) The *Oficina de Atención a las víctimas del terrorismo de Estado*

The *Oficina de Atención a las víctimas del terrorismo de Estado* (Office for the Care of Victims of State Terrorism) was created in October 2010 under the auspices of public health administration (Decreto No. 297/010) as the institution responsible for implementing medical compensation services. Its task was to coordinate access to medical and psychotherapeutic support measures for people who have rights under Ley No. 18.596, i.e. the Compensation Act 2009, or Ley No. 18.033, the law regulating the pension rights of those persons who were excluded from gainful employment for political reasons due to work bans, exile, etc.[215]

2.11 Victims' Associations

2.11.1 The Uruguayan Human Rights Movement

The human rights movement in Uruguay took shape very late. Unlike in Chile, for example, where Church structures offered opportunities for human rights groups to meet and organize themselves, there was no such civil society flagship in Uruguay. The extensive control to which the military had subjected the country made it even more difficult to organize around these interests. It was only after the failed constitutional referendum in 1980 that there was first room for manoeuvre. In this context, the Jesuit Father Luis Pérez Aguirre founded the Uruguayan section of SERPAJ (*Servicio Paz Y Justicia*, Service for Peace and Justice) in 1981, inspired by the 1980

215 Accessed 11 April 2022, https://www.asse.com.uy/contenido/Oficina-de-Atencion-a-Victimas-de-Terrorismo-de-Estado-6634.

Nobel Peace Prize laureate Adolfo Pérez Esquivel (SERPAJ-Argentina). With the establishment of this NGO, the public silence about the massive degree of military violence was broken for the first time. In view of this systemic violence, SERPAJ demanded that human rights be upheld.[216]

The establishment of SERPAJ-Uruguay created a focal point for previously unarticulated interests in the field of human rights. Inspired by SERPAJ, for example, relatives of the Disappeared and relatives of the political prisoners formed themselves into groups. Other civil society organizations, such as trade unions, student and religious associations and professional associations, also adopted the demand for human rights protection and thus embedded the concerns of the human rights movement in society. After an attention-grabbing hunger strike, SERPAJ was banned in 1983, but activists continued to work in secret and inside other organizations until they were re-admitted in 1985. SERPAJ has developed into the most important human rights organization in the country, whose range of topics include not only dealing with the human rights violations of the dictatorship, but also children's rights, economic, cultural and social basic rights, freedom of the press, social security, human rights education, etc.

In 1984, the professional association of Uruguayan lawyers, with the support of SERPAJ, formed the *Instituto de Estudios Legales y Sociales del Uruguay* (IELSUR, Uruguayan Institute for Legal and Social Studies), which provided legal advice to victims of repression and their families and represented them in court. To this day, the IELSUR is one of the central institutions when it comes to legal questions of human rights. Many human rights lawsuits have since been prepared by the IELSUR and represented in court.

In the final years of the dictatorship, the human rights secretariat of the trade union federation PIT-CNT (*Plenario Intersindical de Trabajadores – Convención Nacional de Trabajadores*, General Assembly of Workers – National Workers' Convention) was set up, many victims of the dictatorship having also been active trade unionists.

In the following years, SERPAJ, IELSUR and the PIT-CNT were the central human rights organizations active in policy areas of the Uruguayan politics of the past.[217] The *Observatorio Luz Ibarburu* (OLI) was added as a further relevant body in 2012. The Human Rights Secretariat of the PIT-CNT had suggested this was created in order to observe and monitor compliance with and implementation of the decisions

216 Ruderer and Strassner, 'Ecumenism in National Security Dictatorships'.

217 In the broader context of the human rights movement, however, there are other civil society organizations that support the concerns of human rights and victims' organizations without becoming protagonists themselves. These include, for example, CIPFE (*Centro de Investigación y Promoción Francisca-na y Ecológica*), FUCVAM (*Federación Uruguaya de Cooperativas de Vivienda por Ayuda Mutua*), ASCEEP (*Asociación Social y Cultural de Estudiantes de la Enseñanza Pública*) or other student groups.

of the judgement of the Inter-American Court of Human Rights in the Gelman vs. Uruguay trial.[218]

As a rule, the human rights organizations act together with the groups of victims of the dictatorship. In past decades it was mainly just the triad SERPAJ, IELSUR and MFDD that acted together. IELSUR contributed most of the legal expertise, SERPAJ situated the issues in the broader human rights context and, thanks to its extensive networks, was able to mobilize public support. The MFDD gave the cause a human face and moral integrity.

2.11.2 The Uruguayan Victims' Organizations

The repression that existed during the Uruguayan military dictatorship had a broad impact. In terms of numbers, the largest repressed group is comprised of former political prisoners and exiles as well as those affected by occupational and work bans. In view of the fate of the Disappeared and murdered, however, these people did not give their own victim status central stage. It was only towards the end of the 1990s that former political prisoners began to organize and demand their rights.

Overall, the Uruguayan victims of repression organized quite late. This is related to the all-encompassing repression and control that obtained predominated during the dictatorship and the lack of effective civil society structures under whose protection the victims could have come together. In addition, most of the Uruguayan victims disappeared outside the country's borders, mainly in Argentina, so that the relatives were more orientated towards Argentinian groups.[219]

(i) Die *Madres y Familiares de Uruguayos Detenidos Desaparecidos* (MFDD)

It was only with the founding of SERPAJ that the relatives of disappeared Uruguayans succeeded in networking and organizing, so that over time the most significant victims' organization in Uruguay, the *Madres y Familiares de Uruguayos Detenidos Desaparecidos* (MFDD), emerged. This is still in existence today.[220] Together with the numerically much larger groups of relatives of exiles and political prisoners, the MFDD

218 Accessed 11 April 2022, www.observatorioluzibarburu.org.

219 Therefore there are groups with names like the *Madres y Familiares de Uruguayos desaparecidos en Uruguay, Argentina y Paraguay; Madres y Familiares de Uruguayos desaparecidos en Argentina*; *Familiares de Uruguayos detenidos-desaparecidos en Uruguay*; *Agrupación de Familiares de Uruguayos Desaparecidos en Europa* (each with variants on those names).

220 Carlos Demasi and Jaime Yaffé, eds., *Vivos los llevaron... Historia de la lucha de Madres y Familiares de Uruguayos Detenidos Desaparecidos (1976 – 2005)* (Montevideo: Trilce, 2002).

formed an important part of the mobilization against the regime.[221] With the end of the dictatorship, the liberation of the political prisoners and the return of the exiles, the other victims organizations dissolved, leaving only the MFDD. After the defeat in the referendum, the group lost meaning and purpose and finally stopped their regular protest marches in 1992. Only as the situation changed, beginning at the end of the 1990s, did the MFDD regain importance as an important protagonist. From the beginning they worked closely with IELSUR and especially SERPAJ, in whose premises they were housed for a long time.

The MFDD as an organization, but also the members of the group, are very well respected by the public. In contrast to some protagonists of the Argentinian human rights movement, they are usually very moderate in tone, but all the clearer in content. Due to their proximity to the *Frente Amplio*, the group succeeds time and again in placing its concerns in the political and parliamentary debate.

(ii) HIJOS Uruguay

With the new dynamic that defined the confrontation with the past in the Río de la Plata area from the mid-1990s, the children of the Uruguayan Disappeared organized for the first time and founded the HIJOS Uruguay group – similar to the parallel group in Argentina. Around half of the 50 or so children of those who disappeared from Uruguay were involved in the group.[222] Together with the MFDD and the relevant human rights organizations, they are primarily committed to securing criminal proceedings for human rights violations and to maintaining an appropriate culture of remembrance.

(iii) Groups of Former Political Prisoners (*Memoria para Armar* and CRYSOL)

For years there was no union of former political prisoners in Uruguay. At the beginning of 1997, some female former prisoners got together and founded the network *Memoria para Armar* ('Piecing Together our Memories'). Its aim was to reconstruct the memories of what they had experienced in prison together. Around 300 people took part in this process. Working groups were formed on various topics.[223] The re-

221 The relatives of the political prisoners and exiles did not organize themselves until 1982 and 1983, respectively. After their release or return, these groups supported reintegration and eventually were disbanded.

222 Diego Sempol, 'HIJOS Uruguay: A 20 años de un ensayo de memoria generacional,' *Cuadernos de Aletheia* 2 (2016): 53–60; Diego Sempol, 'HIJOS Uruguay: Identidad, protesta social y memoria generacional,' in *El pasado en el futuro: los movimientos juveniles*, ed. Elizabeth Jelin and Diego Sempol (Buenos Aires: Siglo XXI, 2006), 185–212.

223 Jimena Alonso and Fabiana Larrobla, 'Memorias femeninas en el uruguay pos-dictadura,' *Aletheia* 5/9 (2014), accessed 11 April 2022, http://www.memoria.fahce.unlp.edu.ar/art_revistas/pr.6417/pr.6417.pdf, 1–14, 4–8.

sults were published in several volumes from 2001 onwards.[224] *Memoria para Armar*, whose activities met with great public response and sympathy, has developed into an integral part of the Uruguayan human rights movement in recent years.

In 2000, the former male prisoners also organized themselves under the name CRYSOL (*Centro de Relaciones y Soluciones Laborales – Asociación de los Ex Presos Políticos*, Centre for Labour Relations and Solutions – Association of Former Political Prisoners). The association, which primarily wanted to react to the precarious financial and professional situation of many former prisoners, developed to represent the broader interests of former political prisoners. One of the most important concerns is their public recognition as victims of serious human rights violations. Initially, this group was exclusively made up of men, but over time it also opened up to women.

2.12 Measures in the Educational System

The educational system was of great strategic relevance for the military during the dictatorship. They regarded it as a breeding ground for subversion. At the same time, they recognized the importance of schools to convey values such as 'order' or 'security' and to give students what they considered to be an appropriate worldview in the context of the ideological controversies of the Cold War.[225]

Just one year after the return to democracy, dealing with the recent past became a topic within the education system. The Uruguayan dictatorship was addressed within a larger context (for example, in the context of a broader topic like 'The World After 1945', there was the topic 'Uruguay: Social Tensions, Political Crisis and the Collapse of Institutions').[226] The inclusion of the recent past in the curriculum repeatedly caused controversy in the following years. The question was raised as to whether these subjects could even be adequately dealt with in class. They feared that teaching would become ideological and warned that no objective perspective was possible on these topics. The teachers also complained that there were no reliable materials available for class preparation.[227]

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224 Memoria para Armar, *uno: Testimonios coordinados por el Taller Género y Memoria ex-Presas Políticas* (Montevideo: Senda, 2001); Memoria para Armar, *dos: ¿Quién se portó mal? Selección de Testimonios coordinados por el Taller Género y Memoria ex-Presas Políticas* (Montevideo: Senda, 2002); Memoria para Armar, *tres: Selección de Testimonios coordinados por el Taller Género y Memoria ex-Presas Políticas* (Montevideo: Senda, 2003).

225 Natalia Vitalis, *Educación Secundaria, censura cultural y dictadura: La expulsión de los enemigos: docentes y textos* (= Avances de Investigación) (Montevideo: Facultad de Humanidades y Ciencias de la Educación, Universidad de la República, 2011).

226 Mariana Achugar, Amparo Fernández and Nicolás Morales, '(Re)presentando el pasado reciente: la última dictadura uruguaya en los manuales de historia,' *Discurso & Sociedad* 5/2 (2011): 196 – 229, 203.

227 Achugar, Fernández and Morales, '(Re)presentando el pasado reciente,' 196 – 229, 203.

With the change of government in 2005 and the inauguration of the first left-wing government, many groups had high hopes that the dictatorship would now become the subject of more in-depth classroom discussion. However, actual developments fell short of these expectations. The reasons for this lie not only in political reservation or in the persistence of educational institutions, but also in the difficulty of integrating the events of the 1970s and 1980s into Uruguay's historical self-image (Uruguay as the 'Switzerland of Latin America', with a welfare state, the tolerance of an immigrant nation, liberalism, etc.).[228]

2.13 Coming to Terms with the Past through the Media

In general, Uruguay – especially when compared to other Latin American countries – has a solid and reputable media landscape. Their relationship with the state has been repeatedly referred to as 'gentle' or 'nice'.[229] Since cases of corruption became public in the mid-1990s, the media have been increasingly aware of their role as the 'fourth pillar of democracy'.

The media did not play a prominent role as regards coming to terms with the past and human rights violations. They reported on current developments and debates. The political tendencies of the individual newspapers and media were also reflected in the style of reporting.[230] The left-wing liberal weekly *Brecha* regularly reported on human rights issues.

In contrast to other countries, investigative journalism played a subordinate role in Uruguay in connection with coming to terms with the past. Individual authors such as Virgínia Martínez wrote books on the subject that reached a larger audience.[231]

228 Federico A. Cavanna and Luis Fernando Cerri, 'Enseñanza de historia reciente en Uruguay: pasado y laicidad en el juego de la identidad,' *Archivos de Ciencias de la Educación* 3/3 (2009): 99–112, accessed 11 April 2022, http://www.fuentesmemoria.fahce.unlp.edu.ar/art_revistas/pr.4085/pr.4085.pdf; Carlos Demasi, 'La trasmisión del pasado traumático: Enseñanza de la dictadura y debate social en Uruguay,' *ILCEA – Revue de l'Institut des langues et cultures d'Europe, Amérique, Afrique, Asie et Australie* 26 (2016): 1–14, accessed 11 April 2022, https://doi.org/10.4000/ilcea.3959.

229 José Pedro Díaz, 'Uruguay: Medios de comunicación y Estado/gobierno: Descubriendo la cenicienta,' in *¿Por qué nos odian tanto? Estado y medios de comunicación en América Latina* (Bogotá: Centro de Competencia en Comunicación para América Latina and Friedrich Ebert Stiftung, 2010), 245–261, 251.

230 Antonio Pereira, 'Análisis de los informativos televisivos durante el proceso de aprobación de la ley de caducidad,' *Cuaderno de Historia* 9 (2012): 125–149.

231 Virginia Martínez, *Los fusilados de abril ¿Quién mató a los comunistas de la 20?* (Montevideo: Ediciones del caballo perdido, 2002).

2.14 Coming to Terms with the Past through Art

Since film funding was increased in the mid-2000s and the *Frente Amplio* governments attached greater importance to the inter-related themes of dictatorship, human rights and memory, a large number of films have been made on these topics. Since 2004, between two and five films about the dictatorship have been released almost every year (with a total national production of between five and 17 films). The majority of these are documentaries; feature films are not as common. While the documentaries are similar in terms of design, montage and aesthetics, the feature films deal with different aspects of the military dictatorship in fictional form, even though a number of films explicitly address specific cases.[232] Examples include the feature film *Zanahoria* (director: Enrique Buchichio, 2014) about the search for the Disappeared, and *Migas de pan* (director: Manane Rodríguez, 2016) about the experiences of abuse and (sexual) violence against women imprisoned during the dictatorship.

In the numerous documentaries, but also in the feature films, different stages of the dictatorship (from the events leading up to the dictatorship to questions around remembrance and dealing with the dictatorship) are thematized. There are also pieces that deal with certain characters or motifs: experiences of violence and imprisonment; exile, the Disappeared and the search for them; the children of the Disappeared;[233] or the theme of resistance against the dictatorship.

The time of dictatorship was and is also a theme in the performing arts and theatre. A number of works deal with experiences of authoritarianism and individual and collective trauma. In view of the societal silence around the experience, the theatre wanted to break the pact of silence, question the official narratives and save fragments of memory. In quantitative terms, the number of works and performances is manageable, although there has been an increased interest in these topics in recent years.[234]

Eduardo Galeano and Mario Benedetti are undoubtedly among the most famous Uruguayan writers of the second half of the twentieth century. Both had to leave the country during the dictatorship and returned after 1985. Confrontation with the dictatorship was a focus of writing and journalism for them both. Other authors also

232 Jorge Fierro, '¿Otra película sobre la dictadura? El relato del pasado reciente en el cine uruguayo,' *Brecha* (15 May 2020), accessed 11 April 2022, https://brecha.com.uy/otra-pelicula-sobre-la-dictadura/.

233 Beatriz Tadeo Fuica, 'Presencias y ausencias: Uruguay y los documentales sobre hijos (des)aparecidos,' *Cine Documental* (2015): 169 – 196.

234 Roger Mirza and Gustavo Remedi, eds., *La dictadura contra las tablas: Teatro uruguayo e historia reciente*, (Montevideo: Biblioteca Nacional, 2009); Gustavo Remedi, ed., *Otros lenguajes de la memoria: teatro uruguayo contemporáneo e historia reciente*, (Montevideo: Ediciones Universitarias, 2017); Roger Mirza, 'Memoria y representación en la escena uruguaya: 1968 – 2013,' *Nuestro Tiempo* 19 (2014), 5 – 42.

focused on the experiences of the dictatorship in their works, like Mauricio Rosencof, Tessa Brida, who lives in the USA, and Mario Delgado Aparaín.

Uruguay's cultural creators also participate in many ways in the cultural life of Argentina and, in particular, of Buenos Aires.

3 Stocktaking: Successes and Failures of Transitional Justice in Uruguay

Until the year 2000, the prognosis of democratization researcher Samuel P. Huntington seemed to be true for Uruguay: 'In new democratic regimes, justice comes quickly or it does not come at all.'[235] The issue of human rights violations received a lot of attention after the dictatorship, but there was no justice (in the sense of sanctioning those responsible and compensating the victims). The period before the referendum represented a high point in the social and political dealings with the past. However, after the amnesty law was confirmed by the referendum, the issue disappeared from the social and political agenda until it returned in the late 1990s in a form that meant that politics could no longer refrain from finding ways to come to terms with the problems of the past.

The case of Uruguay shows how much the personal convictions of state presidents can shape the politics of the past. It also shows how influential veto actors like the armed forces can be when it comes to a pacted transition process.

At the same time, the case of Uruguay shows the importance of the human rights movement and of victims' organizations. The UN Special Rapporteur Pablo de Greiff wrote in his report to the UN General Assembly in 2014:

> It has been the victims of these serious human rights violations and their family members – sometimes organized into associations – who have promoted and continue to promote, tirelessly and with admirable dedication, the implementation of initiatives for truth, justice, reparation and guarantees of non-recurrence. The Special Rapporteur notes that the lack of progress in some of these areas [...] have proved extremely exhausting for the victims and their family members.[236]

In the case of Uruguay, it should be stressed that it was the victims with the support of the human rights movement who drove forward the processes of coming to terms with the past. Although the *Frente Amplio* governments in the years 2005–2020 showed a significantly greater openness to the concerns of the victims, it should nevertheless be remembered that the human rights movement had to fight against government resistance for a long time. With this in mind, when accounting for Uruguay's

235 Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oklahoma: University of Oklahoma Press, 1991), 228.

236 de Greiff, *Report of the Special Rapporteur*, No. 6.

politics of the past, a distinction must also be made between the level of the system and the level of the victims.

Transition to Democracy and Civil-Military Relations

The return to democracy in Uruguay came through a pacted and negotiated transition, in which concessions were made to the armed forces and securities were guaranteed. It can be seen as a success that the handover of power to a democratically elected civilian government worked smoothly and without relapse into authoritarianism and that Uruguay was able to resume its democratic tradition. The post-authoritarian governments managed to avoid civil-military tensions or were able to resolve them discreetly. Uruguayan democracy has the reputation of being one of the most stable democracies in the region, revealing the excellent quality of its democracy.[237]

These successes were, of course, bought with the fact that the armed forces' spheres of interest were barely touched and that the majority of the crimes of the military dictatorship went unpunished. The *Ley de Caducidad* itself also makes fundamental inquiries about constitutional practices and – even more – about basic democratic principles such as the separation of powers. With this amnesty law, at least in dictatorship-related human rights issues, the separation of powers was undermined, since the judiciary was in fact controlled by the executive.

Clarification and the Search for Truth

There are probably few countries that have used so many different methods in dealing with their past as Uruguay. These numerous attempts at clarification are certainly related to the half-heartedness with which they have been undertaken. The parliamentary investigative commission was not given sufficient powers, neither was the presidential truth commission. They were also was not given the resources they needed. The other initiatives were also not adequately resourced. Even though Uruguay is a small country, it is questionable whether tasks in institutions such as the *Comisión para la Paz*, the *Grupo de Trabajo Verdad y Justicia* etc. can be carried out by volunteers in addition to all their normal tasks, even with heartfelt commitment.

The experiences of other countries shows that it is more successful (and quicker) to set up a commission equipped with the appropriate competencies and resources at an early stage, rather than undertake numerous half-hearted attempts at clarifica-

237 Uruguay, for example, achieved twelfth place in the evaluation of the quality of democracy (Democracy Matrix 2019) as the 'best' Latin American country – directly behind Spain and ahead of Austria, Great Britain, France and Italy, which were ranked 20 to 23 respectively, accessed 11 April 2022, https://www.demokratiematrix.de/ranking. The Bertelsmann Transformation Index (BTI) also gives Uruguay top marks for statehood, political participation, rule of law and stability of democratic institutions, accessed 11 April 2022, https://www.bti-project.org/de/index/politische-transformation.html.

tion. Of course, this presupposes that the government also wants the truth about the past to be made public. Trying to deal with the past in this way can generate social expectations and political pressure to act that the government must then be able to deal with. When the extent and systematic use of human rights violations become evident, it becomes more difficult for the government to justify impunity and amnesty laws.

In terms of the end result, Uruguay has nevertheless managed to combine the findings of the various institutions set up to give clarity to an overall picture that is accepted by the vast majority of the population. Through this process, the functioning of the military regime has been largely disclosed, the existence of the past human rights violations and the responsibility for them, which lay with the armed forces, are not in doubt. The number and names of those who disappeared have been determined fairly precisely (even if there are still variations in detail). However, less success has been enjoyed in precisely quantifying the numbers of victims of imprisonment, torture and exile. But here, too, there is a wide-ranging social consensus on the established facts of these human rights violations. These advances in the search for truth in turn increased pressure on those in power to end the practice of impunity. The judicial investigations that followed contributed to clarifying the human rights violations.

