

TRANSITIONAL JUSTICE AND STATE CRIME

JENNIFER BALINT*

Genocide and other crimes against humanity are not solely individual crimes. They possess a particular institutional nature that can be difficult for law to capture. Transitional justice relies on the institution of law as a companion to the political goal of enabling political transition and effecting justice in the wake of state crime. There are high expectations of law at such times, that it provide frameworks for peaceful transition, and assist in reconstruction and reconciliation. Yet law is poorly equipped to play such a role. Law's historical preoccupation is with accountability for particular individual crimes, whereas transitional justice, as a framework and practice, is focused on a broader program of institutional and social reconstruction. In this article, I suggest that if law is to be a companion to the political project of state transition, then we need to be developing new political-legal concepts to make law effective in these tasks. While we are developing new legal and political-legal bodies to deal with these crimes, such as truth commissions and international tribunals, we are developing few new legal concepts. If law is to deliver accountability for mass harms and partner transitional justice in reshaping and reconstructing a society in the wake of conflict, then new concepts and frameworks to support law in this task are necessary.

I INTRODUCTION

Addressing state crime poses particular challenges to law. State crimes involve the use and transformation of a state structure and its institutions, both civil and state. The destruction wrought is in the name of the state and part of state policy. The recognition of these acts as state crime is critical for our understanding of them and for their legal redress. This article argues that law, with its focus on individual liability, is ill-equipped to address state crime. It suggests that, if law is to be a companion in the transitional justice project of post-conflict reconstruction, new legal concepts are necessary, and offers the concept of civic liability as a useful framework for linking individual and institutional liability for state crime. Such a framework can assist in the transformative goals of transitional justice, and lay the foundations for structural change and reconstruction of a society in the wake of mass harm.

* LLB (Hons), BA (Hons) (Macq), PhD (ANU), Lecturer in Socio-Legal Studies (Criminology), School of Social and Political Sciences, The University of Melbourne.

II TRANSITIONAL JUSTICE AND LAW

In the first post-apartheid case heard by the South African Constitutional Court, the Court noted that the new Constitution:

retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expresses in its preamble the need for a 'new order ... in which there is equality between ... people of all races'.¹

In demarcating between a former injustice and a future justice, law can be a powerful tool in delineating new normative borders for a society. In so doing, it may provide what we can understand as 'foundational moments' that provide new reference points, a new normative framework, for a society coming out of conflict.² These can be crude uses of law — the People's Revolutionary Council of Kampuchea established by the incoming Vietnamese government 'to judge the genocide crimes committed by the Pol Pot-Ieng Sary clique'³ was designed to eliminate the Khmer Rouge as a political foe in a situation of continuing civil war. It did, however, still create a record of harm. The more recent Extraordinary Chambers in the Courts of Cambodia,⁴ whose establishment was intended to mark an end to the integration of the Khmer Rouge in the Cambodian state, can be understood as a more developed rule of law response to the failure to bring the Khmer Rouge to account. Both can be understood as foundational moments.

In the legal institutions established by the state in the wake of conflict, we can observe the manner in which law plays a role in governance and nation-building. Legal processes established by the state function to strengthen the state and its governance. In the wake of state crime, at a time of political and social instability, this is most marked.⁵ Law is utilised in the project of nation building, and of establishing social order.

¹ *S v Makwanyane* [1995] SA 391.

² See Jennifer Balint, 'Law's Constitutive Possibilities: Reconstruction and Reconciliation in the Wake of Genocide and State Crime' in E Christodoulidis and S Veitch (eds) *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Hart Publishing, 2001) 129. My use of the term 'foundational moment' has been inspired by Elizabeth Jelin's earlier use of the term, although I apply it in different ways. Jelin wrote that in the context of political transition in Argentina, '[t]he trial of the military commanders was the institutional authentication of that "truth" (through the authority of the judiciary) and the foundational moment of "justice": Elizabeth Jelin, 'The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina' (1994) 21(2) *Latin American Perspectives* 38, 51.

³ Ha Van Lau, *Letter Dated 4 October 1979 from the Permanent Representative of the Socialist Republic of Vietnam to the United Nations Addressed to the Secretary-General*, UN GAOR, 3rd Committee, 34th Session, Agenda Item 84, UN Doc A/C.3/34/1 (11 October 1979).

⁴ See David Scheffer, 'The Extraordinary Chambers in the Courts of the Cambodia', in M Cherif Bassiouni (ed), *International Criminal Law Volume III: International Enforcement* (Martinus Nijhoff, 3rd ed, 2008) 219–255.

⁵ See Richard A Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001).

In her study of the use and role of law in political transition, Ruti Teitel identified this use of law. She showed how law and legislation are used in political transitions to complement the processes of transition. In times of political transition, she argued, the institution of law is purposefully utilised to enable a peaceful transition, to ‘enable the construction of a normative shift’.⁶ Justice, at these times, is determined in relation to previous injustice: ‘What is deemed just is contingent and informed by prior injustice’.⁷ What Teitel was outlining was the use of law in times of political upheaval and change and how, as she argues, the use of law at such times ‘play[s] an extraordinary, constitutive role in such periods’.⁸

Teitel here is focused on law, on legal responses to political change that may include criminal trials, inquiries, reparatory measures, lustration and new constitutions. She is not discussing the concept of creating post-conflict justice, rather the constitutive role of law in times of radical political change. The important question for Teitel is the role that *law* plays in times of political upheaval and political transition. We can observe a shift since the 1990s when ‘transitional justice’ as a concept was first discussed by Teitel and others, to its utilisation and meaning today.⁹ From its groundings in institutional change through law, as evidenced in East-Central European post-communist transition, transitional justice discussions are at present focused around how *justice* may be achieved in the wake of gross human rights violations. Justice is broadened to include both social and legal justice. ‘Transitional justice’, as a framework and practice, is thus focused on the contours and attainment of post-conflict justice, not solely the role law may play in the transition.