In Uruguay, through a long and fragmented process, it has been possible to reveal and establish a *global* truth about the dictatorship. With regard to the actual truth about the Disappeared, however, efforts have been less successful: in the vast majority of cases it is still unclear what happened to the Disappeared and where their remains are. The code of silence assumed by the military and those involved in the specific operations is still in effect. For its part, the government does not seem to see any suitable way of getting the armed forces to cooperate and to release information and archives.

Criminal Proceedings

It was over two decades before the first sentence was given in Uruguay concerning the crimes of the dictatorship. For all those years (and beyond), the victims and their lawyers fought against the refusal of the various governments to allow judicial investigations (regardless of possible convictions). On a systemic level, the amnesty solution has contributed to creating a negative peace, i.e. the absence of armed violence, possible for years.[238] However, it is questionable whether allowing judicial investigations would have endangered democracy at any point and whether the argument of ethical responsibility would always weigh equally here. The government blocked all criminal proceedings, following the Werberian Ethics of Responsibility. For the government, it was justifiable to suspend moral conviction in order to ach-

238 Skaar, 'Uruguay,' 83.

ieve political stability. Yet, while this argument had a certain applicability in the direct aftermath of the transition from dictatorship, it seems dubious that it retained the same plausibility in the years that followed.

In any case, it was the victims who had to constantly fight for their rights. For years, the state failed to meet its legal and moral obligations to investigate and compensate for the human rights violations it was responsible for. Although this could possibly be justified at a systemic level, it is difficult to understand at the level of those actually affected.

As a result of the efforts of the victims, their lawyers and the human rights movement, a number of perpetrators were finally brought to justice, albeit with a significant time lag (although many spent their sentences under house arrest because of their advanced age).

Even if it is difficult to prove empirically, the theory is understandable that the impunity that has dominated for years (and in some cases still persists) has weakened trust in the rule of law. It is also noticeable that mistreatment and torture by police officers, i.e. those unpunished crimes that quantitatively made up the majority of the dictatorship's human rights violations, are still a problem in Uruguay today.[239]

Compensation and Reparations

There is also a clear time lag in Uruguay with regard to reparations programmes. After the necessary regulations had been made in an initial phase, it took almost three decades before the first financial compensation payments were made legally binding. It would then take even more years before the first comprehensive compensation measures were introduced under the *Frente Amplio* government, which included financial compensation as well as moral reparations, recognition of suffering and injustice, as well as policies relating to remembrance. Finally, different groups of victims could be taken into account in the reparations programmes.

Politics of Commemoration

For years, there was no public commemoration policy in Uruguay. When remembrance policy measures were made, these mostly followed the initiative of civil society.[240] Only the *Frente Amplio* governments deliberately adopted the angle of *Memoria* in the context of their policies for interpreting and compensating for the past, passed corresponding laws and set up specific bodies to implement them. But here, too, it was civil society (and especially the human rights movement) that kept memories of the dictatorship alive.

239 Skaar, 'Uruguay,' 83.

240 Marín and Cordo, 'Políticas de memoria,' 39 f.

Societal Dealings with the Dictatorship

In Uruguay it was possible to establish a broad consensus on the events of 1973 to 1985. Unlike in other countries, nobody seriously questions the human rights violations committed at the time. Even if the human rights issue played a subordinate role for years after the 1989 referendum, today this is a topic that interests the entire population. At the same time, however, the almost identical results of the two referenda on the *Ley de Caducidad* show that there is no consensus on the need for a comprehensive reappraisal of policy as regards the period of dictatorship.

Conclusion

The Uruguay, case is instructive in many ways. Finally, a few aspects should be briefly mentioned that can be clearly seen in the example of Uruguay.

The *form of system transition* determines the possibilities of coming to terms with the past. In the case of Uruguay, this was a transition in which the armed forces still had an equal say in their role in the post-authoritarian power structure. Impunity for members of the armed forces and security forces can be seen as part of this pact.

The *timing of the transitional justice process* is of great importance. As Samuel Huntington said, action will either be taken immediately or not at all. In the case of Uruguay, this is only partially true because, at a later date, the human rights movement did again succeed in building up such pressure to act that the government had to react. It has been shown, however, that certain past political measures become more and more difficult as time goes on (e. g. clarifying the fate of the Disappeared, punishing the perpetrators, etc.). Other measures, on the other hand, such as commemorative and remembrance policies, even under other conditions, only come into effect once a certain time has lapsed after the events.

The case of Uruguay also shows that the *role of victims' organizations and of the human rights movement* cannot be overestimated. Basically, it is due to these groups that the subject of human rights came onto the social and political agenda in the context of the pacted transition and in the years that followed. These groups not only had to gather support for their cause among the general population, but often also had to fight against government resistance.

The fact that this resistance varied in strength underscores the *importance of the decision-makers in the executive*. It became clear how the elite's priorities shifted during the different governments, and thus past political initiatives were either adopted or blocked. In the case of Uruguay, it became apparent that the left-wing governments that ruled the country from 2005 onwards had an *intrinsic* motivation to press ahead with coming to terms with the past. This *intrinsic* motivation was not evident in the previous governments (of Sanguinetti and Lacalle). During these years, however, there was no *extrinsic* motivation for the governments to tackle this sensitive issue: neither civil society, the human rights movement nor other international actors succeeded in generating the necessary pressure to act. At the same time,

the outcome of the 1989 referendum made it clear that this topic would not win any elections.

Jorge Batlle's presidency can be seen as a transitional period. He was generally more willing than his predecessors to try to deal with the dictatorial past. However, with the rise of the human rights movement and with increasing international pressure, the political costs associated with continuing to block measures were becoming higher, so he began to change tack.

Transitional justice processes *follow specific phases*. At the beginning, the focus is often on pressing questions (such as release from prison, return from exile, etc.) as well as the need for clarification and punishment. Questions of compensation and reparation often follow. As time progresses, questions of commemorative politics and then historical politics come to the fore. It is also often the case that certain measures – even if they were required from the start – only become possible later. Generational aspects certainly play an important role here. This was evident in cases like Uruguay or Argentina in relation to their criminal prosecutions.

In Uruguay, the Gelman case clearly shows the *importance of international legal systems*. After all possible measures had been taken in the country, Gelman turned to the Inter-American Court of Human Rights. On the one hand, he was able to generate political pressure to act in Uruguay; on the other hand, he succeeded with the lawsuit in obtaining a verdict against the Uruguayan state and thus stimulated new political impulses for dealing with the country's past.

Conclusion

Hubertus Knabe

The Effectiveness of Instruments of Transitional Justice – An International Comparison

What are the benefits of coming to terms with dictatorships and mass crimes? At first glance, this question may seem irritating. However, as with all political concepts, it seems advisable to look at transitional justice not only in normative terms, but also to examine its actual effects. This is all the more valid in relation to a concept that is not only supported by numerous governments and has been applied in many countries around the world, but which has also been codified in a guideline laid down by the UN Secretary-General.[1] Given the considerable financial resources that have flowed into measures for ensuring transitional justice in recent decades and which continue to do so, it appears all the more sensible to analyse their effects more closely. In the best case, such an evaluation might lead to a more precise assessment of which instruments actually have an effect and which do not. This, in turn, could help political decision-makers plan their future actions.

This sort of 'reappraisal of reappraisal' has only received increased attention in research in recent years.[2] Despite a vast number of studies on the processes of transitional justice in all parts of the world, comparatively few scholars have dealt with the actual effects of corresponding measures. The early years of research into the topic were mostly dominated by descriptive contributions which attempted to trace efforts to come to terms with the past above all in South Africa and Latin America.[3] The ra-

1 *Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice, March 2010*, accessed 9 November 2021, https://digitallibrary.un.org/record/682111.

2 Cf. Kirsten Ainley, *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone* (London: Springer, 2015); Anita Ferrara, *Assessing the Long-Term Impact of Truth Commissions: The Chilean Truth and Reconciliation Commission in Historical Perspective* (Oxford and New York: Routledge, 2015); Hugo van der Merwe, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington D.C.: US Institute of Peace Press, 2009); Tricia Olsen and Leigh Payne, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington: Cambridge University Press: ICTY, 2010); Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York, 2010); Anja Mihr, *Regime Consolidation and Transitional Justice: A comparative Study of Germany, Spain and Turkey* (New York: Cambridge University Press, 2018); Oskar Thoms, James Ron and Roland Paris, *The Effects of Transitional Justice Mechanisms. A Summary of Empirical Research Findings and Implications for Analysts and Practitioners* (Ottawa: CEPI, 2008), accessed 23 November 2021, https://aix1.uottawa.ca/~rparis/CIPS_Transitional_Justice_April2008.pdf; Elin Skaar, Trine Eide and Camila Gianella Malca, *After Violence: Transitional Justice, Peace and Democracy* (New York: Routeledge, 2015); Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (London and New York: Routeledge, 2010).

3 See, for example, Kenneth Christie, *The South African Truth Commission* (Basingstoke, London and New York: Palgrave, 2000); Emily Hahn-Godeffroy, *Die südafrikanische Truth and Reconciliation*

https://doi.org/10.1515/9783110796629-010

dius of observation soon expanded to include other states that had previously been somewhat disregarded, especially in Africa, but also in Asia and Central and Eastern Europe.[4] A series of transnational studies further analysed the handling of serious human rights violations in several states and attempted to identify typical procedures used in this context.[5] As a result, the focus shifted more towards individual instruments of transitional justice, such as criminal trials or truth commissions, which increasingly became the subject of specialized research.[6] It thereby became apparent that the use of these instruments yielded very different results from country to country. Some authors even came to the conclusion that, for some states, their use had

Commission (Baden-Baden: Nomos, 1998); Guido Klumpp, *Vergangenheitsbewältigung durch Wahrheitskommissionen – das Beispiel Chile* (Berlin: Berliner Wissenschafts-Verlag, 2001).

4 Cf. Kai Ambos and Mohamed Othmann, New *Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone & Cambodia* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 2003); Vladimira Dvořáková and Anđelko Milardović, *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe* (Zagreb: Political Science Research Centre Zagreb, 2007); Luc Huyse and Mark Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International Institute for Democracy and Reconciliation, 2008); Renee Jeffery and Hun Joon Kim, *Transitional Justice in the Asia-Pacific* (New York: Cambridge University Press, 2015); Vesselin Popovski and Mónica Serrano, *After Oppression: Transitional Justice in Latin America and Eastern Europe* (n. p., 2012). Cesare Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: Oxford University Press, 2004); Lavinia Stan (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Pas*t (London: Routledge, 2009).

5 Cf. Kira Auer, *Vergangenheitsbewältigung in Ruanda, Kambodscha und Guatemala: Die Implementierung normativer Ansprüche* (Baden-Baden: Nomos, 2014); Samar El Masri, Tammy Lambert and Joanna R. Quinn, *Transitional Justice in Comparative Perspective: Preconditions for Success* (Cham: Palgrave Macmillan, 2020); Albin Eser and Jörg Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht: Vergleichende Einblicke in Transitionsprozesse* (Berlin: Duncker & Humblot, 2000 – 2012, ('14 vols.); Alexander Laban Hinton, *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (New Brunswick: Rutgers University Press, 2010); Hun Joon Kim, 'Expansion of Transitional Justice Measures: A Comparative Analysis of its Causes,' (PhD diss., Minnesota, 2008); Joachim Landkammer, *Erinnerungsmanagement: Systemtransformation und Vergangenheitspolitik im internationalen Vergleich* (Munich: Wilhelm Fink, 2006); Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006); Veit Straßner, *Die offenen Wunden Lateinamerikas: Vergangenheitspolitik im postautoritären Argentinien, Uruguay und Chile* (Wiesbaden: Verlag für Sozialwissenschaften, 2007).

6 Compare Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (Philadelphia: University of Pennsylvania Press, 2016); Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge: Cambridge University Press, 2012); Wolfgang Kaleck, Michael Ratner, Tobias Singelnstein and Peter Weiss (eds.), *International Prosecution of Human Rights Crimes* (Berlin and New York: Springer, 2006); Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York, 2010); Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Abingdon and New York: Routledge, 2010).

done more harm than good.[7] Nevertheless, why coming to terms with the past should apparently have proven more successful in some situations than in others is still largely a question that remains unanswered by the research carried out to date.

The present volume aims to contribute to closing this gap. To this end, processes of transitional justice were analysed in seven countries from three continents with different experiences of violence and dictatorship: Albania, Argentina, Ethiopia, Chile, Rwanda, South Africa and Uruguay. Experts who have been working for a considerable time on coming to terms with the past in these countries have prepared detailed country studies according to a predefined framework.[8] In these concluding reflections, some of the results will be summarized and analysed comparatively. In the subsequent paragraphs, the methodological difficulties of impact research in the field of transitional justice will first be discussed, followed by a closer look at selected instruments.

1 Methodological Challenges

Those who study politically motivated large-scale crimes and the human suffering associated with them often have inhibitions about analysing how they are dealt with from the point of view of efficiency. Nevertheless, precisely when the aim is to prevent a repetition of such acts, it makes sense to look for the objectively best methods of doing so. If one assumes that societies can learn from historical experiences, then coming to terms with the past has a special role to play. However, this raises the question of which yardstick can be used to measure the effectiveness of transitional justice in two respects. On the one hand, the goals which are to be achieved via the measures implemented must be clarified. On the other hand, it must be determined how the achievement of these goals is to be quantified. Researchers have devoted themselves to this problem several times in recent years but have been unable to arrive at a conclusive answer to it.

For a long time, the normative terms 'truth', 'justice' and 'reconciliation' dominated the relevant literature as the goals of transitional justice. These terms reflected the self-image of the political actors in a number of countries and were – for the first time in Chile in 1990 – frequently even included in the name of corresponding commissions of enquiry.[9] The three terms attained central importance above all in the

7 See, for instance, Jack Goldsmith and Stephen D. Krasner, 'The Limits of Idealism,' *Daedalus* 132:47 (2003), 47–63; Roy Licklider, 'The Ethics of Advice: Conflict Management vs. Human Rights in Ending Civil Wars,' *Journal of Human Rights* 7:4 (2008): 376–387.

8 The research framework comprises eight sub-items on the topic of the experience of dictatorship and fourteen sub-items centred on transitional justice (including criminal prosecution, a change of elites, reparations, laws relating to transitional justice, places of remembrance, institutions of transitional justice and artistic reappraisal of the past).

9 Cf. Hayner, *Unspeakable Truths*.

context of the South African Truth and Reconciliation Commission.[10] Nonetheless, on closer inspection, it becomes clear that they can be interpreted very differently and in practice are often in a state of tension or even opposition to one another. The question of whether the expectations associated with them have been fulfilled can also be answered very differently depending on the observer's perspective. Moreover, the term 'reconciliation' is controversial, because in practice it primarily means that the victims should forgive the perpetrators.[11] As such, these concepts do not seem suitable for measuring the effectiveness of measures implemented within the context of transitional justice.

Other authors mention peace and democracy as goals.[12] These terms are also quite general. Although attempts have been made to define them more precisely, they still contain a great deal of room for interpretation. Furthermore, in some situations, they contradict each other. For example, an authoritarian regime may find it easier to prevent violent conflicts than a democratic system with fragile executive power and strong domestic polarization. Conversely, the democratization of a country can also provide violent forces with greater opportunities for action. Another drawback is that both terms refer to society as a whole, whereas the measures enacted by transitional justice can be effective even if they 'only' benefit the victims. Encouraging the education of young people whose parents were killed in the genocide in Rwanda, for instance, can certainly be a meaningful measure, even if it contributes neither to peace nor to democracy as such.

In comparison, the 'Principles to Combat Impunity', which the French diplomat Louis Joinet drafted for the UN Human Rights Commission in 1997 and which the American legal scholar Diane Orentlicher developed further in 2005, offer more room for differentiation.[13] The goals of transitional justice are defined here as rights

10 Eva-Lotte May, 'Die südafrikanische Wahrheits- und Versöhnungskommission: Wahrheit, Versöhnung und Gerechtigkeit,' in *Amnesie, Amnestie oder Aufarbeitung? Zum Umgang mit autoritären Vergangenheiten und Menschenrechtsverletzungen,* ed. Susanne Pickel and Siegmar Schmidt (Wiesbaden: Springer VS, 2009), 245–286; Robert I. Rotberg, *Truth Commissions And The Provision Of Truth, Justice, And Reconciliation: Truth v. Justice* (Princeton: Princeton University Press, 2010), 1–21.

11 Compare James Hughes and Denisa Kostovicova, *Rethinking Reconciliation and Transitional Justice after Conflict* (Abingdon: Routledge, 2018); Veit Straßner, 'Vergangenheitspolitik, Transitional Justice und Versöhnung: Begriffliche und konzeptionelle Annäherungen,' in *Handbuch Transitional Justice*, ed. Anja Mihr, Gert Pickel and Susanne Pickel (Wiesbaden: Springer, 2018), 201–231, 218–226. Mitja Žagar, 'Rethinking Reconciliation: The Lessons from the Balkans and South Africa,' *Peace and Conflict Studies* 17:1 (2010): 144–175.

12 Skaar, *After Violence*, 3–14.

13 United Nations, Economic and Social Council, Commission on Human Rights, *The Administration of Justice and the Human Rights of Detainees*, *Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, 2 October 1997, accessed 9 November 2021, https://digitallibrary.un.org/record/245520/files/E_CN.4_Sub.2_1997_20_Rev.1-EN.pdf; United Nations, Economic and Social Council, Commission on Human Rights, *Promotion and Protection of Human Rights*, 8 February 2005, accessed 9 November 2021, https://digitallibrary.un.org/record/541829.

to which there is a claim after the end of politically motivated mass crimes. More specifically, these are:

1. The *Right to Know* – which refers to the right of victims and society alike to have serious human rights violations investigated.
2. The *Right to Justice* – which is understood as the state's obligation to atone for serious human rights violations, if necessary through international courts.
3. The *Right to Reparation* – which not only involves material compensation and medical support for victims, but also their non-material recognition and satisfaction, for example, via the creation of memorial sites.
4. *Guarantees of Non-Recurrence* – which include personnel and structural changes within the state apparatus, as well as the abolition of discriminatory laws, the demobilization of armed factions, or the democratic control of security organizations.

The question of the extent to which these rights are guaranteed after the end of dictatorships and mass crimes offers a comparatively concrete yardstick for evaluating the success or failure of transitional justice processes. In addition, it has the advantage of focussing on the victims and not on society as a whole. This is important because the latter often represents divergent interests, especially if larger parts of the population tolerated the crimes of the former regime or even participated in them.

However, ensuring the aforementioned rights by no means automatically guarantees successful transitional justice. In some situations, it can serve to prolong violent conflicts or even trigger them in the first place. For example, efforts to investigate serious human rights violations can strengthen the resistance of those responsible for them and can lead to violent opposition or a relapse into dictatorship.[14] The entitlement to prosecution can lead to the continuation of armed conflicts or to authoritarian rulers holding on to power. This holds especially true during periods of civil war or in transitional situations.[15] The establishment of memorial sites can also deepen political antagonisms under certain circumstances and thus make peaceful coexis-

14 Cf Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1993); Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule, Vol. 4, Tentative Conclusions about Uncertain Democracies* (Baltimore: John Hopkins University Press, 1986).

15 Compare Francesca Lessa and Leigh A. Payne (eds.), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2012); Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (London: Hart Publishing, 2008); Héctor Olásolo, *International Criminal Law: Transnational Criminal Organizations and Transitional Justice* (Boston: Brill, 2018); Further relevant literature can be found in Lina Grip and Jenniina Kotajoki, 'Deradicalisation, Disengagement, Rehabilitation and Reintegration of Violent Extremists in Conflict-Affected Contexts: A Systematic Literature Review,' *Conflict, Security & Development* 19:4 (2019), 371–402.

tence more difficult.[16] The demand for changes of personnel within the state apparatus or stronger control of security services can likewise have a counterproductive effect in specific situations, if it leads to processes of democratization being abandoned or reversed.[17]

It follows from this that the success of processes undertaken in regard to achieving transitional justice cannot be viewed statically. Rather, these processes must be evaluated in their respective temporal and political contexts. As numerous studies show, dealing with the past usually goes through different chronological phases. This is likewise confirmed by the country analyses published in this volume. What seems to makes sense in one phase can have a counterproductive effect in another. The same applies to the national and international context. Measures that were successful in South America do not necessarily have to be so in Africa. The starting conditions are often very different even within an individual region.[18] Another factor – and one that often receives too little attention in research on the topic – is whether the process of transitional justice takes place after the end of a dictatorship or following the cessation of an armed conflict, and in what form this end was brought about in each case. Which measures are realistic, meaningful and effective in the sense of the rights mentioned above thus depends to a large extent on the circumstances.

However, a distinction must also be made in another respect. The collective of all citizens of a state cannot, as mentioned, be the only yardstick for judging the success or failure of transitional justice mechanisms. Rather, the victims of grave human rights violations are entitled per se to have them atoned – even if this does not correspond to the interests of the majority society.[19] As the modern state replaces the private justice of the pre-state era, it must act on behalf of the victims and provide them with the satisfaction and peace guaranteed under the law by punishing the perpetrators. This is additionally and especially true in the area of politically motivated mass crimes and has therefore found expression in its own international criminal

16 Cf. Trine Eide and Astri Suhrke, 'Rwanda: Some Peace, No Democracy, and the Complex Role of Transitional Justice,' in Skaar, *After Violence*, 125 – 148, 142 ff.

17 An example of this is the 2013 military coup in Egypt. Compare Omar Ashour, *Ballots versus Bullets: The Crisis of Civil-Military Relations in Egypt* (Doha: Brookings Doha Center, 2013), accessed 23 November 2021, https://www.brookings.edu/wp-content/uploads/2016/06/Ashour_Egypt_Civil-Military-Relations_Al-Jazeera-Center-for-Studies.pdf; Jean-Francois Letourneau, 'The Perils of Power: Before and After the 2013 Military Coup in Egypt,' *British Journal of Middle Eastern Studies*, 46:1 (2019): 208 – 213.

18 Skaar et al. distinguish between global, national and regional contexts. Compare Skaar, *After Violence*, 40 – 46.

19 Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes,' *Vand. J. Transnat'l L.* 35 (2002); 1399; Raquel Aldana, 'A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities,' *Journal of Human Rights* 5.1 (2006): 107 – 126; Diane F. Orentlicher, 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime,' *The Yale Law Journal* 100 (1991): 2537 – 2615, accessed 23 November 2021, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7376&context=ylj.

law.[20] However, even in realms which lie beyond criminal law, victims' organizations play a significant role in advancing the political process of democratization and making it irreversible through their insistence on the *Right to Know* and *the Right to Justice*.[21]

How, though, does one measure the success or failure of the actions taken to ensure transitional justice? Some authors have tried to gauge the effects by means of quantitative indicators.[22] Institutions such as Freedom House, for example, have developed complex calculation systems to indicate the current freedom status of a country every year.[23] Research projects such as the Cingranelli-Richards (CIRI) Human Rights Dataset or the Political Terror Scale (PTS) also provide annual indicators on the extent of terror and violence.[24] The so-called Democracy Barometer likewise collects data at wider intervals on the state of democracy in a number of former dictatorships.[25] The resulting information can be used to check whether changes have occurred over time that correlate with certain transitional justice measures. For instance, one can measure whether or not the freedom status of a country has improved after the establishment of a truth commission. In the same way, it is possible to determine whether or not the number of human rights abuses has decreased

20 Cf. Florian Jeßberger and Gerhard Werle, *Völkerstrafrecht* [5](Tübingen: Mohr Siebeck, 2020); Kaleck, *International Prosecution*; Christoph Safferling, *Völkerstrafrechtspolitik: Praxis des Völkerstrafrechts* (Berlin: Springer, 2014).

21 Cf. Ram Kumar Bhandari, *The Role of Victims' Organisations in Transition from Conflict: Families of the Disappeared in Nepal* (Phd. diss., Hamburg: Institute for Peace Research and Security Policy, 2011); Gérard Birantamije, 'Civil Society Organisations and Transitional Justice in Burundi: When Making is Resisting,' in *Resistance and Transitional Justice*, ed. Briony Jones and Julie Bernath (London: Routledge, 2017), 77–100; Sri Lestari Wahyuningroem, 'Towards Post-Transitional Justice: The Failures of Transitional Justice and the Roles of Civil Society in Indonesia,' *Journal of Southeast Asian Human Rights* 3 (2019): 124.

22 An – older – overview of relevant works can be found in Oskar Thoms et. al., *The Effects of Transitional Justice Mechanisms*, 68–77. See also Olsen, *Transitional Justice*; Wiebelhaus-Brahm, *Truth Commissions*.

23 Compare Arch Puddington, Jennifer Dunham, Elen Aghekyan, Shannon O'Toole, Tyler Roylance and Sarah Repucci (eds.), *Freedom in the World 2017: The Annual Survey of Political Rights and Civil Liberties* (New York: Freedom House, 2019), 651–664, accessed 23 November 2021, https://freedomhouse.org/sites/default/files/FH_FITW_Report_2017_Final_EMBARGOED.pdf.

24 Cf. David L. Cingranelli and David L. Richards, 'Das Menschenrechtsdatenprojekt von Cingranelli und Richads (CIRI),' *Human Rights Quarterly* 32 (2010), 401–424, accessed 23 November 2021, https://www.researchgate.net/publication/236759507_The_Cingranelli_and_Richards_CIRI_Human_Rights_Data_Project; Peter Haschke, *The Political Terror Scale (PTS) Codebook* (Ashville, 2017), accessed 23 November 2021, https://www.politicalterrorscale.org/Data/Files/PTS-Codebook-V100.pdf.

25 Mark Bühlmann, Wolfgang Merkel, Lisa Müller et al., 'Demokratiebarometer: ein neues Instrument zur Messung von Demokratiequalität,' *Zeitschrift für Vergleichende Politikwissenschaft* 6 (2012): 115–159, accessed 23 November 2021, https://link.springer.com/article/10.1007/s12286-012-0129-2.

after the implementation of criminal proceedings against those responsible for previous crimes.[26]

Another method is to fall back on surveys that measure the population's satisfaction with the work of state institutions or the functioning of the political system.[27] For Central and Eastern Europe, Eurobarometer is particularly relevant in this respect. Initiated by the European Commission, it has been surveying the opinions of the populations of the EU member states since 1974.[28] A similar approach is taken by *Latinobarómetro*, which conducts annual surveys in 18 Latin American countries.[29] The World Values Survey network organizes worldwide polls in almost 100 countries, albeit only at wider intervals.[30] The results of these surveys can then be related to individual transitional justice measures in order to gauge their impact. Cynthia M. Horne, for example, has used the Eurobarometer and New Democracies Barometer surveys as a yardstick to determine whether or not lustration – the vetting and replacement of people in certain key positions – has increased trust in social institutions in Eastern and Central Europe.[31]

In most of these attempts at statistical evaluation, however, it remains open as to whether improvements, such as those in the freedom status of a country or its trust in social institutions, can actually be attributed to the mechanisms introduced by transitional justice. As a rule, these indicators are also determined to a considerable extent by other factors.[32] Precisely those studies that compare a large number of countries on the basis of statistical data arrive in part at problematic generalizations.[33] Moreover, the quantitative approaches do not usually differentiate according to social subgroups. Consequently, the effects of measures in favour of victims in particular are barely reflected in the results of such studies. Although the above-men-

26 See Thomas Ostertag, *Der gezähmte Diktator: Die Wirkung von Menschenrechtsverfahren auf das Repressionslevel in Autokratien* (Berlin: De Gruyter Oldenbourg, 2017).

27 On this topic, too, a – likewise older – overview can be found in Thoms et al., *The Effects of Transitional Justice Mechanisms*, 78–85 and 68–77.

28 Sylke Nissen, 'The Eurobarometer and the Process of European Integration,' *Quality & Quantity* 48.2 (2014): 713–727.

29 Cf., accessed 23 November 2021, https://www.latinobarometro.org/lat.jsp.

30 Compare, accessed 23 November 2021, https://www.worldvaluessurvey.org/wvs.jsp.

31 Cynthia M. Horne, 'Lustration, Transitional Justice, and Social Trust in Post-Communist Countries: Repairing or Wresting the Ties that Bind?,' *Europe-Asia Studies* 66:2 (2014): 225–254, accessed 9 November 2021, https://www.tandfonline.com/doi/abs/10.1080/09668136.2014.882620.

32 For example, in the view of some authors, a correlation exists between the level of human rights abuses and the per capita income or population growth in a country. See Neil Mitchell and James McCormick, 'Economic and Political Explanations of Human Rights Violations,' *World Politics* 40:4 (1988): 476–498; Christian Davenport, *State Repression and the Domestic Democratic Peace* (Cambridge: Cambridge University Press, 2007).

33 On the basis of a statistical analysis of 97 countries with autocratic regimes, Ostertag comes to the conclusion that the legal enforcement of human rights in neighbouring states has a 'repression-reducing effect on personalized regimes and one-party dictatorships,' while in military dictatorships it can lead to an 'increase in repression'. Cf. Ostertag, *Diktator*, 146.

tioned calculations and surveys can thus be used to assess the democratic quality of a political system, they are not especially suited to evaluating the success or failure of individual measures employed in the context of transitional justice.[34] Only in the case of targeted victim surveys can they be assumed to provide relatively precise information regarding how those questioned rate the process of transitional justice or the implementation of compensation programmes.

In addition, many of the aforementioned criteria for successful transitional justice cannot be quantified. There is no objective standard for determining when the *Right to Know* is fulfilled. Even the ways in which this goal should be achieved can be defined very differently – from court cases via public hearings to the opening of secret archives and academic research. The establishment of justice is, *a fortiori*, not an objective quantity. Measures to bring about justice can range from the conviction of a dictator to the punishment or dismissal of a large number of state officials. The same is true of the *Right to Reparation*, because actual recompense for the damage suffered is not possible in most cases. Finally, even the most successful programme of transitional justice cannot provide an absolute *Guarantee of Non-Recurrence*.

Against this background, a different, historically-orientated approach was chosen for this volume. In seven country studies, different ways of coming to terms with the past were examined. The aim was to analyse the different ways of dealing with mass crimes within a chronologically longer-term perspective and to relate these to their respective temporal and political contexts. This qualitative analysis first makes clear which instruments of transitional justice have been used in each country and which of them have brought about improvements in accordance with the criteria mentioned above. It thereby becomes apparent that the instruments utilized are often more comprehensive than the truth commissions and criminal trials which have been primarily studied by researchers. Some of these instruments – for example, in the field of reparations or the creation of specific institutions of transitional justice – have hitherto received comparatively little attention, even though they appear to be suitable as best practice models for other countries as well.[35]

Furthermore, this qualitative analysis helps to clarify which factors have advanced or blocked the process of transitional justice in the countries examined. Comparison accordingly proves to be a useful heuristic method, because these factors become more visible when comparing the processes of transitional justice in different countries. The use of a uniform framework, which underlies all the studies published

34 On the criticism of studies based on statistics, see also Skaar, *After Violence*, 17–21 and 53.
35 Some of the instruments developed in South America, such as the creation of state institutions to continue the work of truth commissions, the establishment of genetic databases to identify the remains of those killed, the formation of governmental or ombudsmen's offices for human rights, the concentrated assistance for former victims of persecution through the Office for the Support of Victims of State Terrorism in Uruguay or the participation of human rights organizations in the institutions responsible for compensation in Chile, appear to be applicable globally.

in this volume, makes differences and similarities particularly clear. Comparing the different ways of coming to terms with the past also reveals the factors that have helped to further or block this process. This is important not only when taking measures that help to improve the contextual conditions into account, but also when developing a realistic strategy that is adapted to the respective circumstances.

The observations made so far display that there are no simple answers to the question, posed at the beginning of this chapter, concerning the effect that dealing with mass crimes has and how this can be measured. Nevertheless, by analysing and comparing the processes of transitional justice in different countries, it is certainly possible to ascertain which instruments have brought about improvements in accordance with the criteria established by the UN Commission on Human Rights mentioned above and why this was the case. As such, some of these instruments will now be examined more closely on the basis of the country studies published in this volume.

2 Prosecution

The prosecution of politically motivated mass crimes is the most common instrument in dealing with past dictatorships and serious human rights violations.[36] Since the end of World War II, when the victorious powers tried leading politicians and military leaders from Germany and Japan in Nuremberg and Tokyo for waging a war of aggression, war crimes and crimes against humanity, there have been numerous efforts to ensure that dictatorship and war crimes no longer go unpunished.[37] Despite this, it took another half-century before a permanent International Criminal Court was created. This occurred following the establishment of temporary International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) with the foundation of the ICC in the Hague in 1995 via the Rome Statute.[38] Since 2002, this has meant that, for the first time in history, there is an international court that can prosecute

36 Cf. Kaleck, *International Prosecution;* Ulfrid Neumann and Paulo Abrao, *Transitional Justice: Das Problem gerechter strafrechtlicher Vergangenheitsbewältigung* (Frankfurt am Main: PL Academic Research, 2014); Naomi Roht-Arriaza, I*mpunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995); Ruti G. Teitel, T*ransitional Justice* (Oxford: Oxford University Press, 2000).

37 Of particular importance here are the Universal Declaration of Human Rights of 1948, which is not binding under international law, the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights, which entered into force in 1976, the United Nations Convention against Torture, which became effective in 1987, as well as numerous regional agreements.

38 On the origins and work of the ICC see Salla Huikuri, *The Institutionalization of the International Criminal Court* (Cham: Palgrave Macmillan Cham, 2019).

'the most serious crimes affecting the international community as a whole' (Paragraph 4, Preamble of the Statute) in 121 participating states.[39]

On the initiative of the UN, so-called hybrid courts were additionally established in Sierra Leone and Cambodia, in which national and international judges passed sentences jointly.[40] Furthermore, the provisions of international criminal law were incorporated into many national penal codes so that these crimes could also be prosecuted by the respective national judiciaries. In Germany, a corresponding International Criminal Code came into force in 2002.[41] However, ordinary criminal codes likewise tend to contain regulations that make the crimes typical of dictatorships, such as murder, torture or unlawful detention, punishable offences.

The country studies published here analyse the prosecution of dictatorships and mass crimes within the framework of transitional justice in different contexts. The studies describe almost all known approaches – from far-reaching or conditional amnesties via the comprehensive or conservative application of national criminal law to the punishment of serious human rights abuses with the help of international criminal law and international courts. The studies not only make it possible to compare the different instruments and their results, but also show how and why the means and methods of using criminal law within transitional justice changed over time.

The model of a far-reaching amnesty is represented in this volume by the case of Uruguay, as analysed by Veit Strassner.[42] A state of emergency was declared in this small country on the east coast of South America in 1968, and the parliament was dissolved in 1973. Around 2,900 people were arrested and 80 lost their lives in the fight against the leftist guerrilla organization *Tupamaros*. After the military seized power, the crackdown intensified. Approximately 25,000 people were imprisoned for political reasons, about 6,000 of them for a longer period of time. In relation to the population of almost three million at the time, this amounted to a higher proportion of incarcerations than during the military dictatorships in Argentina, Brazil or Chile. A further 183 people 'disappeared' without a trace, most of them in neighbouring Argentina. They were almost certainly murdered. After several years of nego-

39 *Rome Statute of the International Criminal Court*, accessed 24 November 2021, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf. Compare, too, the commentary on the Rome Statute by William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010).

40 On the establishment and work of hybrid courts, see Aaron Fichtelberg, *Hybrid Tribunal: A Comparative Examination* (New York: Springer, 2015).

41 Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch* (Baden-Baden: Nomos, 2013); Jeßberger, *Völkerstrafrecht*.

42 On transitional justice in Uruguay, see also Eser, *Strafrecht*, *Teilband 11: Chile, Uruguay* (2007), 449–641; Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (New York: Palgrave Macmillan New York, 2013); Francesca Lessa and Elin Skaar, 'Uruguay: Halfway towards Accountability,' in *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability*, ed. Elin Skaar, Jemima Gracía Godos and Cath Collins (New York and London: Routledge, 2015), 77–102; Skaar, *After Violence*, 67–93; Straßner, *Wunden*, 159–226.

tiations with the military, the dictatorship ended in November 1984 with free elections.

Unlike its counterparts in Chile and Argentina, the Uruguayan military had not initially codified an amnesty for itself in law. Only after the release of all political prisoners in March 1985 and the subsequent filing of over 700 charges against those responsible for the original arrests did the military demand an amnesty similar to the one previously granted by parliament for the prisoners. In December 1986, therefore, a law was passed that accommodated this request and left it up to the president to decide whether or not an act fell under the amnesty regulation. Mainly out of fear of another coup d'état, President Julio María Sanguinetti subsequently had all outstanding trials terminated. Human rights organizations initiated a referendum against the law twice – in April 1989 and in October 2009. However, on both occasions a narrow majority voted for the continuation of the amnesty.

As a result, in no other country in the world did the policy of immunity from prosecution possess such a high degree of democratic legitimacy as in Uruguay. Nevertheless, a gradual 'erosion' of the amnesty began to set in after about 15 years. Firstly, human rights groups and the lawyers associated with them sought legal loopholes, which they found, among other things, in civil claims for damages against the state and in criminal proceedings against civilian politicians who were not covered by the amnesty law. For example, they regarded the forced disappearance of individuals as continuing abductions because the victims' remains could not be found. Seen from this perspective, the act of disappearance lay outside the amnesty's period of validity. In addition, they appealed to the Inter-American Court of Human Rights, which in 2011 declared the amnesty law invalid in several cases because it prevented the criminal investigation of serious human rights violations. Moreover, from 2005 onwards, the presidents of the centre-left *Frente Amplio* alliance gave the judiciary a free hand, allowing it to decide independently and with less restraint about possible prosecutions.

After the Supreme Court declared the amnesty law unconstitutional in several cases, the Uruguayan parliament ultimately passed a law on the state's right to inflict punishment in 2011. This declared the crimes committed during the dictatorship to be 'crimes against humanity'. Since it was now necessary to weigh two contradictory laws in each individual case, the criminal justice process in Uruguay proceeded in a slow and halting fashion. Of 339 cases, 102 were dropped, while 45 people were convicted of human rights abuses between 2002 and 2020. As of 2020, the rest were still pending. Those convicted included former president Juan María Bordaberry, who was sentenced to 30 years' imprisonment, former *de facto* president General Gregorio Álvarez, who received 25 years in prison, and a number of other military and police officers.

A similar development occurred in Chile, which Ricardo Brodsky examined in his country study.[43] After a coup by the armed forces and the police, a military dictatorship held power there from September 1973 onwards under the commander-in-chief of the army, General Augusto Pinochet. Especially in the early years of its rule, the military junta acted with great brutality against leaders and activists of the left-wing electoral coalition *Unidad Popular*, which had brought the socialist politician Salvador Allende into office in 1970. Thus, following the coup, thousands of people were interned in stadia, camps, military compounds and secret detention centres. After the dissolution of the secret service *Dirección de Inteligencia Nacional* (DINA) in 1977, the extent of the repression decreased. Despite this, of a population of ten to twelve million at the time, a total of more than 38,000 people were imprisoned and tortured for political reasons. More than 2,000 were executed and more than 1,000 disappeared. Free elections were held in December 1989, after Pinochet had lost a vote on whether to serve another term as president. However, he remained commander-in-chief of the army until 1998 and enjoyed immunity from prosecution, having had himself declared a senator for life.

As early as 1978, the military junta had declared an amnesty that exempted a large proportion of the violent acts committed under its aegis from prosecution. This decree was not repealed by subsequent democratic governments. In Chile, as in Uruguay, human rights organizations and lawyers aligned with them therefore looked for legal loopholes. Since the amnesty only applied to acts up to 1978 and did not cover all eligible offences, initial investigations were launched in the 1990s. These led to the arrest of former DINA leader Manuel Contreras in 1994. 1998 witnessed a turnaround in jurisprudence, when the Supreme Court ruled that the Geneva Convention applied in cases of enforced disappearances. This brought about the resumption of proceedings. A few weeks later, Pinochet was arrested in London at the request of a Spanish investigating judge and placed under house arrest there for a year and a half – a decision that echoed around the world. In Chile, too, lawsuits against the former dictator were now permitted for the first time, and in the year 2000 his immunity as a senator was lifted.[44]

Against this background, the Supreme Court appointed 60 judges in 2001 at the request of the socialist president Ricardo Lagos. These were to give priority to deal

43 On transitional justice in Chile, compare Cath Collins, *Post-Transitional Justice:. Human Rights Trials in Chile and El Salvador* (Pennsylvania: Pennsylvania State University Press, 2010); Cath Collins and Boris Hau, 'Chile: Incremental Truth, Late Justice,' in Skaar, *Latin America*, 126–150; Albin Eser, *Strafrecht, Teilband 11: Chile, Uruguay* (2007), 23–447; Claudio Fuentes, 'The Unlikely Outcome: Transitional Justice in Chile 1990–2008,' in Popovski, *After Oppression*, 116–142; Klumpp, *Vergangenheitsbewältigung;* Stephan Ruderer, *Das Erbe Pinochets: Vergangenheitspolitik und Demokratisierung in Chile 1990–2006* (Göttingen: Wallstein, 2010); Straßner, *Wunden*, 227–307.

44 Cf. Heiko Ahlbrecht, *Der Fall Pinochet(s): Auslieferung wegen staatsverstärkter Kriminalität?* (Baden-Baden: Nomos, 1999); Roger Burbach, *The Pinochet Affair* (London and New York: Zed Books, 2003); Bruno Zehnder, *Immunität von Staatsoberhäuptern und der Schutz elementarer Menschenrechte – der Fall Pinochet* (Berlin: Nomos, 2003).

with about 110 cases of serious human rights violations. Lagos' successor Michelle Bachelet, who had herself been imprisoned and whose father had died in custody, also actively campaigned for a reappraisal of the crimes committed by the regime. However, due to the judiciary's slow *modus operandi* and the gradual erasure of criminal responsibility by the Supreme Court, in the end – judged in comparison to the number of victims – only a small proportion of those responsible were punished. In total, Chilean courts imposed just over 600 prison sentences between 2010 and 2019, mostly against members of the security forces. Pinochet was not among them, as he had been declared unfit to stand trial in 2001.

The third South American country examined in this volume is Argentina.[45] There too, high-ranking military officers staged a coup in the 1970s. Between 1976 and 1983, the junta under General Jorge Rafael Videla and his successors arrested around 10,000 opposition activists, predominantly on the left. Almost 9,000 are believed to have disappeared and were presumably killed. In relation to the population of 26 to 30 million at the time, more people were killed on average per capita in Argentina than in Chile or Uruguay.

The picture that Veit Strassner paints in his country study in this volume displays how the process of transitional justice as regards criminal law in Argentina occurred in several waves. Although the military had guaranteed a comprehensive amnesty by passing the Law of National Pacification shortly before the free elections in October 1983, the Argentinian parliament declared the law unconstitutional soon afterwards. Instead, in 1985, on the orders of the new president Raúl Alfonsín, the so-called junta trials took place, in which Videla and other junta members were sentenced to lengthy prison terms.

However, primarily due to fears of another military coup, prosecutions were soon stopped. In December 1986, the parliament passed the so-called Full Stop Law, which stipulated that new criminal charges relating to the human rights abuses committed under the regime had to be brought within 60 days. This was followed six months later by the Law of Due Obedience, which reduced the number of charges permitted to only 18. President Carlos Menem, who came to office in 1989, then opposed prosecution altogether and gradually also pardoned all military officers and civilians who had already been convicted.

As in Uruguay and Chile, human rights organizations and their lawyers subsequently sought legal loopholes in the amnesty legislation. For example, relatives of the victims sued the state for compensation and, in 1998, a mother won the

45 On transitional justice in Argentina, see Arnold, *Strafrecht, Teilband 3: Argentinien* (2002); Lorena Balardini, 'Argentinia: Regional Protagonist of Transistional Justice,' in Skaar, *Latin America*, 50–76; Mario Hemmerling, *Vergangenheitsaufarbeitung im postautoritären Argentinien: Ein Beitrag zur Reaktion des Verfassungsrechts und der Verfassungsgerichtsbarkeit auf staatlich gesteuertes Unrecht im Lichte völkerrechtlicher Verpflichtungen* (Baden-Baden: Nomos, 2011); Lessa, *Memory*; Catalina Smulovitz, 'The Past is Never Dead: Accountability and Justice for Past Human Rights Violations in Argentina,' in Popovski, *After Oppression*, 64–85; Straßner, *Wunden*, 73–158.

right to have the fate of her disappeared child legally clarified. In both cases, however, the Argentinian state only gave way after the Inter-American Court of Human Rights became involved. In addition, criminal proceedings were brought for child abduction, because this offence was not covered by the amnesty laws. Consequently, Videla and other high-ranking military officials were tried again and finally sentenced to terms of imprisonment in 1998.[46]

Following the election victory of the Peronist politician Néstor Kirchner, the Argentinian parliament repealed the amnesty laws as unconstitutional in 2003. The Supreme Court confirmed this two years later. Thus, 22 years after the end of the military dictatorship, there were no longer any legal hurdles for the prosecution of serious human rights violations in Argentina. As a result, by September 2020 there had been around 600 trials for crimes against humanity, in which almost 1,000 responsible parties were convicted. However, owing to their now advanced age, the majority served their jail terms under house arrest.