The dominant focus of transitional justice has thus shifted from a recognition of the critical normative role that law can play in times of political transition, to consideration of what justice at such times demands. The question central to transitional justice is what form transformation should take. Transitional justice discussions have been attentive to focusing less on criminal accountability and more on structural change.¹⁰ Mahmood Mamdani pointed out in his critique of the South African Truth and Reconciliation Commission (‘the Commission’) that the Commission’s focus on individual physical harms missed the broader harms of the apartheid system, ‘the colonial nature of the South African context’.¹¹ As Wendy Lambourne has argued, transitional justice has failed to be a ‘transformative justice’.¹² This has been emphasised through

⁶ Ruti G Teitel, *Transitional Justice* (Oxford University Press, 2000) 7.

⁷ Ibid 6.

⁸ Ibid 4.

⁹ For a discussion of the origins of transitional justice, see Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321.

¹⁰ See, eg, Lisa Laplante, ‘Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework’ (2008) 2 *International Journal of Transitional Justice* 331; Zaida Miller, ‘Effects of Invisibility: In Search of the “Economic” in Transitional Justice’ (2008) 2 *International Journal of Transitional Justice* 266; Isamael Muvingi, ‘Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies’ (2009) 3 *International Journal of Transitional Justice* 163; Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* (Routledge, 2012); Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press, 2002). Mani argues for the inclusion of a ‘distributive’ justice alongside a ‘legal’ and ‘rectificatory’ justice.

¹¹ Mahmood Mamdani, ‘The Truth According to the TRC’ in I Amadiume and A An-Na’im (eds) *The Politics of Memory: Truth, Healing and Social Justice* (Zed Books, 2000) 179.

¹² Wendy Lambourne, ‘Transitional Justice and Peacebuilding after Mass Violence’ (2009) 3 *International Journal of Transitional Justice* 28, 35–6.

discussions on what may make for an enduring and more holistic justice that addresses the broader contours of the harm perpetrated.

Transitional justice has also been critiqued for being too Western dominant, with Chris Cunneen observing that transitional justice ‘has tended to ignore the extent to which liberal democracies themselves might be considered in need of “post-conflict” reconciliation and restorative justice’.¹³ Outlining the absences within transitional justice has resulted in discussion around what justice, particularly in the case of colonial harm and its structural parameters, requires. Transitional justice has been challenged to consider what a structural justice may demand.¹⁴

Rosemary Nagy points out that transitional justice has become a ‘global project’, ‘a body of customary international law and normative standards’.¹⁵ As Nagy also establishes, ‘[t]he question today is not *whether* something should be done after atrocity but *how* it should be done’.¹⁶ Supported by a permanent International Criminal Court, we are beyond discussions that impunity is acceptable. As articulated by the United Nations:

The notion of ‘transitional justice’ discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.¹⁷

There are high expectations of law — that it ought contribute to reconciliation and societal reconstruction. Mandates for addressing state crime include prospects of reconciliation and post-conflict reconstruction. The preamble to the 1996 legislation establishing the domestic Rwandan criminal trials draws a link between legal accountability and reconciliation, stating ‘in order to achieve reconciliation and justice in Rwanda, it is essential that the culture of impunity be eradicated forever’.¹⁸ The El Salvador Commission on the Truth is to ‘contribute to the reconciliation of Salvadorian society’.¹⁹ The United Nations resolution supporting the establishment of a tribunal to bring individual Khmer Rouge leaders to account does this within

¹³ Chris Cunneen, ‘State Crime, the Colonial Question and Indigenous Peoples’ in Alette Smeulers and Roelof Haveman (eds) *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, 2008) 159.

¹⁴ See Jennifer Balint, Julie Evans and Nesam McMillan, ‘Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach’ (2014) 8(2) *International Journal of Transitional Justice* 194.

¹⁵ Rosemary Nagy, ‘Transitional Justice as Global Project: Critical Reflections’ (2008) 29(2) *Third World Quarterly* 275, 276.

¹⁶ *Ibid.*

¹⁷ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies — Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004) 4 [8].

¹⁸ *Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990* (Rwanda) No 08/96 (30 August 1996), preamble.

¹⁹ Report of the Commission on the Truth for El Salvador UN Doc S/25500 (1 April, 1993) annex (‘*El Salvador: Mexico Peace Agreements — Provisions Creating the Commission on Truth*’) 189.

the context of a ‘legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security’.²⁰

With expectations of law that it both ‘do justice’ and assist in reconstruction, it is necessary to rethink what law needs in order to both be a partner in transitional justice and fulfill its accountability role. Without addressing the broader institutional dimensions of state crime, these broader aims have less chance of success, and law also has less chance of reaching its accountability goal. Transitional justice — unlike law — has particular expectations of the post-conflict process. Law’s preoccupation is accountability for particular individual crimes, whereas the transitional justice project is interested in a broader program of social and institutional reconstruction. Yet without addressing the institutional dimensions of mass harm, its structural underpinnings and institutional frameworks, these broader post-conflict goals for law cannot be as successful. These are acts perpetrated ‘in the name of the state’, co-opting individuals and institutions, both state and non-state. It is in understanding the nature of state crime that we may understand the impact of political legal processes designed to address them.