In light of the above, it can be said that amnesties played an important role in the process of transition from dictatorships to stable democracies in all three South American states.[47] Since the military could assume that no-one from their ranks would be held accountable, they renounced their political power or attempts to regain it by force respectively. At the same time, it can be observed that a strong human rights movement, in cooperation with lawyers, courts and the Inter-American Court of Human Rights, slowly eroded the commitments to immunity from prosecution and in one case – Argentina – finally brought them down altogether. Furthermore, it is striking that the intensity of the criminal justice process depended strongly on the political balance of power, above all on which party was in power and what influence the military had in each case.

Criminal justice developed in a markedly different way in Albania, examined in this volume by Jonile Godole.[48] Between 1944 and 1990, the Balkan state – which has less than three million inhabitants – was ruled by one of the most repressive communist dictatorships in Europe. The total number of political prisoners under dictator Enver Hoxha is estimated to stand at between 24,000 and 34,000, and the number of politically motivated executions is estimated at over 6,000. Around 1,000 people are said to have died in custody. About the same number again were killed at the bor-

46 Wolfgang Kaleck, *Kampf gegen die Straflosigkeit: Argentiniens Militärs vor Gericht* (Berlin: Wagenbach, 2010).

47 On this topic, cf. Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009).

48 On transitional justice in Albania, compare Robert Austin and Jonathan Ellison, 'Albania,' in Stan, *Eastern Europe*, 176–199; Arolda Elbasani and Artur Lipinski, 'Transitional Justice in Albania: Historical Burden, Weak Civil Society and Conflicting Interests,' in *Transitional Justice and Civil Society in the Balkans*, ed. Olivera Simié and Zala Volčič (New York: Springer, 2013), 105–121; Lavinia Stan and Nadya Nedelsky (eds.), *Encyclopedia of transitional justice*, vol. 1 (Cambridge: Cambridge University Press, 2013), 7–14.

der. The dictatorship in Albania not only lasted considerably longer than in the South American states examined here. It also led to the wholesale destruction of established social structures. The previous elites were killed or imprisoned. The borders were hermetically sealed. The economy was completely nationalized. Agriculture was forcibly collectivized. In 1967, even any kind of religious practice was banned.

After the first free elections in 1991, from which the communist Party of Labour emerged victorious, the judiciary inherited from the dictatorship conducted a series of trials against former leading officials. For example, the dictator's widow was sentenced to nine years in prison for embezzlement in December 1991. Hoxha's successor, Ramiz Alia, received the same prison sentence in 1994. Similar sentences were handed down to a number of other officials, but the will to prosecute soon waned and most of the sentences were overturned. A second attempt to resolve matters was made in 1995, when the Albanian parliament passed the law 'On Genocide and Crimes against Humanity' following the election victory of the Democratic Party (DP), which was founded by former opposition members. As a result, 24 former high-ranking officials were arrested – among them Alia, who has since been released, and the head of the secret service, Zylyftar Ramizi – and sentenced to heavy fines.

After a severe economic and political crisis, the Socialist Party (SP), as the Party of Labour now called itself, won the elections again in 1997. The court of appeal decided shortly afterwards to drop the charges against Alia and other top officials because they 'could not be punished for acts that were not illegal at the time they were committed'.[49] In 1999, the court further acquitted those officials who had already been convicted. However, the aforementioned officials had already escaped from prison two years earlier during the unrest and, in some cases, had fled abroad. In total, 26 people were convicted in Albania, but none of them had to serve their full sentences.

Albania, like South America, reveals a close connection between the political balance of power and the intensity of transitional criminal justice. However, the consequences of this are more significant in Albania's case, because the country lacked several influential factors that were crucial in Latin America. These included a strong human rights movement supported by qualified lawyers, a relatively independent judiciary and a supranational judicial body such as the Inter-American Court of Human Rights, which could have exerted external influence on the administration of justice in Albania. Another difference to South America is the fact that all political camps were intertwined with the old regime in terms of personnel, and former persecutees had only a weak political elite at their disposal.

49 Quoted in Bledar Abdurrahmani, 'Transitional Justice in Albania: The Lustration Reform and Information on Communism Files,' *Interdisciplinary Journal of Research and Development*, 5:3 (2018): 123.

South Africa, which Hugo van der Merwe has examined in this volume, took a fundamentally different path than the states mentioned so far.[50] The policy of racial segregation practised there, especially between 1948 and 1994 – known as apartheid – led to the persecution of the black opposition movements spearheaded by the African National Congress (ANC) and Pan Africanist Congress (PAC). This in turn engendered a guerrilla war supported by the Soviet Union, which also involved brutal actions against 'traitors' in the ranks of the opposition by its own members. In 1990, the ban on the ANC was lifted and its leader Nelson Mandela released. After several years of negotiations with the white government, free elections were held in 1994. These ended with an electoral victory for the ANC. The transition period from 1991 to 1994 in particular witnessed fierce conflicts between the ANC and the black, anti-communist Inkatha Freedom Party (IFP). These clashes claimed the lives of at least 14,000 people – far more than had died during more than 40 years of apartheid. It is still not known how many of the country's approximately 60 million inhabitants were victims of political violence in total.

Haunted by these bloody clashes, the South African parliament passed a law for 'the Promotion of National Unity and Reconciliation' in 1995.[51] Those responsible for serious human rights violations during the period from 1960 to 1994 were to be granted an amnesty, provided that they 'make a full disclosure of all the relevant facts [...]'. A Truth and Reconciliation Commission set up by Mandela and chaired by the black Archbishop Desmond Tutu was to shed light on the crimes committed via public hearings, grant amnesty to self-confessed perpetrators and make recommendations regarding reparations for victims. The commission had two years to complete its work and presented its final report in October 1998.[52]

The legislature's offer, however, met with only a limited response. Although the commission received in excess of 7,000 amnesty applications, these came mainly from perpetrators from the ranks of the liberation movement who had already been convicted and from white officials whose deeds had already become known. Victims appealed against more than 1,600 amnesty applications, resulting in public hearings. Over 1,000 applicants, mostly ANC members, were nevertheless granted amnesty. After concluding its work, the commission handed over about 400 investi-

50 On transitional justice in South Africa, see Ole Bubenzer, *Post-Trc Prosecutions in South Africa: Accountability for Political Crimes After the Truth and Reconciliation Commission's Amnesty Process* (Leiden and Boston: Brill, 2009); Audrey Chapman and Hugo van der Merwe, *Truth and Reconciliation in South Africa: Did the TRC deliver?* (Philadelphia: De Gruyter, 2008); Antje du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge: Cambridge University Press, 2007); Eser, *Strafrecht, Teilband 8: Südafrika*; Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (New York: Routledge, 2010).

51 *Promotion of National Unity and Reconciliation Act 34 of 1995*, accessed 24 November 2021, https://www.justice.gov.za/legislation/acts/1995-034.pdf.

52 *The TRC Report*, accessed 24 November 2021, https://www.justice.gov.za/trc/report/index.htm. Cf. Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor: University of Michigan Press, 2013).

gation files relating to instances in which it had rejected the respective amnesty applications made to the public prosecutor's office. Nevertheless, even these cases tended not to be prosecuted. Van der Merwe attributes this fact to influence exerted by the ANC, which feared that it too would otherwise end up in the cross-hairs of the investigations.[53]

In total, approximately 20,000 serious crimes were reported to the commission. However, due to its short mandate and understaffing, it was not able to investigate most of them in more detail. Only about ten percent of the victims or relatives who came forward were heard in public. Most of the human rights abuses were neither publicly dealt with nor punished. Contrary to the expectations of Mandela and Tutu, the South African approach did not lead to the establishment of lasting peace in this fractured society, as has most recently been demonstrated by the unrest in the summer of 2021.

By comparison, the criminal proceedings employed within the context of transitional justice in two other African states examined in this volume took a fundamentally different course. Unlike South Africa, though, this process did not take place after a negotiated transition, but following a military victory by rebels over the regimes that had held sway until then. The criminal proceedings initiated in those nations were thus imbued with characteristics more akin to victors' justice than to prosecution under the rule of law.

In Ethiopia, to which Tadesse Metekia has devoted his country study, a Marxist-Leninist-orientated military junta ruled from 1974 to 1991. The regime enjoyed the support of the Soviet Union and other Eastern Bloc states.[54] Especially during the time of the 'Red Terror' in 1977/78, the multi-ethnic state endured mass persecution, which is said to have cost the lives of up to 150,000 Ethiopians. However, thousands were arrested, tortured and executed both before and after that period. In addition, over 10,000 civilians were killed by bombardments in the fight against independence movements in the north of the country. Furthermore, the regime was partly responsible for a severe famine in which more than half a million people perished between 1984 and 1985. In total, between 725,000 and two million people are said to have lost their lives under dictator Mengistu Haile Mariam in Ethiopia, which has a population of just over 100 million. After several years of civil war, the regime was overthrown in

53 Compare the contribution of Hugo van der Merwe in this volume.

54 On transitional justice in Ethiopia, cf. Girmachew Alemu, Charles Schaefer and Kjetil Tronvoll, *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (Woodbridge: Boydell & Brewer, 2009); Tadesse Metekia, 'Violence Against and Using the Dead: Ethiopia's Dergue Cases,' *Human Remains and Violence* 1:4 (2018): 76 – 92; Demelash Shiferaw Reta, *National Prosecution and Transitional Justice: The Case of Ethiopia* (n. p., 2014); Jeremy Sarkin, 'Transitional Justice and the Prosecution Model: The Experience of Ethiopia,' *Law, Democracy & Development* 2:3 (1999): 253 – 266; Stan, *Encyclopedia*, vol. 2, 167 – 173; Marshet Tadesse Tessema, *Prosecution of Politicide in Ethiopia: The Red Terror Trials* (The Hague: Asser Printing Press, 2018).

1991 by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) and the Oromo Liberation Front (OLF).

The newly created transitional government, which the OLF soon left, initially made no effort to deal with the past in terms of criminal law. However, in response to international pressure, a law was passed in 1992 that provided for the establishment of a special prosecutor's office. The constitution, which came into force in 1995, further stipulated that genocide and crimes against humanity were neither subject to a statute of limitations nor to a pardon.

The Special Prosecutor's Office carried out investigations under the precepts of international criminal law, as well as investigating murder, grievous bodily harm with intent, unlawful arrest and similar offences. The investigations, which lasted from 1992 to 2010, were not only directed against political decision-makers, field commanders and officials of the communist regime, but also against private individuals who had participated in atrocities. In addition to several regional courts, the Federal Supreme Court, which heard the most prominent cases and also served as a court of appeal, was primarily responsible for conducting the trials.

In total, more than 5,000 people were charged and almost 3,600 convicted. Nevertheless, only 2,275 people actually had to serve their sentences, as the rest had left the country and efforts to extradite them proved unsuccessful. Mengistu, who had fled to Zimbabwe, could also only be sentenced in absentia to life imprisonment for genocide, manslaughter and other charges in 2006, and to death in absentia in 2008. The same applies to 19 of his 73 co-accused. Of the 23 individuals accused of war crimes, only five were even present at their trials. In addition to lengthy prison sentences, 52 unenforced death sentences were handed down during the trials, 18 of them against junta members.

The EPRDF attempted to gain more political legitimacy as regards both domestic and foreign policy via the trials. However, given the successor regime's authoritarian character and the instrumental character of the prosecutions that it initiated, this has only been achieved to a limited extent. For example, during Mengistu's stay in South Africa, Amnesty International explicitly opposed his extradition to Ethiopia because he would have been extradited to a country where suspects would arguably face unfair trials and the death penalty.[55] The Director-General of the Ethiopian Agency for Civil Society, Jima Dilbo Denbel, further argued that the trials had hindered rather than promoted the quest to find the truth. In his opinion, if the government officials who had formally apologized had not been imprisoned and threatened with the

55 Amnesty Interational, 'Äthiopiens Ex-Diktator Mengistu nicht verhaftet,' *AI-Journal* (January 2000), accessed 24 November 2021, https://web.archive.org/web/20160304074225/http://www.amnesty.de/umleitung/2000/deu05/264?lang=de%26mimetype%3dtext%2fhtml.

death penalty, but had been given the opportunity to testify voluntarily, this would have been more likely to aid the healing process for the victims.[56]

In Rwanda, which is examined in this volume by Julia Viebach, criminal prosecution took place under similar conditions.[57] However, the acts of violence committed there differed from those in Ethiopia in that they claimed an extremely high number of victims in a very short period of time and had been committed with the broad participation of the population. Moreover, due to the dimensions of the genocide and the passive attitude of the UN, the process of transitional criminal justice in Rwanda was to a large extent an international issue.

In spring 1994, at least 800,000 people were killed in Rwanda in just 100 days. Armed units as well as around 200,000 civilians took part in the mass murder, which was mainly committed with primitive hand-held weapons. The violence originated with the majority Hutu section of the population and was directed against the minority Tutsis. However, moderate Hutus such as Prime Minister Agathe Uwilingiyimana were also among the victims. The genocide was ended by the decisive military victory of the Tutsi rebel army the Rwandan Patriotic Front (RPF), which is also said to have killed at least 25,000 civilians during its campaign.

The dimensions of the crimes and the large number of people responsible for them made criminal prosecution particularly difficult. Furthermore, national and international actors worked side by side with and sometimes even against each other. In November 1994, the UN Security Council decided to establish a temporary International Criminal Tribunal for Rwanda (ICTR), the jurisdiction of which was limited to genocide, war crimes and crimes against humanity committed in 1994.[58] In order to prevent influence being exerted by the RPF, the court was located in neighbouring Tanzania. Rwanda, which had originally requested the establishment of the court, voted against the resolution. From 1995 to 2014, the ICTR indicted a total of 93 people. These consisted primarily of individuals involved in organizing the genocide ('*génocidaires*'), such as cabinet members, regional and local politicians, military leaders and members of the *Interahamwe* militia, in addition to some prominent

56 Jima Dilbo Denbel, 'Transitional Justice in the Context of Ethiopia,' *International Letters of Social and Humanistic Science* 10 (2013), 73–83, accessed 24 November 2021, https://www.scipress.com/ILSHS.10.73.pdf.

57 On transitional justice in Rwanda, see Urs Behrendt, *Die Verfolgung des Völkermordes in Ruanda durch internationale und nationale Gerichte: Zugleich ein Beitrag zu Inhalt und Funktion des Universalitätsprinzips bei der Verfolgung von Völkerrechtsverbrechen* (Berlin: Berliner Wiss.-Verlag, 2004); Eide and Suhrke, 'Rwanda,' in Skaar, *After Violence* (New York: Taylor & Francis Ltd., 2015), 139–162.; Sam Rugege and Aimé M. Karimunda, 'Domestic Prosecution of International Crimes: The Case of Rwanda,' in *Africa and the International Criminal Court,* vol. 1., ed. Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (The Hague: Springer, 2014), 79–116.

58 UN Security Council, *Resolution 955* (8 November 1994), accessed 24 November 2021, https://www.humanrights.ch/cms/upload/pdf/100916_SC_Res_955.pdf. Cf William Schabas, *The UN international criminal tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006).

businessmen and media representatives. 61 people received prison sentences, and three cases were handed over by the court to the judiciary in Rwanda.[59]

Rwanda itself was initially without a functioning judicial system, since the new rulers had broken up the previous Hutu-dominated one. However, as part of their 'policy of maximum criminal responsibility', they wanted to punish not only high-ranking perpetrators but all those involved in the genocide. Up to 140,000 people, including around 5,000 youths, were taken into custody. This led to catastrophic conditions in the overcrowded prisons, where detainees frequently experienced inhumane treatment. The war crimes and revenge killings committed by Tutsis were not prosecuted, not even by the ICTR.

For the purposes of prosecution, the Rwandan penal code was supplemented with elements of international criminal law. At first – more precisely, from 1996 to 2000 – special courts had jurisdiction over the proceedings. In order to speed up processing the cases, the suspects were classified according to the severity of their crimes into four, and, later, three categories. Moreover, a system of so-called confession hearings was introduced, in which defendants could expect a considerable reduction in their sentences if they made a comprehensive confession and apologized to their victims. This procedure was used above all in relation to minor offences.

Nevertheless, even these measures did not resolve the backlog in processing the cases, which was mainly due to the considerable number of them. The first and most serious category alone, which included genocide, incitement to violence, sexual torture, murder and the desecration of corpses, encompassed 70,000 to 80,000 suspects. By mid-1997, however, the special courts had handed down only 142 sentences, including 61 death sentences. Later, the tempo increased. By the end of 2001, a good 4,000 people had been brought to trial and, by the close of 2003, a further 2,300. In spite of this, although about 10,000 people had been prosecuted by mid-2006, it would still have taken about 100 years to try all the accused if the pace had remained the same.

From 2002, the Rwandan government thus began to establish so-called *gacaca* courts. Utilizing an ancestral tradition, whereby in conflict situations the village elder – the *inyangamugayo* – was called upon to make a decision, these were granted additional authority, which allowed them try crimes against humanity and genocide and to decide on punishments and reparations. Following a pilot phase, these village courts were introduced throughout Rwanda in 2005.[60]

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59 ICTR, *Key Figures of ICTR Cases*, accessed 24 November 2021, https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf.

60 On the g*acaca* courts, compare Paul Christoph Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (Oxford: Oxford University Press, 2012); Philipp Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge: Cambridge Universitiy Press, 2010); Nandor Knust, *Strafrecht und Gacaca: Entwicklung eines pluralistischen Rechtsmodells am Beispiel des ruandischen Völkermordes* (Berlin: Duncker & Humblot, 2011); Charity

The village communities elected over 250,000 men and women to serve as *inyangamugayo* judges at that point in time. Those chosen received only basic legal training. Lawyers or qualified judges did not participate in the proceedings. At the lowest level, more than 9,000 cell courts were responsible for hearing evidence as well as handling property offences. Approximately 1,500 sector courts tried more serious crimes and dealt with appeal cases. Cases in the first of the aforementioned categories were initially referred to national courts, but from 2008 they were also tried by sector courts. The *gacaca* courts could sentence defendants to up to 25 years in prison or to community service. By 2012, when they ended their work, they had sentenced in excess of 1.9 million people. 273,000 were declared innocent.

In a similar fashion to its Ethiopian counterpart, the government in Rwanda claimed that the trials were intended to end a 'culture of impunity'. Admittedly, they did indeed contribute to providing for the *Right to Justice* mentioned earlier. The price, however, was a massive restriction of the rights of the accused in the *gacaca* courts. This led to international criticism, especially from jurists. Whether – as Denbel postulates for Ethiopia[61] – the *Right to Know* would have been better served if criminal prosecution had been dispensed with altogether seems doubtful. After all, discontinuing the threat of punishment does not automatically lead to a greater willingness to testify on the part of those responsible. On the other hand, the practice of offering reduced sentences during criminal proceedings, as employed in Rwanda, proved quite effective in terms of criminal prosecution in relation to transitional justice.

The main objection to the approach taken in Ethiopia and Rwanda is that the regimes responsible for the crimes were not replaced by state structures based on the rule of law, but by new authoritarian forms of rule. Ethiopia, for example, was a country with extremely repressive laws – at least until 2018. Faced with increasing political violence, the government has again resorted to instruments of persecution since 2020, as well as deploying the military against breakaway regions. Ethiopia's freedom status admittedly improved from 12/100 points in 2017 to 24/100 in 2020, but the country is still considered unfree and its score deteriorated once more to 22/100 in 2021. Rwanda's freedom status likewise scarcely improved between 2002 and 2013, dropping from 24/100 (2017) to 21/100 (2021) in recent years.[62] In both countries, therefore, the *Guarantees of Non-Recurrence* remain unfulfilled.

A comparison of criminal prosecution in the seven states examined here shows that there is no patent remedy for the question posed at the beginning of this paper as to which instruments of transitional justice are effective and which are not. Their

Wibabara, *Gacaca Courts versus the International Criminal Tribunal for Rwanda and National Courts* (Baden-Baden: Nomos, 2014).