III THE CONCEPT OF STATE CRIME IN LAW

The perpetration of genocide and other sustained mass harm requires the use and transformation of a state structure and its institutions. State crime involves the harnessing of state and non-state institutions, and the utilisation of a state structure towards this end.²¹ The police, army, legal system, and religious bodies are all harnessed in the name of the state. Individuals killing individuals is not what identifies this form of state crime. Entire state structures are mobilised to commit this mass harm. Accountability, thus, should not be solely individual accountability, but an institutional reckoning that is key to any full redress for state crime, as well as establishing a foundation for the future.

State crime includes both institutional perpetrators as well as institutional beneficiaries. Organisations whose position it is to protect populations are involved in their harm or are companions to or beneficiaries of this harm. As Richard Vernon has shown, these crimes are characterised by the state using its resources to target rather than protect its citizens: ‘an abuse of state power involving a systematic inversion of the jurisdictional resources of the state’.²² In the case of Rwanda, this was the state, the army and the police. In South Africa, a host of institutions, state and non-state, were both perpetrators and beneficiaries.

These are programs of mass destruction or subjugation initiated and carried out by governments or governments-in-waiting. They harness and transform institutions and are grounded in certain

²⁰ *Khmer Rouge Trials*, GA Res 57/228B, 57th sess, 85th mtg, UN Doc A/RES/57/228B (13 May 2003) annex (‘Draft Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea’) 2.

²¹ For further discussion of the concept of state crime, see Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Routledge-Cavendish 2012) ch 1; Penny Green and Tony Ward, *State Crime: Governments, Violence and Corruption* (Pluto Press, 2004); Alex Alvarez, *Genocidal Crimes* (Routledge, 2010); Dawn L Rothe, *State Criminality: The Crime of All Crimes* (Lexington Books, 2009).

²² Richard Vernon, ‘What is Crime against Humanity?’ (2002) 10(3) *The Journal of Political Philosophy* 231, 242.

ideologies and structural inequalities and histories: the Nazi Weltanschauung that sought a Greater Germany, a 'Jew-less' Reich; the Hutu power of Rwanda that sought to reclaim a Rwanda without Tutsis; the 'State of the people' of Pol Pot and the Khmer Rouge that violently oppressed all deemed 'non-Khmer'; the apartheid vision of South Africa that led to the disenfranchisement of black and other 'non-white' South Africans; the 'Ethiopia First' of Mengistu and the Dergue; the Greater Serbia of Milosevic and the Serbian state to be; the Greater Turkey and new vision of the Ottoman Empire that excluded Christian Armenians; the vision of a 'white' Australia that resulted in a genocide against Aboriginal peoples.

The destruction wrought is in the name of the state and part of state policy. It demarcates between who is deemed a citizen and who is not. The recognition of these acts as state crime is critical for our understanding of them and for their legal redress. After the genocide of the Armenians during World War I, the President of the Ottoman Senate spoke of the mass murder of the Armenians as an 'officially' sanctioned 'state' crime requiring 'some kind of intervention' by the authorities.²³ The subsequent Courts-Martial heard one witness speak of doing 'government business'.²⁴ What I suggest is that we consider these crimes by states or 'states-to-be' as particular crimes that require a considered redress. Perpetrated in the name of the state or the state-to-be, with the intention of violently fashioning a state or state-to-be in a particular and terrible image, these can be understood as crimes of state.

Law strains to address this form of crime. Judith Shklar and Hannah Arendt both questioned how a criminal trial could encompass the enormity of crimes such as the Holocaust, the genocide of European Jewry during World War II. Arendt argued that '[t]he attempt to reduce the Nazi demographic policies to the criminal concepts of murder and persecution had the result ... that the very enormity of the crimes rendered any conceivable punishment ridiculous'.²⁵ Shklar argued that crimes against humanity should be understood as an 'organised corporate enterprise', that '[o]ne is not dealing here with a handful of deviants, but with a social movement, and this makes the relationship between the causes of and responsibility for these acts exceptionally problematic'.²⁶ In so arguing, both showed the deficiencies of the individual criminal accountability model and the necessity of viewing this form of crime outside the lens of individual crime.

International criminal law, however, has no concept of state crime. Although there exists a substantial list of 'international crimes'²⁷ such as genocide and torture that incur individual criminal liability, there does not exist within international criminal law a concept of a crime of

²³ Vahakn N Dadrian, 'The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish Military Tribunal' (1994) 22 *Journal of Political and Military Sociology* 97, 110.

²⁴ Annette Höss, 'The Trial of Perpetrators by the Turkish Military Tribunals: The Case of Yozgat', in R G Hovannisian (ed), *The Armenian Genocide: History, Politics, Ethics*, (St Martin's Press, 1992) 220.

²⁵ Hannah Arendt, 'Understanding and Politics (The Difficulties of Understanding)' in H Arendt (ed) *Essays in Understanding 1930-1954* (Harcourt Brace & Company, 1994) 310.

²⁶ Judith Shklar, *Legalism* (Harvard University Press, 1964) 192.

²⁷ M Cherif Bassiouni, 'The Sources and Theory of International Criminal Law: A Theoretical Framework' in M Cherif Bassiouni (ed), *International Criminal Law Volume I Crimes* (Transnational Publishers, 2nd ed, 1999) 62. Bassiouni draws a list of twenty-five international crimes, based on the sources of international law. The list includes crimes against the person such as crimes against humanity, genocide, war crimes and torture, as well as crimes such as drug offences, bribery of foreign public officials, and theft of nuclear materials.

state. Nor are our international legal institutions equipped to address crimes of state as *state* crimes. As William Schabas has pointed out, ‘case law has tended to play down the role of State policy in international crimes’.²⁸ Further, there is no international criminal framework for bringing these crimes as *state* crimes.

The one place where states can be brought to account is the International Court of Justice, yet this is not criminal accountability, and involves a voluntary process of state compliance. Its failures as an avenue for state redress can be seen in the judgment of the case brought by Bosnia-Herzegovina against Serbia and Montenegro during the Yugoslav War, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* 1993. Here, the Court found, fourteen years after the case was first initiated, that the crimes perpetrated at Srebrenica constituted genocide. Despite this, the court found that the state of Serbia was not in fact responsible, denying any link between the mass harm perpetrated by ‘Republika Srpska’ and the leadership of the state of Serbia.²⁹ The case was only possible due to the nation-state status Bosnia-Herzegovina now holds, a result of the war in the former Yugoslavia that was the subject of the claim. States rarely bring actions against other states for actions of genocide, and victim communities are seldom in a position to bring an action for genocide. In the 1980s, a case was prepared by international NGOs and scholars to take the Khmer Rouge killings to the Court under the provisions of art IX of the *Convention on the Prevention and Punishment of the Crime of Genocide*.³⁰ No government was willing to take the case on.³¹

The 20th century saw the increased codification of acts of mass harm committed against civilians. Acts committed by state officials, in particular heads of states, formerly did not warrant criminalisation, nor were they defined as crimes, but were, if deemed necessary, to be mediated by diplomacy or force. These were defined as ‘wrongful acts of states’. The move to define such acts as crimes began only post-World War II. As Marini Spinedi noted in a discussion of international crimes of state:

The need to distinguish among internationally wrongful acts of a state a category of particularly serious wrongful acts, having regard to the importance of the obligation

²⁸ William A Schabas, ‘State Policy as an Element of International Crimes’ (2008) 98 *Journal of Criminal Law and Criminology* 953, 954.

²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 91.

³⁰ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 11 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art IX (‘*Genocide Convention*’). Article IX of the *Genocide Convention* reads: ‘Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in art III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute’.

³¹ See David Hawk, ‘The Cambodian Genocide’ in Israel Charny (ed), *Genocide. A Critical Bibliographic Review* (Facts on File Publications, 1988) 143; Greg Stanton, ‘The Khmer Rouge Genocide and International Law’, in B Kiernan (ed), *Genocide and Democracy in Cambodia* (Yale University Southeast Asia Studies, 1993). A 200-page draft model dispute was prepared by Hurst Hannum, Director of the Procedural Aspects of International Law Institute and David Hawk, Director of Cambodian Documentation Commission; Greg Stanton’s Cambodia Genocide Project separately approached Australia to take a case to the ICJ against the Khmer Rouge exile regime, but this was refused.

breached, was asserted immediately after the end of World War II by both a Soviet author, D B Levin, and a British author, H Lauterpacht.³²

She continued:

The latter said that in the event of extremely serious breaches, the responsibility of the guilty state is not confined to the obligation to make reparations for damage caused but also includes subjection to reprisals and possibly sanctions provided for in the Charter, a responsibility in addition to the international criminal responsibility of the organs of the state that ordered or executed the wrongful act.³³

This understanding, as she continues, entailed a conception of state responsibility that would be in addition ‘to the international criminal responsibility of the organs of the State who ordered or executed the wrongful act’.³⁴ It was at this time too that the International Law Commission (‘ILC’) began considering the topic of ‘state responsibility’, deliberations which ended only in mid-November 2001.³⁵

It is in the ILC’s Draft art 19 on State Responsibility that the concept of state crime can be found. First developed in 1976,³⁶ in its final form in 1996, the article read:

1. An act of State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.³⁷

It set out four types of acts from which an international crime may result:

- (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

³² Marina Spinedi, ‘International Crimes of State: The Legislative History’ in J H Weiler, A Cassese and M Spinedi (eds), *International Crimes of State. A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (Walter de Gruyter, 1989) 340.

³³ Ibid.

³⁴ Ibid.

³⁵ The subject was one of fourteen topics originally selected by the Commission for ‘codification and progressive development’ in International Law Commission, *Yearbook of the International Law Commission* (1989) 281, cited in James Crawford, Special Rapporteur, *First Report on State Responsibility*, UN Doc A/CN.4/490 (24 April 1998) 2 [1]. It was originally confined to state responsibility for injuries to aliens and their property. The topic was reconsidered in 1962, and in 1963 it was agreed that the Commission should focus on ‘the definition of the general rules governing the international responsibility of the State’, by which, as Rapporteur James Crawford comments, was meant responsibility for wrongful acts: International Law Commission, *Yearbook of the International Law Commission* (1963) II, 228, cited in *First Report on State Responsibility* UN Doc A/CN.4/490 (24 April 1998) 4 [12].

³⁶ ‘Report of the International Law Commission on the Work of its Twenty-Eighth Session (3 May – 27 July 1976)’ [1976] 1 *Yearbook of the International Law Commission* 239.

³⁷ International Law Commission, *Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May–26 July 1996* UN GAOR 51st mtg, Supp No. 10 UN Doc A/51/10 (6 May–26 July) 131, art 19.