61 Denbel, 'Transitional Justice, 82.

62 Accessed 24 November 2021, https://freedomhouse.org/country/ethiopia/freedom-world/2017 and https://freedomhouse.org/country/rwanda/freedom-net/2017.

success depends to a large extent on the prevailing national and international conditions. Nevertheless, some conclusions can be drawn for the future:

1. **Criminal prosecution is necessary.** The criminal prosecution of serious human rights violations serves the goal of removing those responsible for them. It takes into account the victims' need for atonement whilst helping to enforce the rule of law, restore trust in the state and deter attempts at repetition. At the same time, it makes a contribution to establishing the truth. Not to prosecute would call into question basic principles of criminal law, disappoint the victims and their relatives, and foster the danger of repetition. In the case of war crimes, genocide and crimes against humanity, it would also contradict the international criminal law now in force in many states.
2. **Amnesties make sense.** In the interests of a peaceful transition from dictatorship to democracy, it is nevertheless often required to deliberately refrain from prosecution. In many cases, the democratization of an authoritarian regime is only possible if larger sections of the ruling elite can assume that they will gain more advantages than disadvantages from it. The greater the danger of a relapse into dictatorship, the more restrained the instrument of criminal prosecution that must therefore be used. This applies all the more to situations of civil war, where the threat of prosecution can strengthen resistance and prolong violent conflicts. The prospect of an amnesty is thus a legitimate and practicable means of bringing hostile parties to the negotiating table and committing them to ending violence, whereby it can be structured differently in terms of substance and chronology.
3. **Remission of punishment facilitates transitional justice.** A mitigated form of amnesty is exemption from punishment (South Africa) or reduced punishment (Rwanda) if the accused makes a confession. This instrument, which is also used in many countries for criminal offences, is a sensible method for making transitional justice easier. However, it loses its pacifying effect if, as in South Africa, criminal prosecution ultimately does not occur even against those who do not confess. Moreover, the remission of punishment should leave civil claims untouched, so as not to curtail the rights of victims.
4. **Prosecution can be narrowed down.** When it comes to dealing with mass crimes under criminal law, the judiciary often reaches its limits. Only if a manageable circle of victims and perpetrators is involved is it possible to hold a significant proportion of the perpetrators criminally responsible. With a large circle of victims and perpetrators, it is therefore in the interest of successful transitional justice to concentrate on serious offences. This is especially true if the judiciary is overburdened, leading to the possibility that the accused become unable to stand trial or that their crimes could expire by limitation, so that serious human rights abuses could go unpunished.
5. **Judicial reforms are necessary.** Successful criminal justice generally requires a thorough reform of the judicial system, both in terms of personnel and organization. The aim should be to maximize the independence of the judiciary and to

largely eliminate political influence. The efficiency of the judiciary must also be increased, since in times of transition a large number of offences often have to be prosecuted simultaneously. In countries with a poorly functioning judiciary – or one that toes a political line – care must be taken to ensure that institutional reforms and programmes of legal qualification are introduced. A complete dismantling of the old judicial system, on the other hand, is counterproductive.

6. **Obstacles to prosecution must be removed.** In many countries, legal obstacles prevent the prosecution of serious human rights abuses. These include not only extensive amnesties, which were frequently declared by the former rulers themselves, but also the prohibition of *ex post facto* legislation, statutes of limitations and the defence that perpetrators were acting under orders. In the interest of effective criminal justice, these restrictions, which are essential for functioning constitutional states but which often lead to impunity when dealing with crimes committed under dictatorships, should be eliminated or restricted at an early stage through legislative or constitutional amendments.
7. **Alternatives to criminal proceedings are possible.** In the case of a large number of serious crimes, traditional criminal proceedings followed by imprisonment are too time-consuming to ensure effective transitional justice in this area. In order to prevent arbitrariness and impunity, it is therefore necessary to use simpler forms of sanction. The decision-making bodies should be decentralized – as was the case with the *gacaca* courts in Rwanda or the American courts in Germany after 1945. To help avoid arbitrariness, a court of appeal should further exist. However, due to the limited rights of the accused, possible sanctions should be low-threshold.
8. **Criminal prosecution should be flanked by socio-political measures.** A strong civil society facilitates transitional justice and monitors the functioning of the rule of law. Victims' organizations, human rights groups and the lawyers associated with them play a special role in this respect. Frameworks for transitional justice regarding criminal law following the end of dictatorships and mass crimes should therefore include flanking programmes that strengthen these actors.

In summary, it can be said that criminal prosecution is a feasible, useful and necessary instrument of transitional justice. The political challenge after the end of an unjust regime is to adapt it to the respective circumstances in such a way that it is conducive to the criteria mentioned above in as comprehensive a fashion as possible. The time factor likewise plays an important role in this context, since processes of transition are not static, but go through various phases.

3 Redress

Whilst numerous academic studies that address the criminal prosecution of serious human rights abuses exist, the question of the rehabilitation of the victims and their relatives, as well as their compensation, has generally been treated as a side issue within the relevant research.[63] This may have something to do with the fact that, when examining crimes, more attention tends to be paid to how the perpetrators are dealt with than to the situation in which the victims find themselves. In addition, compensation is often seen as the interest of a subgroup, whereas punishing perpetrators is perceived as a concern shared by society as a whole. Nevertheless, given that no other instrument of transitional justice has such a direct impact on the circumstances of people who were victims of mass crimes, it is remarkable that the topic of redress has not been focused on more strongly. Moreover, it represents the counterpart, as it were, to criminal prosecution, because the damage caused by a perpetrator should not only be punished, but also remedied or compensated. For this reason, the measures of reparation in the countries dealt with in this volume will likewise be subjected to a comparative analysis in the following paragraphs.

The UN General Assembly set out what is meant by reparation in more concrete, detailed terms in a resolution of December 2005. According to this, it includes the following elements:

- The original situation of the victims is to be restored ('restitution');
- Their physical, psychological and material damage, including lost opportunities, should be compensated ('compensation');
- They should receive medical, psychological, legal and social care ('rehabilitation');
- The crimes committed should be disclosed, the whereabouts of the dead and disappeared clarified, and the dignity of the victims restored ('satisfaction');
- The military and security forces should be effectively controlled, the independence of the judiciary should be strengthened, the military and security forces as well as the civil service should be educated regarding the observance of human rights, and laws that violate human rights should be revised ('guarantees of non-repetition').

63 On the problems associated with redress, cf. Pablo De Greiff (ed.), *The Handbook of Reparations* (Oxford: Oxford University Press, 2008); Dan Diner and Gotthard Wunberg (eds.), *Restitution and Memory: Material Restoration in Europe* (New York and Oxford: Berghahn, 2007); Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Leiden: Brill, 2010); Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge: Cambridge University Press, 2012); Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge: Cambridge University Press, 2012).

The resolution further stipulates that reparation must be made by the state if it was responsible for the human rights violations. This must be done in an 'adequate, effective and prompt' fashion.[64]

Whilst the resolutions made by the General Assembly are only recommendations, the UN Convention against Torture, in force since 1987, is legally binding. It obliges the 171 signatory states to ensure that 'the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation'.[65] Whether and how these requirements have been implemented in the seven countries examined in this volume will be analysed in more detail below.

As a rule, one of the first actions to be carried out after overcoming a dictatorship is the release of political prisoners. Since they were usually deprived of their liberty using legal provisions, a legal act is normally also required to lift those provisions. What appears simple at first glance often turns out to be complicated in practice, since the group of prisoners to be released must be clearly defined in legal terms in order to include all those affected but exclude ordinary inmates. Even the question of whether those affected are to be granted an amnesty or rehabilitated, which, on the face of it, seems to be a trivial matter, is of considerable importance. This is because, in the one case, the persons concerned are only pardoned, while in the other, their imprisonment is declared unlawful.

In Uruguay, a Law of National Pacification was passed in 1985, immediately after the new, freely elected president took office. This granted amnesty to all political prisoners. At the same time, it rehabilitated the state employees dismissed by the military. Later, further laws also enabled those employees to return to their old jobs and credited them with their lost pension entitlement. More than 16,000 people benefited from this this act. Furthermore, in 1986, a government commission was set up to support the return and reintegration of the approximately 350,000 expatriate exiles.

It was not until many years later – after the establishment of a truth commission in the year 2000 – that further remedial measures were passed. Disadvantages that exiles and dismissed or demoted military officers and teachers had regarding their old-age pensions were now offset. Following the example of neighbouring Argentina, the Disappeared were also given the same legal status as deceased persons. This gave

64 United Nations, *Resolution adopted by the General Assembly on 16 December 2005, Annex*, 7–9, accessed 24 November 2021, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

65 United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1)*, accessed 24 November 2021, https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.

their relatives the opportunity to dispose of their assets without having to have them declared dead.

Direct financial compensation was only decided upon in 2006, more than 20 years after the end of military rule. Former political prisoners and those who had gone into exile now received a small special pension from the age of 60. In 2009, a compensation law – which made explicit reference to the UN resolution mentioned above – then awarded victims free life-long healthcare as well as a one-off capital compensation payment, which varied in amount for relatives of the Disappeared, victims of severe maltreatment and imprisoned children. The implementation of these provisions was, however, unsatisfactory. A mere 360 applications for compensation were granted in the course of the first five years following the passing of the law.

A number of victims also tried to obtain compensation via recourse to the civil courts. After this initially failed at the national level, the Inter-American Court of Human Rights obliged the Uruguayan state to make extensive reparations in at least one case. In a legal battle lasting years, the Argentine poet Juan Gelman, with the support of the Center for Justice and International Law, succeeded in forcing Uruguay to pay his granddaughter 513,000 US dollars in compensation.

The policy of redress in Chile followed a similar course.[66] However, the early establishment of a commission to clarify the fate of the Disappeared led to significantly swifter compensation for the relatives of this group of victims. In 1990, a National Office of Return was created for the numerous expatriates in exile. By 1994, it had helped over 52,000 Chileans with their resettlement and reintegration. Then, in 1992, the children of the more than 2,000 individuals killed or disappeared were awarded monthly compensation. They were to receive the payment until the age of 25, plus a one-off lump sum when that benefit expired. Finally, in 1993, a law was passed to improve the situation of the almost 160,000 civil servants dismissed under the old regime. It offset their loss of pension rights, guaranteed them a minimum pension, and provided for the payment of redundancy settlements.

More than ten years later, the establishment of another commission, this time on political imprisonment and torture during the dictatorship, led to compensation payments for this group of victims, too. In 2004, the more than 38,000 former political prisoners were awarded a monthly sum. Minors who had been born in prison received a one-off capital compensation payment. Moreover, detainees and the children of those killed were entitled to free medical care, whilst the children of those persecuted received a monthly student grant until the age of 35. A further law stipulated that confiscated property had to be compensated or restituted. Human rights organizations played an important role in the implementation of these regulations.

66 See Elizabeth Lira's analysis, in addition to the documents contained in De Greiff, *Handbook*, 55–101 and 732–759.

In addition, the Chilean state had to pay the equivalent of 133 million US dollars in damages as a result of almost 1,000 civil lawsuits.[67]

Argentina pioneered this type of reparations policy in South America.[68] A truth commission there had already proposed compensation as early as 1984. Initially, however, these measures only benefited dismissed state employees, who were reinstated and had the time lost credited in their pension calculations. In 1986, a modest pension amounting to 75 percent of the minimum wage was additionally introduced for partners and children of the Disappeared.

After several court cases, a law was passed in 1991 – much earlier than in Uruguay or Chile – that awarded former political prisoners a one-off capital compensation sum. For each day of imprisonment, they were entitled to the same income that a public servant in the highest salary bracket would earn. House arrest and probationary periods were also considered imprisonment. In the case of deceased individuals, the right to compensation passed to their legal successors. Taken as a whole, approximately 8,000 people were awarded the equivalent of about 690 million US dollars, which equates to more than 86,000 US dollars per person. However, the payment was made in the form of ten-year government bonds. From the government's perspective, this had the advantage that the sum did not have to be taken from the current state budget. The victims, though, were at a disadvantage, since they risked financial losses in the event of an early sale on the stock exchange. Furthermore, the payment was conditional on the applicant waiving further claims for damages against the state.

Under the same conditions, the relatives of the Disappeared and murdered also received capital compensation from 1994 onwards. It was set at 100 times the monthly salary of a top-level ('A' bracket) public servant – the equivalent of around 220,000 US dollars. This was followed in 2004 by compensation equivalent to 20 such monthly salaries for children who had been imprisoned together with their parents. In 2009, the circle of those entitled to compensation was additionally extended to include victims of the violent clashes that took place before the 1976 coup. Moreover, in 2011, a centre for the psycho-social support of victims of human rights abuses began its work. In 2013, an honorary pension for former political prisoners was finally adopted, which is paid independently of other benefits. On top of that, since 2016, Argentinians who had to leave the country for political reasons have been entitled to a quarter of the rate of the imprisonment compensation for each day spent in exile.[69]

If one compares reparation policies in the three South American countries, numerous similarities are clear, despite all the differences in the details. The initial focus centred on dismissed state employees and exiles. In Uruguay and Argentina, state employees were given the opportunity to return to their former jobs – in addi-

67 Compare the contribution of Ricardo Brodsky in this volume.

68 On this, cf. María José Guembe's analysis, as well as the documents contained in De Greiff, *Handbook*, 21–54 and 701–731.

69 See Veit Strassner's contribution in this volume.

tion to compensation for disadvantages in their pension schemes – and in Chile they received severance pay. Later, both the relatives of those murdered and former political prisoners received one-off payments or monthly support.

In all three nations, reparations were only expanded step by step during the course of a growing willingness to come to terms with the past. In two countries – Argentina and Chile – a direct temporal and causal connection between the recommendations made by the truth commissions and the implementation of the compensation schemes can be observed. Geographical proximity and the lack of language barriers in Latin America promoted the international transfer of experience, so that some regulations were also adopted by other countries. The fact that the victims in Argentina and Uruguay initially had to enforce their claims for compensation in court frequently caused great strain and distress for those affected, but it also imbued the process of transitional justice with a purposeful dynamic.

However, the situation was significantly different in the other four countries covered by this volume. In Albania, the only European country examined herein, reparation payments were much lower than in South America. Moreover, they depended to a large extent on the changing political balance of power and the respective economic situation. Although political prisoners had already been granted amnesty under the communist government in 1991 and were rehabilitated by law shortly afterwards, the compensation announced in the law did not materialize.

It was only after the election victory of the opposition Democratic Party (DP) that parliament passed a law in 1993 which promised formerly persecuted individuals compensation as well as other assistance such as scholarships or the right to council housing. However, it took massive protests by those affected to convince the Council of Ministers to compensate them with the equivalent of about 1,000 euros per year of imprisonment. This decision was reached in 1994. However, over half the sum was issued in the form of vouchers with which state property could be preferentially purchased. Doing so, though, was out of the question for many. All the same, between 1993 and 1997, a total of about 17.5 million euros was paid out, which would correspond to almost 17,000 years of imprisonment. In addition, for the purposes of pension calculation, each year of imprisonment was counted as two years of work.[70]

Nevertheless, numerous serious human rights violations – for example, executions, torture and deaths in custody – were not taken into account in this scheme. After the Socialist Party (SP) assumed the reins of government again in 1997, the system of compensation was therefore restructured. Now, five categories of politically persecuted persons were recognized: those executed, those who died in jail, those imprisoned in labour camps or prisons, and mentally injured parties. According to the government's calculations, this amounted to a total of almost 43,000 eligible claimants. At the same time, however, the amount of compensation for former prisoners was massively reduced to little more than a tenth of the previous amount. Even

70 Compare the contribution of Janina Godole in this volume.

these funds were paid out only slowly. Indeed, from 1998 onwards they were no longer disbursed at all, although the compensation for imprisonment was nominally tripled again in 2004 after renewed protests.

After the Democratic Party (DP) came to power once more, parliament passed a law in 2007 that massively increased the rates of compensation again. Each former detainee was now to receive 7,300 or 3,650 US dollars per year of imprisonment. However, the sum was to be paid in eight instalments, with payments only starting a good two years later and being suspended again in 2011. Contrary to the figures arrived at under the previous government, the number of those persecuted was now estimated at 100,000.

Following a further change of government to the SP, the compensation act was amended yet again in 2014. It now distinguished between primary victims (i. e.: the victims themselves) and non-primary victims (i. e.: relatives). Moreover, in 2018, payment in instalments was abolished. However, only 430 persecutees received the full sum.

When drawing a comparison to South America, it becomes clear that compensation in Albania mainly followed party-political and fiscal interests. In addition, the system was constantly amended and payment extremely unreliable. It is thus impossible to argue that the measures employed there guaranteed the *Right to Reparation* as set down in the requisite UN documents. The lack of an effective human rights movement and the judiciary's proximity to the former regime meant that justified claims could not be enforced via recourse to civil proceedings, either.

South Africa has a mixed record regarding redress.[71] A law granting victims of racially motivated expropriations the right to restitution or compensation admittedly came into force there as early as 1994. However, its practical implementation turned out to be exceedingly complicated and protracted due to difficulties regarding the provision of evidence. By contrast, the redistribution of land could be realized more quickly through purchase. To this end, the South African state acquired nearly 5,000 farms for more than 1.2 billion US dollars between 1994 and 2013, which it then transferred to black ownership.

In 1998, the Truth and Reconciliation Commission formulated recommendations for compensation, in a similar fashion to the way in which this had already been done in South America. Victims of serious human rights abuses or their relatives were to receive an annual payment of 20,000 rand (equal to about 3,000 US dollars at the time) over a period of six years, i. e.: a total of 18,000 US dollars. They were also to receive medical and educational support. Furthermore, the communities most affected by the violence were to benefit from collective assistance. To date, however, only little in the way of this has been implemented.

71 Cf. Christopher J. Colvin's analysis on this matter, in addition to the documents in De Greiff, *Handbook*, 176 – 214 and 770 – 820.

It is true that the Commission had already paid out a small amount of emergency aid of around 3,000 rand (500 US dollars) per person to the victims cooperating with it during its work. Nonetheless, it took another five years until parliament adopted its own compensation programme in 2003. All victims registered with the Commission were to receive a one-off subsidy of 30,000 rand (3,900 US dollars), which was less than a quarter of the compensation originally proposed. Affected individuals with a low annual income could additionally receive educational support, which was paid directly to the relevant educational institution. Medical support for victims, which was also planned, has not materialized so far.[72] A significant restriction is to be found in the fact that persons who had not registered with the Commission are excluded from receiving aid. Moreover, there is usually no possibility to claim civil damages, as the amnesties declared by the Truth Commission already encompassed such claims.

Similarly, the collective measures of redress proposed by the Commission in 1998 have not yet been realized. That said, a draft regulation on how to support the more than 100 communities most affected by violence was published in 2018. This would provide for reconciliation and development projects to be funded with the equivalent of up to 1.8 million US dollars each – if the regulation enters into force in this form.

In Rwanda, the poorest of the countries discussed here, no laws were passed at all obliging the state to pay individual compensation. The 2003 constitution admittedly affirmed that 'the State shall, within the limits of its capacity, take special measures for the welfare of the survivors [...] who were rendered destitute by the genocide'. However, most survivors have never received reparation in the sense of the UN resolution of 2005.

If at all, those affected could only demand this by way of civil action in criminal proceedings brought before national courts. This was done in an estimated two-thirds of the cases against roughly 10,000 defendants. About half of the claimants were actually awarded compensation. The amounts varied greatly, because they were at the sole discretion of the court. Nevertheless, payments were rarely made, as many of those convicted were destitute.

Although the courts initially ordered the state to pay compensation, too, the government never fulfilled these payment obligations. Instead, it referred to a planned compensation fund that was never realized (FIND). Civil lawsuits against the state were declared inadmissible from 2001 onwards on the same grounds. It was not until 2008 that a law came into force obliging the state to pay six percent of its revenues into a government fund to support genocide survivors (FARG). At the same time, it was stipulated that only this fund was permitted to bring private prosecutions in cases of genocide and murder, even against private individuals. However, the fund into which the money flowed did not disburse it to the claimants, but used it to finance its own support programmes.

72 See Hugo van der Merwe's contribution in this volume.

Since only a fraction of the serious human rights abuses committed were tried in national courts, the number of people actually compensated under these conditions was very small. Nonetheless, the *gacaca* courts were also empowered to decree reparations. These courts handled the majority of cases, which involved in excess of 1.6 million convicted individuals. At first, reparations were to be determined conjointly with the help of the community. Later, they had to comply with the guidelines set for the planned compensation fund. As mentioned, however, claims were only allowed to be directed against civilians and, from 2008, only in cases of minor crimes such as looting or the destruction of property. It is not known how many people benefited from this. In 2018, though, over 54,000 cases were still considered unsolved. In more than half of them, no solution could be expected because the perpetrators had died, fled or were destitute.[73]

An analysis of the policy of redress in Rwanda shows that it was driven by the intention to counteract individual claims against the state and to set up social aid programmes in lieu thereof. To this end, the FARG fund was established in 1998. By its own account, the fund claims to have financed more than two million medical treatments, supported the education of 110,000 children and youths, built about 45,000 housing units and helped 54,000 people with income-generating activities. In addition, under the *girinka* project (translated: 'to own a cow'), 5,000 poor families received a cow as a gift with the proviso that they pledge the first female calf to their neighbour. In total, the fund, which distributes its resources through the district governments and to which international donors also contribute has disbursed the equivalent of around 270 million euros over 20 years. Despite this, the fund has been accused of working inefficiently and being susceptible to corruption. First and foremost, however, by diverting compensation into collective aid programmes, the direct connection between the respective crime and the resulting reparations is lost.[74]

If Ethiopia is placed at the bottom of the list on this issue, it is because the country has not made provision for any kind of redress at all. Neither in the charter drawn up by the transitional government, nor in the establishment of the Special Prosecutor's Office, nor in the constitution of 1995 did the issue play a role. During the criminal trials, too, the courts did not oblige the state or the officials found guilty to pay compensation to the victims – even if they had appeared as witnesses. In his country study, Metekia attributes this to the 'partisan' nature of the regime change in Ethiopia. After the military victory of the rebel forces, there would have no longer been any need for negotiations with the old rulers. A national dialogue that would have in-

73 Compare Julia Viebach's contribution in this volume.

74 On the fundamental criticism of 'collective' compensation, cf. Naomi Roht-Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence,' in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 121–139, 130; Naomi Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights,' *Justice and Economic Violence in Transition*, ed. Dustin Sharp (New York: Springer, 2013), 109–138.

cluded all parties and victim groups and also discussed questions of redress therefore failed to materialize.[75]

A comparative analysis of reparation policies in the seven countries examined here makes it clear that they are often far from the standards described in the UN resolution of 2005. As a rule, provisions for compensation had to be fought for and won in a long, confrontational process. In some states, they exist even today only in fragments or not at all. Nevertheless, the comparison is useful when applied to the initial question as to which instruments of transitional justice have proven to be effective. Firstly, it reveals the broad spectrum of tasks with which nations are faced in supporting victims following the end of tyranny. Secondly, a number of measures can be identified that have clearly improved the situation of those persecuted and can therefore also be recommended for other countries. Thirdly, the comparison makes it possible to work out which contextual conditions are important for measures of redress to be taken at all.