- (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
- (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
- (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.³⁸

The article distinguished between ‘internationally wrongful acts’ and ‘international crimes’.³⁹ Both acts invoke the responsibility of states. It raised the question, as discussed by Spinedi in a volume dedicated to a discussion of Draft Article 19, of the relationship between the ‘crime under international law’ committed by the individual-organ acting in its capacity as State organ, and the ‘international crime’ of the State.⁴⁰

The ILC, however, did not end up including ‘conduct constituting an international crime of the State’ as a ‘crime under international law’. The Draft Articles on *Responsibility of States for Internationally Wrongful Acts* adopted in 2001 by the ILC do not include state criminal responsibility or state crime as a principle. Rather, the Articles use the concept of wrongful act of state, beginning with the statement: ‘Every internationally wrongful act of a State entails the international responsibility of that State’.⁴¹

ILC Rapporteur James Crawford wrote of ‘state crimes’ in the context of one of the most discussed aspects of the ILC’s attempt at creating a framework for State responsibility — the distinction between ‘criminal’ and ‘delictual’ responsibility.⁴² He noted that when article 19 was adopted, it was envisaged as a full-scale regime of state criminal responsibility for such crimes as aggression, genocide, apartheid and other international crimes of state.⁴³ However, there was pressure to exclude the notion of State criminal responsibility from the Draft Articles altogether.⁴⁴ Crawford noted that taking Draft Article 19 seriously means treating such crimes with the legal consequences that morally iniquitous conduct ought to entail.⁴⁵ He wrote that this appeals to the ‘reality that State structures may be involved in wholesale criminal conduct — in

³⁸ Ibid.

³⁹ Paragraph 4 concluded: ‘Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict’: Ibid, 132, art 19.

⁴⁰ Spinedi, above n 32, 138.

⁴¹ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex (‘*Responsibility of States for Internationally Wrongful Acts*’) art 1.

⁴² James Crawford, Special Rapporteur, *First Report on State Responsibility*, UN Doc A/CN.4/490 Addendum 1 (1 May 1998) 2 [43]; See James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013).

⁴³ James Crawford, Special Rapporteur, *First Report on State Responsibility*, UN Doc A/CN.4/490 Addendum 3 (11 May 1998) 2 [76].

⁴⁴ Ibid.

⁴⁵ Ibid 7 [89].

genocide, in attempts to extinguish States and to expel or enslave their peoples'.⁴⁶ However, he recommended that although:

the recognition of the concept of 'international crimes' would represent a major stage in the development of international law. The present Draft Articles do not do justice to the concept or its implications for the international legal order, and cannot be expected to do so.⁴⁷

He suggested that '[t]he subject is one that requires separate treatment',⁴⁸ and recommended that art 19 (and consequently arts 51, 52 and 53) be excluded from the Draft Articles on State Responsibility.⁴⁹ State crime as a concept in international criminal law was subsequently abandoned.

IV LEGAL RESPONSES TO STATE CRIME

The absence of a concept of state crime in international law has meant a failure to sufficiently address these crimes of state. While 'crime against humanity', 'crime against peace' and 'war crime' are individual crimes, they are also crimes of the state. Although they possess a necessary individual dimension, they also importantly possess an institutional dimension. This has been recognised in the manner in which crimes against humanity are defined in the *Rome Statute of the International Criminal Court* ('*Rome Statute*'), although there is no concept of state crime as such. The *Rome Statute* notes that an '[a]ttack directed against any civilian population' is 'pursuant to or in furtherance of a State or organizational policy to commit such an attack'.⁵⁰ We can, I suggest, understand these systematic acts of human rights violations that result in destruction or subjugation as 'state crimes against humanity'.

There has been some innovation within international and national criminal law to capture the institutional and organisational scope of the harm perpetrated.⁵¹ At the Ottoman Courts-Martial for the genocide of the Armenians, heads of state and key executive members were grouped together in one trial, in addition to trials for ministers of the two wartime cabinets, trials for the officials who organised the deportations and the 'Special Organisation' that did the killing, and trials for provincial officials in areas in which the massacres took place.⁵² In Ethiopia, members of the former Dergue military council were on trial as a group, with individual charges.⁵³ The International Military Tribunal ('IMT') at Nuremberg declared certain institutions as criminal,

⁴⁶ Ibid.

⁴⁷ Ibid 10 [100].

⁴⁸ Ibid.

⁴⁹ Ibid 10 [101].

⁵⁰ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Art 7.2.a

⁵¹ See Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Routledge-Cavendish 2012) ch 4.

⁵² See Jennifer Balint, 'The Ottoman State Special Military Tribunal for the Genocide of the Armenians: "Doing Government Business"' in K J Heller and G Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013) 77; Vahakn N Dadrian and Taner Akçam, *Judgment at Istanbul: The Armenian Genocide Trials* (Berghahn Books, 2011).