The central elements of an effective reparations policy are already mentioned in the UN resolution of 2005. According to this, not only physical, psychological, material and 'moral' damages are to be compensated, but the costs for legal counsel and medical services are likewise to be reimbursed. As far as possible, compensation should restore a victim's original situation.[76] What this means in detail is shown with especial clarity by the regulations introduced in the three South American states studied herein. First, they provided compensation for the loss of a job and for the disadvantages suffered in relation to pension schemes. A second set of rulings regarded one-off or monthly compensation for prisoners, exiles and the relatives of those killed, whereby their children were also included. The Argentinian stipulation of using the earnings of a public servant in the highest pay bracket as a benchmark is also to be understood as a sign of moral esteem for the victims. Further regulations concerned the support of those returning home from exile, the free provision of lifelong healthcare, and the creation of a centre offering psycho-social support for victims.

These measures were made possible by various contextual factors. Victims' and human rights movements proved to be the primary driving force behind them. The establishment of truth commissions also encouraged appropriate decisions to be taken. Another factor was a functioning legal system, which, at least in part, permitted the enforcement of reparation claims through the courts. The creation of special state institutions to handle the payment of benefits was likewise of considerable importance. In addition, financial aspects were naturally an essential point, which in turn depended on the number of victims and the economic situation of the respective

75 See the analysis by Tadesse Metekia in this volume.

76 United Nations, *Resolution adopted by the General Assembly on 16 December 2005, Annex*, 7–9, accessed 24 November 2021, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

country. Compensation in the form of government bonds, as in Argentina, appears to be one way of minimizing costs in the short term.

From the above comparison of reparations policies, a number of conclusions can be drawn. In a similar fashion to those for criminal prosecution, these are also of significance for other states.

1. **Redress is necessary.** The elimination of serious human rights violations does not mean that their consequences are over. The loss of relatives, torture, imprisonment or occupational debarment continue to have an impact in many ways. Minimizing or eradicating the ongoing consequences thereof is thus a central political task in the process of transition. In the case of victims of torture, there is also an obligation to do so under international law.
2. **Redress is the job of the state.** A person responsible for damage must be liable for it and compensate it. This also applies to severe human rights abuses, for which those responsible must be held liable. However, even if the state was not the perpetrator – for example, after a regime change or a civil war – or if the perpetrators cannot be held liable, it still has a responsibility to alleviate or eliminate the consequences of serious human rights violations. The earlier and more actively it tackles this task, the more it eases the burden on the victims.
3. **Redress is an individual process.** Even when a large number of people are affected by politically motivated mass crimes, the suffering of the victims is always individual. Redress must therefore focus on the individual. This does not only apply in a technical sense, but must beat at the heart of corresponding programmes and measures. Offering care and attention is a central prerequisite for alleviating the suffering of victims.
4. **Redress must be accurately targeted.** In order to reduce or eliminate the consequences of severe human rights violations, the amount of compensation is less important than its effectiveness. For this purpose, it is advisable that appropriate measures be drawn up jointly by victims and experts in a commission. People with experience of dealing with victims of persecution should also be involved in the implementation of the measures. The points of the UN resolution mentioned above provide a good orientation as regards the goals to be achieved. This is especially true of the sections relating to restitution and compensation.
5. **Redress can be multifaceted.** Unlike civil claims for damages, reparation does not have to be solely monetary. On the contrary, experience shows that other measures are just as important. In the case of the states examined here, this applies, among other things, to the support of those returning from exile, to the entitlement to be reinstated in one's former job, to the establishment of a rehabilitation centre for former persecutees or to the introduction of the legal concept of the Disappeared. As far as monetary compensation is concerned, due to the long-term consequences of political persecution, a pension-like form of redress appears more appropriate than a one-off capital settlement.
6. **Redress is not a one-off act.** Developments in South America reveal that reparation is a longer-term process. In Chile, victim support measures were adopted

15 years after the end of the dictatorship, in Uruguay after a quarter of a century, and in Argentina after no less than 33 years. Since the consequences of severe human rights abuses frequently continue into the second or sometimes even third generation, reparation programmes have to be repeatedly reviewed and readjusted.

7. **Redress must be flanked by other measures.** As expressed in the UN resolution of 2005, redress also includes commemorative ceremonies and tributes for victims. These not only make it easier for them to come to terms with their traumatic experiences. The establishment of an appropriate culture of remembrance also contributes to making murder, torture, violence or unlawful detention taboo as a means of politics. However, other accompanying measures such as structural reforms, training courses for the security forces, strengthening the independence of the judiciary, improved governance and much more must be added in order to be able to provide effective guarantees of non-recurrence. Collective aid programmes or economic policy reforms can further contribute to reducing social tensions, but cannot replace individual reparations.

4 Places of Remembrance

In most countries, coming to terms with mass crimes also involves remembering the suffering of the victims. Generally speaking, the impulse to do so comes from those affected or their relatives, who are looking for a place of mourning and ways to prevent what happened from being forgotten. The focus in this context tends to be placed on authentic places of persecution that are to be preserved as memorials. These include sites such as prisons, camps, or places of execution, but also mass graves and cemeteries. In many places, memorials are additionally erected at unbesmirched but central locations in order to make the commemoration as prominent as possible. Often, the victims' names are also made publicly visible. According to Aleida Assmann, such sacred places of remembrance testify to a 'basic human need' for ritualized contact zones with the past.[77]

In numerous countries, organizations, political parties and government agencies are also working to create such places of remembrance – frequently in response to demands from those affected. Often, their aim is not only to establish a place of mourning, but also simultaneously to educate people about the crimes committed and their causes. Accordingly, these kinds of places of information are not only located at former sites of persecution, but also where the crimes were planned or ordered. They are often also established in untainted places in the form of museums or documentation centres. While in Germany a terminological distinction is made between

77 Aleida Assmann, *Erinnerungsräume: Formen und Wandlungen des kollektiven Gedächtnisses* (Munich: C. H. Beck, 2009), 305.

Gedenkstätten (located at places of persecution), *Erinnerungsorte* (located in other places) and *Denkmäler* or *Mahnmale* (in the sense of monuments), in English usually only the overarching term 'memorial' is used. Artists and architects frequently play an integral role in the design of these different places of remembrance.

Places of remembrance are usually multifunctional institutions. Habbo Knoch assigns them six different tasks when they are located at sites of persecution. These tasks number as follows: *first*, the preservation of structural and other material remains; *second*, the creation and maintenance of sacred places such as cemeteries, graves, or monuments; *third*, the facilitation of mourning and exchange for survivors and their relatives, as well as forms of individual and collective commemoration; *fourth*, the collection of objects, documents and testimonies; *fifth*, carrying out research, organizing permanent exhibitions and supplying other forms of information at the historical site concerned; *sixth*, educational programmes, publications and public events.[78] The last three functions also apply to memorial museums at historically unsullied sites.

The way in which these tasks are most effectively dealt with is, relatively speaking, seldom a topic in the relevant research. This is especially true in terms of an international comparison. This is all the more surprising, since places of remembrance in many countries play a central role in the process of transitional justice. Although political science literature on transitional justice has devoted its attention to the emergence, configuration and *modus operandi* of commemorative sites in individual countries, it is predominantly descriptive in its approach.[79] Various authors have also examined aesthetic and historico-philosophical questions regarding a culture of remembrance directed towards symbolic places, but the suitability of memorial sites as an instrument of transitional justice is not usually discussed.[80] In Germany, where state-sponsored remembrance of the national socialist and communist dictatorships plays a significant role, there is an extensive discourse on the work carried out by places of remembrance. Nevertheless, experiences from other cultural contexts are hardly ever taken into account.[81]

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78 Habbo Knoch, 'Gedenkstätten,' in *Docupedia-Zeitgeschichte*, 11 September 2018, accessed 24 November 2021, http://docupedia.de/zg/Knoch_gedenkstaetten_v1_de_2018.

79 Compare Ksenija Bilbija and Leigh A. Payne, *Accounting for Violence: Marketing Memory in Latin America* (Durham: Duke University Press, 2011); Michael Lazzara, *Chile in Transition: The Poetics and Politics of Memory* (Gainesville: De Gruyter, 2006); Stan, *Encyclopedia*, 117–123.

80 Cf. Assmann, *Erinnerungsräume*; Pierre Nora (ed.), *Erinnerungsorte Frankreichs* (Munich: C. H. Beck, 2005); Pierre Nora (ed.), *Realms of Memory: Rethinking the French Past* (Chicago: Columbia University Press, 1998); James Young, *The Texture of Memory: Holocaust Memorials and Meaning* (New Haven: Yale University Press, 1993).

81 On places of remembrance in Germany, see Bundeszentrale für politische Bildung, *Gedenkstätten für die Opfer des* Nationalsozialimus, vols. 1 and 2 (Bonn 1999), accessed 9 September 2022, https://www.bpb.de/shop/multimedia/dvd-cd/33945/gedenkstaetten-fuer-die-opfer-des-nationalsozialismus; Etienne François and Hagen Schulze (eds.), *Deutsche Erinnerungsorte*, vols. 1–3 (Munich: C. H. Beck, 2001); Anna Kaminsky (ed.), *Orte des Erinnerns: Gedenkzeichen, Gedenkstätten und Museen zur Dik-*

The relevant United Nations documents likewise only mention memorials and places of remembrance as instruments of transitional justice in passing. They do not even appear in the UN General Assembly resolution on 'Basic Principles and Guidelines on the Right to a Remedy and Reparation' of December 2005. Under the item 'satisfaction', there is only a general mention of 'commemorations and tributes to [...] victims'.[82] In the same year, when revising the main goals of transitional justice, Diane Orentlicher admittedly expanded the *Right to Know* via the addition of the principle that the state has the duty to ensure 'a people's knowledge of the history of their oppression' through appropriate measures. Nevertheless, she did not mention places of remembrance as a means to this end.[83] Not until the UN Secretary-General's 2010 Guidance Note on Transitional Justice was it mentioned that reparations could include 'building museums and memorials'.[84]

Against this background, a report drawn up in 2020 by the UN's Special Rapporteur on questions related to transitional justice, Fabián Salvioli, is of particular significance. Therein, the former president of the UN Human Rights Council proposes adding memory work as a fifth pillar that should stand alongside the *Right to Know,* the *Right to Justice,* the *Right to Reparation* and the *Guarantees of Non-Recurrence*. In his report, Salvioli recommends that the 'state must play an active and decisive role' in remembrance. In doing so, he argues for 'a "dialogic truth"' in which victims' voices 'play a key role'. Commemoration, he opines, must 'focus on understanding the mechanisms of oppression and dehumanization that always precede large-scale violence'. However, he also warns against the 'dangers of vengeful memorialization' and a 'tyranny of memory' aimed at justifying new acts of violence.[85] In spite of this, concrete conclusions regarding the use of places of remembrance as instruments of transitional justice are not found in this report, either.

The country studies published in this volume provide more detailed information in this respect. Firstly, they indicate that there was and is a need to commemorate the victims of severe human rights violations in each of the seven states examined. The

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tatur in SBZ und DDR (Berlin: Ch. Links, 2016); Martin Sabrow (ed.), *Erinnerungsorte der DDR* (Munich: C. H. Beck, 2009).

82 United Nations, *Resolution adopted by the General Assembly on 16 December 2005, Annex*, 7–9, accessed 24 November 2021, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

83 United Nations, Economic and Social Council, Commission on Human Rights, *Promotion and Protection of Human Rights*, 8 February 2005, accessed 9 November 2021, https://digitallibrary.un.org/record/541829.

84 United Nations, *Resolution adopted by the General Assembly on 16 December 2005, Annex*, 7–9, accessed 24 November 2021, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

85 United Nations Human Rights Council, *Memorialization Processes in the Context of Various Violations of Human Rights and International Humanitarian Law: The Fifth Pillar of Transitional Justice. Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, accessed 24 November 2021, https://undocs.org/A/HRC/45/45.

way in which meeting this need has been realized, however, has depended to a large extent on the respective political and social context. Three different forms of commemoration become apparent: commemoration that occurs within the realm of civil society, in which victims' organizations play a key role; state-dominated commemoration, in which the government exerts a determining influence on the content of remembrance; and marginalized commemoration, in which the victims' desire for recognition meets with scant response.

Uruguay offers an example of commemoration within the realm of civil society. On the initiative of a victims' organization, a memorial for the victims of disappearances ordered by the state was erected there in 2001 – 17 years after the first free elections. It is located in the capital Montevideo, on the banks of the Río de la Plata, and consists of a double wall of glass etched with the names of the Disappeared. The construction of the monument was supported by the mayor and the city government and planned by a commission consisting of public figures and representatives of civil society groups. On the initiative of a trade union victims' organization, commemorative plaques were later also embedded in the ground at several locations throughout the city.

Moreover, a 'Museum of Memory' was opened in Montevideo in 2007. It is located in the former villa of a high-ranking military officer, not far from what was once a detention centre and torture facility. The city of Montevideo designed it in collaboration with victims' associations and human rights organizations. Numerous objects, mainly from detention centres, are displayed there in several differently themed rooms. The comparatively simple exhibition is visited by about 28,000 people a year, mainly school classes. In addition, the museum organizes events and puts on touring exhibitions that are shown outside the capital. Together with former prisoners, the museum managed to convince parliament to pass a law in 2018 to establish further places of remembrance. Since then, a commission made up of representatives belonging to state agencies and civil society organizations has been determining the official recognition of these sites. There are now almost 200 places of remembrance at former locations of persecution in Uruguay, although many of them are only marked by signs.

A similar development took place in the much larger neighbouring country of Argentina. In 2007 – 24 years after the first free elections – a 'Memory Park' was completed in the capital Buenos Aires. It is managed jointly by human rights organizations, the University of Buenos Aires and the municipal government. In the centre of the 14-hectare site is a gigantic wall on which the names of the almost 9,000 Disappeared are inscribed. In contrast to Uruguay, contemporary art plays a prominent role in this place of remembrance. In an adjoining hall, which also serves as an information centre, art exhibitions are put on and events held. Furthermore, visitors can research the names of the victims here. A separate artistic department is responsible for erecting more sculptures on the site and for staging the exhibitions.

Moreover, in 2007 also in Buenos Aires a 'Museum and Site of Memory' opened its doors. It is located in the former Navy School of Mechanics (ESMA), which housed

Argentina's largest secret prison or 'black site' during the military dictatorship. A lengthy dispute accompanied deliberations regarding the use of the building, not least because President Carlos Menem wanted to demolish it in 1988 as a sign of 'reconciliation'. Human rights organizations protested against these plans, and relatives of the victims successfully took the matter to court. In 2004, the left-wing Peronist President Néstor Kirchner finally transferred the building to a coalition of human rights organizations, which set up an exhibition on 'state terrorism' in the multi-storey main building. In the erstwhile officers' mess, visitors can also find survivors' testimonies and view the former torture chamber, as well as the attic used as a communal cell. The museum, which has about 50 employees and is financed by the state, additionally organizes special exhibitions, events and teacher training courses.

The ESMA memorial soon developed into a focal point of commemorative culture in Argentina. Other institutions of transitional justice – such as the cultural centre of a victims' organization, the Institute for Human Rights, and the National Memorial Archive – moved onto the former military site. The latter not only holds documents on the military dictatorship, but is also in charge of almost 50 other Argentinian memorial sites. This oversight fell to the National Memorial Archive in 2011. In that year, parliament passed a law which obliged the government to preserve all former secret detention centres as places of remembrance. 160 of these sites have, if nothing else, at least been marked by signs. The Secretariat for Human Rights at the Ministry of Justice and Human Rights is responsible for funding the facilities located on the ESMA site.

Developments in Uruguay and Argentina make it clear that the creation of places of remembrance following the end of a period of severe human rights violations frequently plays a subordinate role at first, because questions of political transition are perceived as being more pressing. This time delay usually proves to be a disadvantage later on, since authentic sites of persecution have been reshaped or removed in the meantime. The victims' desire for recognition is generally only taken into account via the establishment of appropriate places of remembrance when they succeed in mobilizing support from the political sphere. The extent of this support determines whether merely a freestanding monument is erected or a museum associated with permanent operating costs is established.

In Chile, the third South American country examined in this volume, the creation of places of remembrance began much earlier. The main reason for this was the early establishment of a National Commission for Truth and Reconciliation, which had already proposed the creation of memorials for the Disappeared in its concluding report, published in 1991. The commission further suggested that preservation orders be placed on the former torture facilities of the secret police, giving them listed building status. On the initiative of relatives, the first monument was erected in 1994 – just five years after the first free elections – in the main cemetery in Santiago de Chile. Financed by the Ministry of the Interior, this consists of a concrete wall engraved with the names of the more than 3,000 Disappeared. In the same year, the former torture site at the Villa Grimaldi on the outskirts of the capital was also declared a

place of remembrance. However, the secret service had demolished all the buildings there. Consequently, an artistically designed 'Peace Park' was opened on the empty plot in 1997. Here, too, a wall bearing names commemorates those killed. Some parts of the building, including a cell and the entrance gate, have been reconstructed. In addition, a model of the place of detention, a monument and a small exhibition room are part of the site.

In the following years, several other places of persecution in Chile were placed under protection as listed buildings, and some of them were turned into memorials. Furthermore, numerous monuments were erected, so that today the country has over 200 places of remembrance – albeit almost half located in the region around the capital. A central role is played by the 'Museum of Memory and Human Rights', opened in 2010 by the socialist president Michelle Bachelet. The avant-garde building is visited by more than half a million people every year. An exhibition covering 5,000 square metres deals primarily with the history of the Pinochet dictatorship, but the very name of the museum signals a further-reaching claim. As its former director Ricardo Brodsky writes in his country study, it aims to make 'respect for human rights a categorical imperative of our coexistence'. In addition to a library and a memorial room, the museum includes a documentation centre which contains in excess of 40,000 documents and objects. It is supported by several human rights organizations, but financed by the state.

If one compares developments in the three South American countries, it becomes clear that, after the end of the respective military dictatorships, a vibrant culture of remembrance has emerged everywhere. This has crystallized to a considerable extent in physical places. Whilst sacral elements initially had priority, especially the naming of the dead as a form of recognition, more extensive informative and educational measures now dominate. Historical sites, such as the ESMA memorial, or pretentiously designed museums, such as the one in Santiago de Chile, have a special impact. Another common feature is the central importance of victims' and human rights organizations in the design and management of places of remembrance. Nevertheless, it is not possible to ascertain exactly how far these have had an impact on society and have promoted a corresponding change in consciousness without carrying out sociological surveys. What is striking, however, is that the discourse of remembrance in Latin America is predominantly determined by exponents of the political left, while conservative currents are hardly involved in it. The division evident on this issue is also reflected in a poll conducted in Chile in 2019, according to which more people were against the state funding of commemoration than in favour of it.

Two other countries examined in this volume represent a noticeably different type of commemoration: Rwanda and South Africa. Despite serious differences in their political systems – South Africa is a democracy, whereas Rwanda is ruled autocratically – the politics of memory in both countries is characterized by a disproportionately stronger influence by the state. In both nations, the state uses places of remembrance to spread a relatively clearly defined political message. In South Africa, this is the idea of reconciliation, with which the ANC leadership around Nelson Man-

dela wanted to unite the socially and ethnically fragmented country following a period of bloody conflicts. In Rwanda, it is the narrative that society was divided by colonialism, which led to the genocide of the Tutsis carried out by the Hutus in 1994.

As outlined by Hugo van der Merwe in his country study, the ANC in South Africa established a commission on museums, monuments, archives and national symbols as early as 1991 – three years before the first free elections – to foster a 'common cultural identity'. Following a decision by the new South African government, the first place of remembrance came into existence in 1997 on the former prison island of Robben Island off the coast of Cape Town. At the ceremonial opening of the Robben Island Museum (RIM), President Nelson Mandela described the island 'as a symbol of the victory of the human spirit over political oppression and... [of] reconciliation over enforced division' – a formulation which, in a modified form, still serves as a leitmotif for the museum today.[86] The work of the RIM consists first and foremost of organizing guided tours, which visit various places on the island and end in Mandela's former cell. Special educational programmes are also offered for pupils and students. Former prisoners have usually conducted the guided tours of the prison, but the museum also took on some former prison staff. The island, declared a UNESCO World Heritage Site in 1999, is primarily a tourist attraction and welcomed over 300,000 visitors a year before the COVID19 pandemic. The Ministry of Culture not only contributes a significant portion of the budget but additionally appoints the board of directors and must approve the executive director.

With 'Freedom Park' near Pretoria, a second place of remembrance was opened in the year 2000. The park is even more strongly informed by the state's message of reconciliation. The site, which covers over 52 hectares, contains a museum on the country's history, an eternal flame, a memorial, and a wall listing the names of people who died for South Africa in wars and struggles for freedom. The park, described by Mandela as a 'people's shrine', is answerable to the president and the minister of culture. It is intended to foster [...] 'a South African community spirit, by being a symbol of unity through diversity'.[87] Commemorative events, healing and reconciliation ceremonies are held in an attempt to meet this aim, but this is not always done without contradictions. For example, the Marxist guerrilla leader Ernesto Che Guevara was honoured on the 'Wall of Names', whilst the government soldiers killed after 1945 remained unnamed. Conservative groups criticized this as a betrayal of the goal of reconciliation.

The Apartheid Museum in Johannesburg, founded in 2001, also pursues a political objective. Although it is a private institution, its construction and operation were effectively a *quid pro quo* given by a group of companies in return for being granted a state casino licence in 1995. In a professionally designed permanent exhibition, numerous objects, posters and films recall the unequal treatment of blacks and whites during the pe-

86 Quoted according to Schell-Faucon, 278. Compare, accessed 4 December 2021, https://www.robben-island.org.za/vision-mission/.

87 Anonymous, accessed 4 December 2021, https://www.freedompark.co.za/index.php/corporate/about.

riod of racial segregation. The website of the non-profit operating company states that the exhibition is 'a trip through time that traces the country's footsteps from these dark days of bondage to a place of healing founded on the principles of a democracy'.[88] This focus is also reflected in the design of the inner courtyard, where words such as 'democracy', 'reconciliation' or 'diversity' emblazoned on huge concrete pillars are meant to express the values of the South African constitution of 1996. In the last part of the exhibition, visitors are also invited to symbolically place a stone on a pile and thereby commit themselves to fighting racism, prejudice and discrimination.