⁵³ See Jennifer Balint, *Genocide, State Crime and the Law: In the Name of the State* (Routledge, 2012) 119–121.

establishing a new concept of ‘group criminality’ to encapsulate the ‘common plan’ of the crimes.⁵⁴ The indictment against the 24 former Nazi officials was directed against them ‘individually and as members of any of the ... groups or organisations to which they respectively belonged’.⁵⁵ The separate United States Military Trials at Nuremberg grouped defendants into significant ‘associations’, with three additional trials held that addressed corporations that collaborated with the Nazi state.⁵⁶ The ‘joinder’ indictments at the International Criminal Tribunal for Rwanda were designed to capture the evidence gathered by the Tribunal of a structured and systematic plan of genocide, both by government and non-government institutions.⁵⁷ The International Criminal Tribunal for the Former Yugoslavia adopted the concept of ‘joint criminal enterprise’ to ensure that all individuals involved in the crime perpetrated shared liability for this crime.⁵⁸

Building on this, the permanent International Criminal Court has introduced the concept of ‘common purpose’ to the court:

that ‘a person shall be criminally responsible and liable for punishment ... if that person ... contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose’.⁵⁹

These, however, are mainly organisational tools. With the exception of the criminalisation of organisations at the IMT, the focus remains on individual criminal accountability and not institutional or state accountability. In many ways, the prevailing approach to war crimes trials and international crime in general has been ‘putting individuals on trial’. We can thus question the extent to which the approach taken has indeed been one that conceptualises international crime as acts perpetrated within the framework of a state body, within state policy, and reliant on the institutions of the state to perpetrate it. Most legal approaches to mass harm have used the institution as a tool of organisation in putting individuals on trial, rather than addressing it as such. While individuals are positioned according to their institutional role in the perpetration of state crime, there is little addressing of the institutions involved, nor the allocation of state

⁵⁴ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (signed and entered into force 8 August 1945) 82 UNTS 79 annex (‘*Charter of the International Military Tribunal*’) art 9.

⁵⁵ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, Volumes 1–42* (AMS Press, 1947) 27.

⁵⁶ *Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No 10* (Washington DC, Government Printing Office 1949–53); see also Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011).

⁵⁷ See Balint, ‘Genocide, State Crime and the Law’, above n 53, 141; See also André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals, Vol VI: The International Criminal Tribunal for Rwanda 2000–2001* (Intersentia, 2003) 134.

⁵⁸ The first reference to joint criminal enterprise and its constituent elements was provided in the *Tadic* case of the International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v Dusko Tadic* (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 82 [190]. The Appeals Chamber noted in its discussion of the concept that: ‘Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions...’

⁵⁹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25.

responsibility. Accountability rests solely with the individual, with no possibility of allocation of a wider accountability.

Recognition of the scope of state crime can be found in political-legal redress. Truth commissions and inquiries are starting to name a range of actors as responsible. The Truth and Reconciliation Commission of South Africa ('the Commission') held institutional hearings that examined the many institutions, state and non-state, that supported and sustained the apartheid system. Hearings were held on the media, business, prisons, the faith community, the legal system, political parties, the armed forces, the State Security Council and the health sector. This was in addition to the many individual testimonies that were heard.⁶⁰ In its *Report*, the Commission found for the complicity of the state and a range of institutions. For example, it found that the South African media, in failing to report adequately on gross human rights violations, 'helped sustain and prolong the existence of apartheid'.⁶¹ The *Report* concluded that 'the former state was the major violator'.⁶² In particular:

These were not isolated incidents of the work of mavericks or 'bad apples'; they were the product of a carefully orchestrated policy, designed to subjugate and kill the opponents of the state.⁶³

The Timor-Leste Commission for Reception, Truth and Reconciliation named the Indonesian state, as well as the former colonial power, Portugal, and bystander nations such as Australia and the United States, as responsible for the systematic oppression in East Timor over decades. It found that Portugal 'fell short' in 'its obligation to protect the people of Timor-Leste from harm'⁶⁴ and that 'during the Indonesian occupation successive Australian governments not only failed to respect the right of the East Timorese people to self-determination, but actively contributed to the violation of that right'.⁶⁵ Other truth commissions have also held institutional hearings, including the Commissions of Sierra Leone and Liberia.⁶⁶

What we find in truth commission processes, however, is an account of the harm perpetrated, not a finding of liability. In including an account of the role of states and institutions, government and non-government, within these processes, there is important recognition of the parameters of state crime. There is, however, no inclusion within these processes of a concept of state and institutional *liability*. The question arises as to how to include a concept of state and institutional liability within our legal proceedings and processes. How do we address the institutional dimensions of this kind of crime? In so doing, how can we develop legal-political concepts that assist both in a directed accountability for state crime, and in the transitional justice project of post-conflict reconstruction?

⁶⁰ Audrey R Chapman, 'Truth Recovery Through the TRC's Institutional Hearings Process' in Audrey R Chapman and Hugo van der Merwe (eds), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press, 2008) 169.

⁶¹ Truth and Reconciliation Commission of South Africa, *Report* (1999) vol 4, 189.

⁶² Truth and Reconciliation Commission of South Africa, *Report* (2003) vol 6, 615.

⁶³ *Ibid* 617.

⁶⁴ Timor-Leste Commission for Reception, Truth and Reconciliation, *Chega!* (2005) Part 8, 90.

⁶⁵ *Ibid* 91.

⁶⁶ Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (Graphic Packaging, 2004); Truth and Reconciliation Commission of Liberia, *Volume II: Consolidated Final Report* (Truth and Reconciliation Commission of Liberia, 2009).

Facilitating both accountability and reconstruction through law is a core challenge. Law is familiar with individual accountability, yet a broader structural reckoning is generally beyond its scope. Yet it is this recognition of the parameters of state crime, of broader institutional change, that may assist law in being a better companion to post-conflict social change. Including institutional responsibility in our legal processes, together with state responsibility, could provide a solid framework for a sustainable future. Designing responses that include an articulation of institutional and state responsibility and liability recognises these crimes as state crimes. In understanding the dimensions of state crime, we are also providing the possibility of reconstruction — of transformation of core institutions that collaborated and colluded in the crime. In so doing, we are also acknowledging the relationship between institutional and social change. I suggest that we need to develop new concepts and processes that bring accountability and reconstruction together.

What we have in international law is a consideration of genocide, crimes against humanity and war crimes as separate acts, with little explicit conceptualisation of their state nature and a dominant individual focus. This leads to misunderstanding of these kinds of crimes, with implications for accountability and prevention. If we look at the dominant modes of accountability for state crime, they are individual. And where we do have recognition of institutional actors, the result is an account of the harm, not a finding of liability. The question is how we can include *within* our legal proceedings a concept of state and institutional liability. We have developed new legal institutions to tackle crimes committed by states, in particular the truth commission. Yet we continue to grapple with the institutional dimensions of crimes such as genocide and apartheid in accountability for state crime. We have not developed new legal concepts to encapsulate this form of harm. We are still mostly focused on individual legal processes. And while addressing the individuals — the key perpetrators and instigators of these acts, and the victims and survivors — is critical, in order to fully address these kinds of crimes their institutional dimensions must be recognised. This is both if justice in terms of strict accountability or any broader reconstruction is to be achieved — goals that are increasingly put forward as central in the wake of state orchestrated harm, particularly within a transitional justice framework.

V CIVIC LIABILITY AND INSTITUTIONAL ACCOUNTABILITY

The concept of civic liability is designed both to capture the institutional parameters of state crime and to allow for a transformative accountability. Civic liability draws on the duty of care owed by core state and civil institutions to society. I suggest an integrated accountability process that contains *criminal liability* for key individuals, and *civic liability* for key institutions, both state and non-state. Civic liability tackles the role of state and non-state institutions as actors and beneficiaries of state crime.

The term ‘civic’ is a deliberate reference to the depth of care owed by our institutions to the society in which they function, and the abrogation of this civic responsibility during the perpetration of state crime. Civil society depends for its well-being upon a framework of strong institutions. The abrogation of the responsibility of such institutions to the wider civil society in

their abuse of their position and their participation in the perpetration of gross violations of human rights means that they incur a civic liability.

As a legal concept, civic liability is designed to give weight to the responsibility of institutions in the perpetration of state crime. Without the harnessing of state and civil institutions, the harm perpetrated would have been of a different dimension. This is also important because these are mostly core institutions. Some, such as the Rwandan 'Interahamwe', the youth military organisation established 18 months prior to the genocide to play a key role in the killing, were deliberately established for the state crime.⁶⁷ So too the 'Special Organisation' comprising mainly released prisoners conscripted in the perpetration of the genocide against the Armenians by the Ottoman state in World War I.⁶⁸ Most others, however, are permanent institutions such as the army, the police and the legal profession who play key roles in society in and outside of conflict. Here we can also include religious institutions or professional institutions such as the medical profession. Bringing these bodies into a process of civic liability gives recognition to their often pivotal role and provides a means of transformation for future prevention.

Civic liability is thus a way to bring institutions, both state and non-state, into an overarching framework of liability for state crime. State crime includes institutional perpetrators and institutional benefactors. Core institutions such as the police, military and executive can fail actively, by planning and participating in the crime. Religious institutions or national associations can fail passively, by collaborating in a crime, or being companion or bystander to a crime. At the business hearings of the Truth and Reconciliation Commission of South Africa, the Congress of South African Trade Unions submitted that 'apartheid's labour laws, pass laws, forced removals and cheap labour system were all to the advantage of the business community'.⁶⁹ The Commission in its Report outlined first, second and third-order involvement by businesses in maintaining apartheid. First-order involvement was *direct* involvement with the state in formulating oppressive policies or practices, second-order was *knowledge* of the use to which their services would be applied, and third-order was when business activities *benefited indirectly* from operating within the apartheid society.⁷⁰ In naming processes such as these institutional hearings at the South African Commission as civic liability processes we are recognising their place within a process of establishing liability for state crime.

We can learn from approaches to the crimes of corporations, in particular the Accountability Model developed for the acquittal of corporate crime by Brent Fisse and John Braithwaite.⁷¹ Public identification and legal enforcement of remedial action is central to their model. In their framework, key principles include both the importance of individual responsibility as well as the importance of holding (in their case) corporations responsible as corporations.⁷² These principles can apply equally to state crime. In the pursuance of civic liability of institutions, individual

⁶⁷ Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia University Press, 1995).

⁶⁸ Vahakn N Dadrian, 'The Role of the Special Organisation in the Armenian Genocide during the First World War', in P Panayi (ed), *Minorities in Wartime. National and Racial Groupings in Europe, North America and Australia during the Two World Wars* (Oxford, 1993).

⁶⁹ Truth and Reconciliation Commission of South Africa, *Report* (1999) vol 4, 24.

⁷⁰ *Ibid* 26.

⁷¹ Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 140–157.

⁷² *Ibid* 158–163.

criminal liability of individuals responsible must be maintained, yet at the same time the institutions involved, state and non-state, must be addressed as institutions.