The two trusts that run 'Constitution Hill' in Johannesburg on behalf of the government have similar aspirations. This is an 80-hectare area boasting several former prisons where Mahatma Gandhi and Nelson Mandela were incarcerated. Since 2004, the new building of the South African constitutional court has likewise been located here. Its operators define the location as 'a global beacon for human rights, democracy and reconciliation', as well as a place 'where we meet to talk to each other and celebrate our diversity'. Moreover, the site 'is a living museum that tells the story of South Africa's journey to democracy'.[89] The prison buildings and the constitutional court can be visited on guided tours, for which a fee is charged. Educational programmes for school classes are also offered. The site is visited by over 50,000 people per year and is run on an annual budget equivalent to 3.5 million US dollars.

There are numerous other monuments and museums in South Africa which reference the apartheid era. The most important sites are run by semi-autonomous administrative committees whose members are appointed by the Department of Arts and Culture. Nevertheless, they usually have to generate a considerable portion of their income themselves. It is difficult to assess what societal impact these institutions have had without empirical research. However, the political and ethnic unrest of recent years indicates that there is a considerable gap between the rhetoric espoused by the places of remembrance and the political reality in South Africa. The tendency to idealize the transition from the apartheid regime to democracy, as nurtured by the government, could thus have the opposite effect and might impair the credibility of commemorative work.

In Rwanda, too, the state exerts a considerable influence on the design of commemorative sites. In contrast to other countries, these are made up exclusively of mass graves that were laid out after the genocide in spring 1994 and are often located near the scenes of mass murder. In many places, following the burial of the dead, survivors felt the need to mark these sites or to preserve them as testimony to those terrible events. In some cases, though, they were initially left to their own devices and only later turned into memorials. As Julia Viebach notes in her country study, these sites – unlike those in South America – 'were never intended as symbols of redress and are not viewed as such by the survivors'.[90]

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88 Accessed 4 December 2021, https://www.apartheidmuseum.org/permanent-exhibition.

89 Accessed 4 December 2021, https://www.constitutionhill.org.za/pages/vision-mission-and-guiding-principles.

90 See the paper by Julia Viebach in this volume.

In Ntamara, for instance, a Catholic church was turned into a place of remembrance. In 1994, around 5,000 people had sought refuge there, only to be literally slaughtered by Hutu paramilitaries. Skulls are displayed on simple shelves as evidence of the massacre. In front of the church, stone sarcophagi have been erected on which flowers can be laid. Similarly, the Nyamata genocide memorial is an actual place of worship, in which about 10,000 people took refuge, likewise in 1994. At that time, Hutu militias smashed holes in the walls, threw grenades into them and shot the survivors or murdered them with machetes. The blood-stained altar cloth and the holes in the walls remain as evidence, and it is possible to walk through the crypts, in which thousands of corpses have found their final resting place. A third example is the Nyarabuye memorial, another former church, where about 20,000 people sought shelter in 1994 and were then murdered. The dead were subsequently buried in mass graves. The church has since been renovated, but in the monastery behind it visitors are shown human bones and pieces of clothing worn by the victims. In a small memorial garden, a wall inscribed with names commemorates the victims.

Today, all these memorials are under state control. Their structure and content are precisely regulated. According to the law 'governing memorial sites and cemeteries of the victims of the genocide against the Tutsi in Rwanda', which came into force in 2008, they must contain at least 11 elements. These range from an exhibition area with 'photos and archives to indicate Rwandan history before genocide' to a place where the 'names and photos' of 'heroic characters' who tried to save the Tutsi can be displayed. The law even centrally determines the opening hours to which these sites must adhere.[91]

An additional law, passed in 2016, regulated the administration of these sites. The National Commission for the Fight against Genocide (CNLG), founded in 2007, became responsible for so-called national memorials, of which there are currently eight. In the case of so-called district memorials, the local authorities are responsible. There must be at least one of these memorials in each district. However, even all non-governmental memorials, especially those of the Catholic Church, have been placed under state supervision. In addition, the law stipulates that a 100-day commemoration period be held every year, with commemorative events regulated down to the last detail.[92] In 2019, President Kagame ordered smaller places of remembrance to be dissolved after

91 Article 11 of *Law No. 56/2008 of 10/09/2008 governing memorial sites and cemeteries of the victims of the genocide against the Tutsi in Rwanda*, accessed 6 December 2021, https://rema.gov.rw/rema_doc/Laws/Plastic%20bags%20law.pdf.

92 *Law No. 15/2016 of 02/05/2016 governing ceremonies to commemorate the genocide against the Tutsi and organisation and management of memorial sites for the genocide against the Tutsi*, accessed 6 December 2021, https://www.rlrc.gov.rw/fileadmin/user_upload/lawsofrwanda/laws%20of%20rwanda/7._Administrative/5.6.%20Heritage%20%26%20Tradition/5.6.3.%20Law%20governing%20ceremonies%20to%20commemorate%20the%20Genocide%20against%20the%20Tutsi%20and%20organization%20and%20management%20of%20memorial%20sites.pdf.

all, and the dead stored there to be transferred to larger memorial sites.[93] In this way, the number of genocide memorials in Rwanda was reduced by more than a quarter – from 234 in 2015 to 172 in 2021.[94]

The CNLG was the central government agency for commemoration. By law, its role was 'to plan and coordinate all activities aimed at commemorating the Genocide against Tutsi, to preserve genocide memorial sites of Genocide against Tutsi at the national level and provide advice on the management of all genocide memorial sites in general'.[95] Its head, the executive secretary, was appointed by the prime minister, as is its regulatory body. The seven commissioners were appointed by the president. In October 2021, the Commission was replaced by a newly established Ministry of National Unity and Civic Engagement.

As made clear in a Human Rights Watch report dating from 2008, in terms of content, the account of the genocide in Rwanda has to follow a governmental 'truth'.[96] This includes the portrayal of the Catholic Church as being responsible for a large part of the violence against Tutsis and the claim that the rebel army of current President Paul Kagame did not commit war crimes. These precepts are backed up by draconian punishments. By 2008 alone, 1,304 people had been tried for adhering to 'genocide ideology' and 243 for 'negationism' and 'revisionism'. Furthermore, hundreds of people and dozens of organizations have been publicly pilloried, often with drastic consequences. The only relevant opposition party was also destroyed in this way.

It was not until 2008 that a law officially criminalized 'genocide ideology'. Thereafter, 'marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading' and other acts were punishable by ten to 25 years in prison. Children were also covered by the law, as were political and social organizations, which could be heavily fined and dissolved.[97] In a report published in 2010, Amnesty International contended that accusations of 'genocide ideology' and 'divisionism' had led to the suppression of 'calls for the prosecution of war crimes committed by the Rwandan Patriotic Front (RPF)' and had been exploited 'in the context of land dis-

93 *Presidential Order No. 061/01 of 20/05/2019 determining modalities for consolidation of memorial sites for the Genocide against the Tutsi*, accessed 6 December 2021, https://gazettes.africa/archive/rw/2019/rw-government-gazette-dated-2019-05-27-no-21%20bis.pdf.

94 Anonymous, 'The Senate Adopts the Report on Consolidation of the Genocide Memorial Sites,' accessed 6 December 2021, https://www.parliament.gov.rw/news-detail?tx_news_pi1%5Baction%5D=detail&tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Bnews%5D=16027&cHash=de69d119fd24304a4de10b09a66272d0.

95 *Law No. 015/2021 of 03/03/2021 governing the national commission for the fight against genocide*, accessed 6 December 2021, https://www.cnlg.gov.rw/fileadmin/templates/documents/Law_governing_CNLG.pdf. Capitalizations in the original.

96 Human Rights Watch, *Law and Reality. Progress in Judicial Reform in Rwanda* (New York: Human Rights Watch, 2008), 34–43.

97 *Law No. 18/2008 of 23/07/2008 relating to the punishment of the crime of genocide ideology*, accessed 6 December 2021, https://www.refworld.org/pdfid/4acc9a4e2.pdf.

putes or personal conflicts'.[98] In 2018, a new 'Law on the Crime of Genocide Ideology and Related Crimes' came into effect. This was only slightly more precise, but it refrained from punishing children. Now, anyone who chooses to 'distort the facts about genocide for the purpose of misleading the public' or who claims that there was a 'double genocide' in Rwanda can be punished with between five and seven years imprisonment. The law considers even sending a message to another person to be a 'public' act. Moreover, organizations can still be heavily fined or dissolved.[99]

The most important place of remembrance that has been created under these conditions is the Kigali Genocide Memorial on the outskirts of the Rwandan capital. With the help of the Aegis Trust, a British organization for the prevention of genocide, the construction of a representative memorial site began there in 1999, to which the remains of more than 250,000 murdered people were transferred. The memorial was opened on the tenth anniversary of the genocide. Since then, the government has regularly taken international visitors there. Three modern permanent exhibitions are on display. The largest of these is dedicated to the 1994 genocide, while a smaller one centres on murdered children. In terms of content, the presentation conforms to the official narrative in Rwanda and omits sensitive topics such as the decades of Tutsi dominance or the war crimes committed by the rebel army. The memorial, which is answerable to the CNLG but managed and funded by the Aegis Trust, also runs an educational centre and an archive. Outside, there is a garden of reflection, a memorial to the children killed and a 'Wall of Names'.

The Murambi Genocide Memorial Centre in the south of the country offers a further example of the nationalization of remembrance in Rwanda. Around 50,000 people had sought refuge in a school building there, where they were then killed with primitive weapons. Following the massacre, the corpses were interred in mass graves in the school grounds. On the initiative of survivors, about 850 human bodies were exhumed in 1995 and 1996. The cadavers were then preserved with lime and displayed on wooden frames in the former classrooms. 15 years later, a permanent exhibition reflecting the official interpretation of the genocide was opened in the school's main building. The CNLG, to which the memorial is now subordinate, plans in the long term to display only a few mummified bodies in glass coffins as part of the exhibition.

Whilst the South African government created places of remembrance to support the process of nation-building, in Rwanda they indirectly serve to legitimize the current authoritarian system of rule, which is controlled by an elite that emerged from

98 Amnesty International, *Safer to Stay Silent* (London: Amnesty International Publications, 2010), accessed 6 December 2021, https://reliefweb.int/sites/reliefweb.int/files/resources/CBCBF4D4CFC49B494925779000199C1B-Full_Report.pdf.

99 *Law No. 59/2018 of 22/8/2018 on the crime of genocide ideology and related crimes*, accessed 6 December 2021, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=0D45A47A781783B9C125880C00331787&action=openDocument&xp_countrySelected=RW&xp_topicSelected=GVAL-992BU6&from=topic&SessionID=DNMSXFGMJQ.

the Tutsi rebel army. Prominently displaying the mass murder of the Tutsis and simultaneously threatening to punish a vaguely defined 'genocide ideology' prevents criticism of their hegemony. This kind of instrumentalization of commemoration, which was similarly characteristic of concentration camp memorials in communist states, is problematic for various reasons. It not only gives an incomplete rendering of the causes of mass crimes, but it also impairs the credibility of the places of remembrance. It shows that the term 'politics of memory', popular among German historians, does not necessarily have to denote a democratic process of negotiation.[100] It is nigh-on impossible to empirically determine what effects this form of commemoration actually has within Rwandan society, since criticism of it could be interpreted as a criminal offence at any time.

A third model of dealing with places of remembrance is the marginalized commemoration of victims. This is characteristic of the countries of Albania and Ethiopia presented in this volume. It is essentially distinguished by the fact that the need to honour the victims is not taken into account either by the state or by relevant parts of society. Accordingly, the activities undertaken in this sphere are correspondingly meagre.

At best, little more than fragments of institutionalized commemoration are discernible in Ethiopia, as Tadesse Metekia makes clear in his country study. In 1992, the relatives of 59 executed Ethiopian civil servants had their loved ones' remains exhumed from a mass grave and transferred to the Holy Trinity Cathedral in Addis Ababa. In this manner, a modest place of remembrance arose there – one year after the end of the regime. Information about the dead is also provided there, and their families gather in the cathedral on the anniversary of the execution.

Two years later, a commemorative stone was erected in the central Meskel Square in front of the Addis Ababa Museum. However, it is hardly visible and was apparently intended as a foundation stone for a memorial that was never built. Next to the stone, with the help of donations, the Association of Red Terror Survivors, Families, and Friends founded the Red Terror Martyrs Memorial Museum (RTMMM) in 2010. There, instruments of torture, skulls, bones, coffins, bloody clothes and photographs of victims are displayed in an exhibition. A sculpture depicting a mother accompanied by two daughters stands in front of the entrance to the building. It bears the inscription 'Never, ever Again'. Nonetheless, compared to the memorial museums in Kigali, Santiago de Chile or Buenos Aires, this private museum seems decidedly modest. Even its website has since been deactivated.[101]

The best-known place of persecution in Ethiopia, Kerchele Central Prison in Addis Ababa with its infamous *Alem Bekagn* ('Farewell to the World') wing, was demolished in 2008. The new headquarters of the African Union was built on the spot

100 Compare Stefan Troebst, 'Geschichtspolitik,' in *Docupedia-Zeitgeschichte*, 4 August 2014, accessed 22 December 2021, http://docupedia.de/zg/troebst_geschichtspolitik_v1_de_2014.

101 Accessed 6 December 2021, https://web.archive.org/web/20200225100656/http://rtmmm.org.

where it once stood, financed by China. The union of 55 African states had decided beforehand to construct a memorial, which was to be located in Ethiopia, to the victims of the Red Terror. However, this decision was never implemented. Only a small monument inside the building reminds visitors of the former prison. Nothing but a few eyewitness accounts on the internet, which were posted there years ago, bear witness to the unrealized project of an 'African Union Human Rights Memorial'.

This marginalization of the commemoration of victims stands in clear contrast to the other culture of remembrance that exists in Ethiopia. The Tiglachin memorial, a 50-metre-high monument built by the Dergue regime that was intended to honour Ethiopian and Cuban soldiers, still stands in the capital. The rebel organizations responsible for overthrowing the regime have also erected their own memorials for their fallen comrades in several provinces. As early as 1995 – four years after the dictator was deposed – a museum boasting a gigantic monument and several sculptures for the 'martyrs of Tigray' was opened in Mekele. In addition to photos of fighters, weapons and other war paraphernalia were likewise exhibited here. Photographs of atrocities committed by the former regime and several coffins containing human remains were also on display. However, forces of the Ethiopian central government destroyed the museum in the summer of 2021.[102] A similar memorial was to be built in 2004 in the regional state of Oromia for the Oromo fighters, but only the monument was completed. Finally, in 2009, a museum for the 'martyrs of Amhara' was established in Bahir Dar, surrounded by an extensive park featuring a monument, a library, a gallery and an amphitheatre.

The situation is little different in Albania, where, as Jonila Godole reports in her country study, there are more than 700 memorials commemorating the partisans of the Second World War, but hardly any places of remembrance for victims of the communist dictatorship. Only in the northern Albanian city of Shkodër is there a small memorial museum in a former city-centre remand prison. This was opened in 2014 – 23 years after the first free elections. A modest exhibition presents objects and documents that provide information about the brutal persecution that took place under Enver Hoxha. In Shkodër, this particularly afflicted the Catholic clergy. Some cells and an interrogation room can also be visited. However, due to renovations, little of the original aura of the place as used by the Albanian secret police has been preserved. The museum receives only scant local funding, and is consequently dependent on support from domestic and foreign sponsors.

In 2017, a further museum was opened in the Albanian capital, but it is not a place of remembrance in the strict sense of the term. It is located in the former listening headquarters of the state security service in Tirana, from which primarily diplomats and celebrities who had their own telephone connections were monitored. The 'House of Leaves', curated by an artist, offers information about the history of the building, the wiretapping methods of the Albanian secret police, the *Sigurimi*,

102 Cf., accessed 6 December 2021, https://twitter.com/mattewos88/status/1411661870742790146.

as well as details about some of the people who were bugged. Victims' organizations were not involved in founding the museum. In addition, a room commemorating the period of communist dictatorship can be found in the National Historical Museum, likewise in Tirana. The demands made by victims' groups to turn one of the notorious former labour camps into a place of remembrance have thus far fallen on deaf ears.

The comparison of victim commemoration in the countries illuminated here makes it clear that places of remembrance play a significant role in different cultural and political contexts. If one takes the 'Principles to Combat Impunity' outlined at the start of this paper as a yardstick, then they not only serve the *Right to Reparation* by publicly honouring the victims, but also contribute to the *Right to Know* and the *Guarantees of Non-Recurrence* by reminding society of the crimes committed. The question of their impact, however, can only be answered incompletely, as this would require special studies that would also have to use visitor research methods.[103] A comparison of the seven countries nevertheless allows a number of generalized conclusions to be drawn.

1. **A place to mourn is needed.** The death of people results in pain caused by their loss among the bereaved. This can be reduced by a process of mourning. In many cultures, the grave of the deceased, marked by their name, plays an important role in this procedure. After mass killings, where no such grave-site exists, there is thus a great need to create a physical place that takes over this function. A site of this sort not only gives the bereaved the opportunity to say goodbye and process their pain. It also fulfils an important social and political purpose as a space of public mourning, admonishment and esteem. Naming the dead facilitates this process by turning anonymous victims into individual fates, thereby symbolically restoring their human dignity.
2. **Places intensify remembrance.** Not only relatives, but societies, too, have the right to know what happened in the past. The prevention of mass atrocities depends to no small degree on the extent to which one succeeds in creating a social awareness of the importance of human rights and the reasons for their violation. Places of remembrance are particularly suitable for conveying such an awareness, because they make events that are difficult to imagine vivid and add an emotional dimension to their cognitive appropriation. For this reason, the combination of commemoration and information transfer that takes place in memorial museums is a particularly effective instrument of transitional justice. Such museums not only guarantee the institutional continuity crucial to educational work, but also function as a refuge for victims, as a centre of thematic

103 Compare Eva M. Reussner, *Publikumsforschung für Museen: Internationale Erfolgsbeispiele* (Bielefeld: Transcript, 2010). See also the articles published regularly in the journal of the Visitor Studies Association (VSA), *Visitor Studies*.

competence and as a focal point for debates and activities related to remembrance policy.

3. **Places of remembrance require a powerful aura.** The effect exerted by places of remembrance depends to a large extent on how far they touch their visitors emotionally. This is especially true in the case of authentically preserved places of persecution, because they make it easier to imagine the suffering endured by the victims. They should therefore be altered as little as possible and preserved as time capsules. Conversions and renovations, even for exhibition purposes, should be avoided. Where authentic places of this sort do not (or no longer) exist and a new commemorative site has to be created, particularly high standards are to be set as regards its aesthetic design. Places like the Human Rights Museum in Santiago de Chile show that even newly constructed places of remembrance can develop a powerful aura.
4. **Objectivity creates credibility.** Places of remembrance have the task of making the experience of severe human rights abuses understandable – also and especially to those who were not involved in them. The more objectively the information is conveyed, the more successful this is. Propaganda, polemics and distorted information damage credibility. The instrumentalization of past suffering in order to strengthen enmity and hatred in the present even holds the danger of new human rights violations. For this reason, commemorative sites should present history in an academically objective fashion, and controversial issues should be identified as such. This approach requires a high degree of expertise and the willingness to have one's work reviewed by external experts.
5. **Places of remembrance should be victim-orientated.** The suffering endured by victims is the starting point for remembrance. Appreciation for them must be evident not only in the content presented in exhibitions, but also in the conception and operation of commemorative sites. This requires regular consultation with victims' associations and other affected persons, so as not to give the impression that the experience of persecution is being appropriated by experts, artists, architects or state authorities. Moreover, victims and their relatives have a special role to play in mediation work, since they are perceived by outsiders as particularly credible witnesses of what happened. They should be involved in the work done by places of remembrance by being appointed to advisory boards and through carrying out eyewitness interviews or guided tours. This can also help them in coming to terms with their experiences of persecution.
6. **The state has a special responsibility.** Considerable financial resources and, frequently, access to public property are necessary to create and operate an effective place of remembrance. The state should therefore foster the work of commemorative sites, which represent a form of immaterial redress and help to ensure that severe human rights abuses are not repeated. However, exercising this responsibility carries the risk of the exertion of political influence or the instrumentalization by government officials. This can affect the credibility of places of remembrance. Therefore, care must be taken to ensure that commemorative sites

possess a high degree of institutional autonomy. This, in turn, requires pluralistic decision-making bodies and supervisory committees that are independent of the state and free to decide on content, expenditure and personnel. Civil society is of particular importance as a counterweight to the state. For this reason, the work of victims' organizations should also be promoted within the framework of programmes related to transitional justice.

5 Conclusion

The discussion should now return to the opening question of whether measures of transitional justice implemented to overcome dictatorships and mass crimes are effective at all. Taking the criteria outlined above as a yardstick, a mixed picture emerges in relation to the states examined here. For their part, Chile, Argentina and Uruguay appear as the countries where the *Right to Know* has been taken into account most comprehensively. In the case of Albania, Ethiopia, Rwanda and South Africa, on the other hand, the precise extent of the crimes committed is still unknown. The situation is different as regards the *Right to Justice*, because in Rwanda in particular, but also in Ethiopia, a comparatively intensive process of criminal prosecution took place. Nevertheless, this is devalued by the fact that it displayed traits akin to a reckoning through which the new rulers sought to consolidate their own power. As far as the *Right to Reparation* is concerned, the greatest successes are once again to be found in the South American states, whilst the countries of the African continent show considerable deficits. The same applies to the *Guarantees of Non-Recurrence*, which can scarcely be taken as a given in the three African nations investigated in this volume. On the contrary, the reprisals and war crimes carried out in Ethiopia since 2020, the violent riots in South Africa in 2021, and the permanent suppression of political opposition in Rwanda make it clear that human rights violations continue to occur in these countries.

When trying to ascertain the reasons behind these differences in development, it becomes clear that the success of processes connected to transitional justice depends not only on the instruments used, but also to a large extent on various contextual factors. For a start, the form of the political system which prevailed before the mass crimes is relevant. States with at least a rudimentary democratic history seem to have a better chance of implementing measures of transitional justice, especially with reference to the establishment of truth, redress and guarantees of non-recurrence. Nonetheless, the characteristics of the dictatorial regime in question likewise have a considerable impact. A lengthy duration and a high degree of domination worsen the conditions for effective transitional justice, while a dictatorship that existed for only a short time and which refrained from pursuing a totalitarian claim to power is easier to come to terms with. Another important factor is to be found in the form of regime change. A smooth transition makes the subsequent pursuit of criminal justice more difficult, whereas after a military victory or a violent

seizure of power this can be enabled comparatively easily. Conversely, the somewhat softer goals of transitional justice, such as knowledge, reparation and guarantees of non-recurrence, appear harder to achieve in the wake of a violent regime change.

Furthermore, there is evidently a correlation between the intensity of transitional justice and a society's prosperity. At least for the countries studied here, it is true that wealth – measured in terms of the per capita gross domestic product adjusted for purchasing power – and the steps taken in terms of transitional justice correlate.[104] This is not only a matter of the state having greater financial resources and a more efficient administration at its disposal in wealthy countries, but also of society setting different political priorities. Closely related to this is the impact of social, ethnic and religious antagonisms. These have proven to be an obstacle to transitional justice, especially in the African nations studied here. Other relevant contextual conditions include the social acceptance of violence, the effectiveness of state structures and the international political milieu that influences the process of transitional justice. Last but not least, transitional justice is subject to international trends. This may have contributed to the fact that, in the countries examined in this volume, corresponding measures were introduced without exception only from the early 1990s onwards.[105]

It follows from all this that it makes little sense to pursue the ideal of comprehensive transitional justice if the conditions for it do not exist. Instead of failing with an unrealistic concept, it seems better to develop a strategy adapted to the prevailing circumstances which can actually be implemented. Similarly, the Christian-influenced goal of reconciliation usually proves to be unattainable and would be better replaced by measures to depolarize society. The distinction made by the German sociologist Max Weber between ethics of moral conviction and ethics of responsibility is of particular significance in the field of transitional justice.[106] Of course, it must be borne in mind that conditions change over time and are always the result of political influence. Structural reforms and the strengthening of democracy, the rule of law, organizational freedom, free media and non-violent conflict resolution are important accompanying measures in preventing a repetition of serious human rights violations. In terms of the measures employed in the stricter sense, priority should

104 According to the International Monetary Fund's estimates for 2019, the gross domestic product per capita adjusted for purchasing power amounted to US$2,363 in Rwanda, US$2,724 in Ethiopia, US $12,962 in South Africa, US$14,534 in Albania, US$22,110 in Uruguay, US$22,997 in Argentina and US $25,057 in Chile.

105 Questions of transitional justice enjoyed a very high international profile above all in the 1990s and early 2000s. Even in the countries where regime change took place before this point (Argentina: 1983, Uruguay: 1984), a more intensive reappraisal of the past did not begin any earlier than in the countries in which a change of regime occurred later (Chile: 1989, Albania: 1990, Ethiopia: 1991, South Africa: 1994, Rwanda: 1994).

106 Compare Detlef Nolte, 'Verantwortungsethik versus Gesinnungsethik: Menschenrechtsverletzungen und Demokratisierung in Südamerika,' in *Politische Gewalt in Lateinamerika*, ed. Thomas Fischer and Michael Krennech (Frankfurt am Main: Vervuert, 2000), 291–309.

be given at least to reducing the continuing consequences of the crimes committed. Improving the situation of the victims should therefore be the primary focus of attention.

Abbreviations

A

AAA	Alianza Anticomunista Argentina (Argentine Anti-communist Alliance)
ACHPR	African Commission on Human and Peoples‘ Rights/ African Charter on Human and Peoples’ Rights
AERG	Association des Etudiants et Éleves Rescapés du Genocide (National Graduate Student Association of Genocide survivors; Rwanda)
AESM	All Ethiopian Socialist Movement
AEUP	All Ethiopia Unity Party
AFDD	Agrupación de Familiares de Detenidos Desaparecidos (Group of Families of the Detained-Disappeared; Chile)
AFEP	Agrupación de Familiares de Ejecutados Políticos (Group of Families of People Executed for Political Reasons; Chile)
AIDSSH	Autoriteti për Informimin mbi Dokumentet e ish-Sigurimit të Shtetit (Authority for Information on Former State Security Documents; Albania)
ANC	African National Congress
ANDM	Amhara National Democratic Movement (Ethiopia)
ANM	Archivo Nacional de la Memoria (National Archive of Remembrance; Argentina)
APDH	Asamblea Permanente por los Derechos Humanos (Permanent Assembly for Human Rights; Argentina)
ASCEEP	Asociactión Social y Cultural de Estudiantes de la Ensenanza Pública (Social and Cultural Association of Students of Public Education; Uruguay)
AU	African Union
AUHRM	African Union Human Rights Memorial
AVEGA	Association des Veuves du Genocide – Agahozo (Association of Widowed Survivors; Rwanda)

B

BMZ	Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (Federal Ministry for Economic Cooperation and Development; Germany)
BStU	Bundesbeauftragter für die Stasi Unterlagen (Federal Commissioner for the Stasi Documents; Germany)
BTI	Bertelsmann Transformation Index

C

CADA	Colectivo Acciones de Arte (Artist Group; Chile)
CCD	Centros Clandestinos de Detención (Secret Detention Centres; Argentina)
CCHDH	Comisión Chilena de Derechos Humanos (Chilean Human Rights Commission)
CDR	Coalition pour la Défense de la République (Coalition for the Defence of the Republic; Rwanda)
CELS	Centro de Estudios Legales y Sociale (Centre for Legal and Social Studies; Argentina)
CEDAV	Centro de Documentación Audiovisual (Centre for Audiovisual Documentation; Chile)
CIA	Central Intelligence Agency (USA)
CID	City Improvement District (South Africa)
CIDH	Comisión Interamericana de Derechos Humanos (Inter-American Human Rights Commission)
CIEPLAN	Corporación de Investigaciones Económicas Para Latinoamérica (Economic Research Corporation for Latin America)

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CIPFE	Centro de Investigación y Promoción Franciscana y Ecológica (Franciscan and Ecological Research and Promotion Centre; Uruguay)
CIRI	Cingranelli and Richards (Human Rights Data Project)
CMD	Council of Ministers Decision (Albania)
CMMH	Commission for Museums, Monuments and Heraldry (South Africa)
CNI	Central Nacional de Informaciones (National Information Centre; Chile)
CNLG	Commission Nationale de Lutte contre le Génocide (National Commission for the Figth against Genocide; Rwanda)
CNR	Comisión National de Repatriación (National Commisson for Repatriation; Chile)
CNRR	Corporación Nacional de Reparación y Reconciliación (National Reparation and Reconciliation Corporation; Chile)
CODEF	Coalition of Democratic Ethiopian Forces
CODEPU	Corporación de Promoción y Defensa de los Derechos del Pueblo (Corporation for the Promotion and Defense of the Rights and of the People; Chile)
CONADEP	Comisión Nacional sobre la Desaparición de Personas (National Commission on the Disappearance of Persons; Argentina)
CONADI	Comisión Nacional por el Derecho a la Identidad (National Commission for the Right to Identity; Argentina)
COSENA	Consejo de Seguridad Nacional (National Security Council; Uruguay)
CPDDHH	Comisión Asesora Presidencial para la Formulación y Ejecución de Políticas de Derechos Humanos (Presidential Advisory Commission for the Formulation and Execution of Human Rights Policies; Chile)
CRID	Central Revolutionary Investigation Department (Ethiopia)
CRYSOL	Centro de Relaciones y Soluciones Laborales (Centre for Labour Relations and Solutions; Uruguay)
CSVR	Centre for the Study of Violence and Reconciliation (South Africa)
CUD	Coalition for Unity and Democracy (Ethiopia)
CV	Curriculum Vitae

D

DCSD	Dergue Campaign and Security Department (Ethiopia)
DFID	Department for International Development (Rwanda)
DINA	Dirección de Inteligencia Nacional (National Intelligence Directorate; Chile)
DIT	Dergue Investigation Team (Ethiopia)
DMC	Dergue Military Committee (Ethiopia)
DNII	Dirección Nacional de Información e Inteligencia (Uruguay)
DP	Democratic Party (Albania)
DRC	Democratic Republic of the Congo
DSFU	Daily Situations Follow-up Unit (Ethiopia)

E

ECCC	Extraordinary Chambers in the Courts of Cambodia
EDL	Ethiopian Democratic League
EDU	Ethiopian Democratic Union
EHRC	Ethiopia Human Rights Commission
ELF	Eritrean Liberation Front
ENDF	Ethiopian National Defence Force
EOC	Ethiopian Orthodox Church
EPA	Ethiopian Press Agency
EPLF	Eritrean People's Liberation Front

EPRA	Ethiopian Peoples' Revolutionary Army
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
EPRP	Ethiopian People's Revolutionary Party
ERP	Ejercito Revolucionario del Pueblo (Revolutionary People's Army; Argentina)
ESMA	Escuela Mecánica de la Armada (Higher School of Mechanics of the Navy; Argentina)
ETO	École Technique Officielle (School in Rwanda)
ETP	Education and Training Policy (Ethiopia)
ETv	Ethiopian Television
EuroClio	European Association of History Educators

F

FAR	Forces armées rwandaises (Rwandan Armed Forces)
FARG	Fonds d'Assistance pour les Rescapés du Génocide (Fund for Assistance of Genocide Survivors; Rwanda)
FASIC	Fundación de Ayuda Social de las Iglesias Cristianas (Social Assistance Foundations of Christian Churches; Chile)
FDRE	Federal Democratic Republic of Ethiopia
FF.AA.	Fuerzas Armadas de Chile (Chilean Armed Forces)
FHC	Federal High Court (Ethiopia)
FIND	Fonds d'Indemnisation (Compensation Fund; Rwanda)
FPMR	Frente Patriótico Manuel Rodríguez (Manuel Rodríguez Patriotic Front; Chile)
FSC	Federal Supreme Court (Ethiopia)
FSC CB	Federal Supreme Court Cassation Bench (Ethiopia)

G

GAERG	Groupe des Anciens Etudiants et Elèves Rescapés du Genocide (Group of Former Students and Pupils who Survived the Genocide; Rwanda)
GAR	Genocide Archive Rwanda
GDP	Gross Domestic Product
GDR	German Democratic Republic
GHC	Grievance Hearing Committees (Ethiopia)
GIAF	Grupo de Investigatión en Antropología Forense (Forensic Anthropology Research Group; Uruguay)
GLR	Great Lakes Region (Rwanda)
GTVJ	Grupo de Trabajo por Verdad y Justicia (Truth and Justice Working Group; Uruguay)
GU	Government of (National) Unity (Rwanda)

H

H.I.J.O.S.	Hijos por la Identidad y la Justicia contra el Olvido y el Silencio (Children for Identity and Justice Against Forgetfulness and Silence; Argentinia)
HPR	House of Peoples' Representatives (Ethiopia)
HSC	Harari Supreme Court (Ethiopia)
HUDAs	Higher Urban Dwellers Associations (Ethiopia)

I

IBUKA	Umbrella organisation of Genocide survivors' associations (Rwanda)
ICC	International Criminal Court (Rwanda)
ICCPR	International Covenant on Civil and Political Rights (Rwanda)
ICMP	International Commission on Missing Persons (Albania)

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunals for Yugoslavia
IDMC	Institute for Democracy, Media and Culture (Albania)
IEDU	Information Evaluation and Dissemination Unit (Ethiopia)
IELSUR	Instituto de Estudios Legales y Sociales del Uruguay (Uruguayan Institute for Legal and Social Studies)
IFP	Inkatha Freedom Party (South Africa)
IIP	Instituti për Integrimin e ish-të Përndjekurve (Institute for the Integration of the Formerly Politically Persecuted; Albania)
ILO	International Labour Organisation
INDDHH	Institución Nacional De Derechos Humanos y Defensoría del Pueblo (National Human Rights Institution and Ombudsman; Uruguay)
INDH	Institución Nacional de Derechos Humanos (National Human Rights Institue; Chile)
IRMCT	International Residual Mechanism for Criminal Tribunals
ISKK	Instituti i Studimeve të Krimeve dhe Pasojave të Komunizmit (Institute for the Studies of Communist Crimes and Consequences; Albania)

J

JSC	Judical Services Committee (South Africa)

K

KAS	Konrad-Adenauer-Stiftung (Konrad Adenauer Foundation; Germany)
KGB	Komitet Gosudarstvennoy Bezopasnosti (Committee for State Security; Soviet Union)
KGM	Kigali Genocide Memorial (Rwanda)
KIDPP	Komiteti i ish-të Dënuarve dhe të Përndjekurve Politikë (Committee for Former Political Prisoners and Persecutees; Albania)
KLSH	Kontrolli i Lartë i Shtetit (Supreme Audit Institution; Albania)
KSG	Khulumani Support Groups (South Africa)

M

MEDH	Movimiento Ecuménico por los Derechos Humanos (Ecumenical Movement for Human Rights; Argentina)
MEISON	Mela Ītyōṗṗyā Soshalīsit Nik'inak'ē (All-Ethiopia Socialist Movement)
MFDD	Madres y Familiares de Detenidos Desaparecidos (Mothers and Relatives of the Disappeared; Uruguay)
MIR	Movimiento de Izquierda Revolucionario (Left Revolutionary Movement; Chile)
MK	Umkhonto we Sizwe (Spear of the Nation; South Africa)
MLN-T	Movimiento de la Liberación Nacional – Tupamaro (National Liberation Movement Tupamaro; Uruguay)
MMSR	Ministria e Mirëqenies Sociale dhe Rinisë (Ministry of Social Welfare and Youth; Albania)
MRND	Mouvement Révolutionnaire National pour le Développement (National Revolutionary Movement for Development; Rwanda)

N

NEC	National Electoral Commission (Rwanda)
NGO	Nongovernmental Organization
NIA	National Intelligence Agency (South Africa)
NIC	National Itorero Commission (Rwanda)

NIOD	Instituut von Oorologs-, Holocaust- en Genocidestudies (Institute for War-, Holocaust- and Genocidestudies; Rwanda)
NP	National Party (South Africa)
NPA	National Prosecuting Authority (South Africa)
NPSA	National and Public Security Affairs (Ethiopia)
NRM	National Resistance Movement (Rwanda)
NURC	National Unity and Reconciliation Commission (Rwanda)

O

OAU	Organization of African Unity
OCOA	Organismo Coordinador de Operaciones Antisubversivas (Anti-subversive Operations Coordinating Body; Uruguay)
OHCHR	Office of the High Commissioner for Human Rights
OL	Organic Law (Rwanda)
OLF	Oromo Liberation Front (Ethiopia)
OLI	Observatorio Luz Ibarburu (Ibaburu Light Observatory; Uruguay)
ONLF	Ogaden National Liberation Front (Ethiopia)
OPDO	Oromo Peoples Democratic Organizations (Ethiopia)
OSC	Oromia Supreme Court (Ethiopia)
OSCE	Organisation for Security and Cooperation in Europe

P

PAC	Pan Africanist Congress (South Africa)
PARMEHUTU	Parti du Movement d'Émancipation Hutu (Party of the Hutu Emancipation Movement; Rwanda)
PD	Partia Demokratike Shqiptare (Democratic Party of Albania)
PDI	Policía de Investiganciones de Chile (Chilean Investigative Police)
PDRE	Peoples' Democratic Republic of Ethiopia
PFSIU	Public Force Special Investigation Unit (Ethiopia)
P.I.D.E.E.	Fundación de Protección a la Infancia Dañada por los Estados de Emergencia (Foundation for the Protection of Children Affected by States of Emergency; Chile)
PIT-CNT	Plenario Itersindical de Trabajadores – Convención Nacional de Trabajadores (Itersyndical Workers' Plenary – National Workers' Convention; Urugay)
PKSh	Partia Komuniste e Shqipërisë (Communist Party of Albania)
PL	Parti Libéral (Liberal Party; Rwanda)
PMAC	Prince Mahidol Award Conference (Ethiopia)
PMG	Provisional Military Government (Ethiopia)
PPSh	Partia e Punës e Shqipërisë (Party of Labour of Albania)
PRAIS	Programa de Reparación y Atención Integral de Salud (Comprehensive Health Care and Reparation Programme; Chile)
PSPC	Public Security Protection Committee (Ethiopia)
PTS	Political Terror Scale
PTSD	Post-Traumatic Stress Disorder

R

RIM	Robben Island Museum (South Africa)
RIU	Revolutionary Information Unit (Ethiopia)
RPA	Rwandan Patriotic Army
RPF	Rwandan Patriotic Front
RPUCC	Revolution Protection Units Coordination Committee (Ethiopia)

RTLM	Radio Télévision Libre des Mille Collines (Free Radio and Television oft he Thousand Hills; Rwanda)
RTMMM	Red Terror Martyrs Memorial Museum (Ethiopia)
RTSH	Radio Televizioni Shqiptar (Albanian Radio and Television)
RUVTE	Registro Unificado de Víctimas del Terrorismo de Estado (Unified Registry of Victims of State Terrorism; Argentinia)

S

SACC	South African Council of Churches
SADF	South African Defence Force
SAHA	South African History Archives
SAPS	South African Police Service
SC	Supreme Court (Rwanda)
SERPAJ	Servicio Paz y Justicia (Service Peace and Justice; Argentinia, Uruguay)
SDG	Sustainable Development Goals
SDHPR	Secretaría de Derechos Humanos para el Pasado Reciente (Secretariat of Human Rights in the recent past; Uruguay)
SDP	Social Democratic Party (Rwanda)
SHIK	Shërbini Informativ Kombëtar (National Intelligence Service; Albania)
SID	Servicio de Información de Defensa (Defence Information Service; Uruguay)
SNNPRS	Southern Nations Nationalities and Peoples' Regional State (Ethiopia)
SML	Servicio Médico Legal (Legal Medical Service; Chile)
SP	Socialist Party of Albania
SPC	Special Penal Code (Ethiopia)
SPO	Special Prosecutors' Office (Ethiopia)
Stasi	Staatssicherheitsdienst (State Security Service; GDR)
SURF	Survivors Fond (Rwanda)

T

TGE	Transitional Government of Ethiopia
TIG	Travaux d'Intérê général (Community Service; Rwanda)
TMMMM	Tigray Martyrs Memorial Museum and Monument (Ethiopia)
TPLF	Tigray Peoples' Liberation Front (Ethiopia)
TRC	Truth and Reconciliation Commission
TSC	Tigray Supreme Court (Ethiopia)

U

UDB	Uprava Državne Bezbednosti (State Security Administration; Yugoslavia)
UDF	United Democratic Front (South Africa)
UDHR	Universal Declaration of Human Rights
UEDP-Medhin	United Ethiopian Democratic Party-Medhin
UI	Unidad Indexada (Indexed Unit; Uruguay)
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
UN SC	United Nations Security Council
UP	Unidad Popular (Popular Unity; Chile)
USSR	Union of Soviet Socialist Republics

V

VOA	Voice of America

W

WCC	World Council of Churches
WHO	World Health Organization
WPE	Workers Party of Ethiopia

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Authors

Ricardo Brodsky is the director of the Benjamín Vicuña Mackenna National Museum and has previously been the Chilean ambassador to Belgium and the executive director of the Museum of Memory and Human Rights. He holds a degree in literature from the University of Chile. He has written the books *Conversaciones con la FECH* (Alfabeta, 1988) and *Trampas de la Memoria* (FLASCO-Chile, 2018).

Jonila Godole is the executive director of the IDMC Institute for Media, Democracy and Culture. Her academic research includes political communication, media systems and the role of the media in collective memory. She wrote her doctoral thesis on journalistic cultures in post-communist countries, titled *Albanian Journalism in Transition* (Papirus, 2014) at the Department of Journalism and Communication at the University of Tirana, where she has taught since 2005.

Peter Hoeres is Professor for Modern History at the Historical Institute at the Julius-Maximilians-University Würzburg and heads the "After Dictatorship" project. His teaching and research activities include memory studies, media, international and intellectual history. He held academic positions in Münster, Gießen, Washington, D. C. and Mainz. He is the author of numerous books, most recently *Zeitung für Deutschland: Die Geschichte der FAZ* (Benevento, 2019) and *Der Kaufhauskönig Helmut Horten und sein Imperium* (forthcoming, with Maximilian Kutzner).

Hubertus Knabe works on Transitional Justice questions at the Julius-Maximilians-University Würzburg, where he supervises the "After Dictatorship" project. He is a leading researcher on the Stasi records. Previously, he served as the director of the Berlin-Hohenschönhausen Memorial Museum. He holds a doctoral degree in political science at the Freie Universität Berlin and has published extensively on the GDR, among others *Die Täter sind unter uns: Über das Schönreden der SED-Diktatur* (Propyläen, 2007).

Hugo van der Merwe is a senior research specialist at the Centre for the Study of Violence and Reconciliation, South Africa. He is also the Co-Editor in Chief of the International Journal of Transitional Justice. His research focuses on transitional justice, peace building and violence prevention. He holds a PhD in Conflict Analysis and Resolution from the George Madison University. His most recent book is *Transitional Justice: Theories, Mechanisms and Debates* (Routledge, 2021, with Hakeem O. Yusuf).

Tadesse Semie Metekia trains members of the Ethiopian judiciary, including military court judges and lawyers, on the national prosecution of international crimes. His research interests lie in the field of atrocity crimes and transitional justice. He holds a PhD in International Crimes and Justice from the University of Groningen. He is the author of *Prosecution of Core Crimes in Ethiopia: Domestic Practice vis-à-vis International Standards* (Brill, 2021).

Veit Straßner works as a lecturer in a Secondary Teacher Trainig College. His research interests encompass human rights issues and transitional justice in Latin America, modern church history and the didactics of religious and political/civic education. He holds a doctoral degree in political science and a postgraduate degree in theology (Lic. theol.) both from the University of Mainz, Germany. He also has a Masters degree in organizational development from the Technical University of Kaiserslautern. His publications include, amongst others, *Die offenen Wunden Lateinamerikas. Vergangenheitspolitik im postautoritären Argentinien, Uruguay und Chile* (Verlag für Sozialwissenschaften, 2007).

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Julia Viebach works as a senior lecturer at the University of Bristol. In her research, she focuses on global criminology, mass violence, transitional justice, and human rights archives; especially in relation to Rwanda. She obtained her doctorate from the University of Marburg. Her most recent publication is *Place-bound Proximity at Rwanda's Genocide Memorials: On Coming Home to the Dead and the Affective Force of their Remains* (Routledge, 2022, in *Localising Memory in Transitional Justice*).

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