What is critical to Fisse and Braithwaite's approach, and would be an integral part of a process of civic liability, is its combination of internal audits that are connected to legal directives.⁷³ Unlike many institutional hearings at truth commission proceedings, these institutional audits would be subject to legal directives requiring internal transformation. So, the recommendations made, for example, in the wake of the Truth and Reconciliation Commission of South Africa, would be *legally required* to be implemented. These could include the recommendations in the Report which, in relation to the business community, included strategies for the establishment of an 'economic justice' that would assist in 'achieving a strong and meaningful human rights culture in order to ensure no repetition of the past'.⁷⁴ The Report of the Commission recommended that 'a scheme be put into place to enable those who benefited from apartheid policies to contribute to the alleviation of poverty',⁷⁵ listing

a wealth tax; a once-off levy on corporate and private income; each company listed on the Johannesburg Stock Exchange to make a once-off donation of 1 percent of its market capitalization; a retrospective surcharge on corporate profits extending back to a date to be suggested; a surcharge on golden handshakes given to public servants since 1990; the suspension of all taxes on land and other material donations to formerly disadvantaged communities.⁷⁶

Other recommendations from the Commission Report included, for example, in the case of the legal hearings, 'codes of practice for police and prosecutors, increased access to legal representation, witness protection, law student education, and increased training of legal professionals'.⁷⁷ A key recommendation for the institution of law was that:

All personnel within the justice system (from clerks to judges) undergo intensive training in the values of the new South African Constitution and in the requirements of international law and standards, including the United Nations Basic Principles on the Independence of the Judiciary. Ongoing training should include sensitization to human rights principles, including gender-specific abuse and appropriate responses.⁷⁸

It is the legal follow up that is critical here. Truth commissions are not generally empowered to enforce their recommendations. As Richard Wilson notes in his discussion of truth commissions as being symbolically powerful yet institutionally weak, the 1993 *Report of the Truth Commission in El Salvador* recommended an extensive program of judicial reform.⁷⁹ Yet despite this being one of the few commissions that stipulated that recommendations would be binding, these were ignored.⁸⁰ Similarly, the biggest disappointment of the truth commission process in

⁷³ Ibid 141–2; 193–198.

⁷⁴ Truth and Reconciliation Commission of South Africa, *Report* (1999) vol 5, 308.

⁷⁵ Ibid.

⁷⁶ Ibid 319.

⁷⁷ Ibid 323–24.

⁷⁸ Ibid 324.

⁷⁹ Wilson, above n 5, 16, 29.

⁸⁰ Ibid; Onur Bakiner, 'Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society' (2014) 8 *International Journal of Transitional Justice* 6, 20.

South Africa has been the largely absent follow up of its recommendations. In 2009, Archbishop Desmond Tutu, who had chaired the Commission, wrote:

I am saddened that after all this time we are still waiting for an appropriate conclusion to the TRC process. Government's lacklustre response to many aspects of the Commission's recommendations remains a source of deep disappointment, and beneficiaries of apartheid have also failed in adequately acknowledging the generosity of their victims' forgiveness.⁸¹

In tying civic liability to an overall accountability framework for state crime that comes *within legal processes*, we are providing a way of enforcing civic liability findings and establishing this as a process of liability rather than as a fact-finding process of responsibility and of public recognition. Responsibility is turned into legal accountability. Liability can be defined as the moment in which responsibility is defined by law.

Building on this, the following procedure with regard to institutions for crimes of state is suggested, as a conceptual model to be developed:

1. *Identify* institutions and organisations as participants in state crime.
2. *Establish* a body to investigate them and their complicity therein: a commission-type process.
3. *Provide* recommendations for reform, including proposals for selected individual criminal liability, and sub-criminal types of responsibility.
4. *Monitor*, through a legally binding regulatory process, the implementation of recommendations. This last step is critical for the acquittal of civic liability.

Civic liability establishes a framework for an accountability and liability that allows for the inclusion of state and non-state institutions, together with individuals. This is a framework for the transformation and accountability of institutions that aims at a broader societal reconstruction not achievable through individual criminal convictions alone. Civic liability is connected to institutional transformation. It is a critical link between the immediate project of legal remedy and the ongoing forward-looking transitional justice project of transformation. In so doing, it has the potential to serve as a bridging concept between institutional reforms as a response to mass atrocity and institutional reforms aimed at post-conflict peacebuilding. It is a way to acknowledge the institutional and state parameters of state crimes against humanity and the importance of institutional and structural change in the wake of state crime. Further, it is an acknowledgment to victims of the harm to which they have been subject.

VI CONCLUSION

Law creates legacies and it creates records. The process of law has the power to reconstitute, to be a partner in reconstruction. Official acknowledgment can provide spaces for mourning and for justice. Being accurate about the crimes that have been perpetrated and creating accountability processes that address the full parameters of state crime is important. It is imperative that

⁸¹ Institute for Justice and Reconciliation, *Annual Report 2009* (2009) 4.

acknowledgement of state crime be brought into the history of a nation and forged into its institutions.

Law can have an impact — it is a powerful tool in drawing lines. Law matters. That is, what forms of law are used in the wake of state crime, and how these crimes are understood through law, does have an impact on prospects for reconstruction, reconciliation and prevention. In the wake of the genocide in Rwanda, Mahmood Mamdani made the observation that the answer to the question, ‘who planned the genocide?’ cannot begin with an identification of individuals.⁸² The brief response to this question, he notes, must be ‘the state power’.⁸³ Only then will the responsibility for the genocide be political, not ethnic.⁸⁴ I think this is true. Understanding these acts as state crime is important for future reconstruction and reconciliation. Legal responses that are able to incorporate both individual and institutional responsibility, and to name the crime as *state* crime, may establish a space for this.

In the process of addressing state crime, in accountability and redress, we may see law’s possibilities — as a framework for a reconstruction and a re-imagining that may be a safeguard against repetition. We need to be cautious of legal accounts that focus overtly on the individual — individual reconciliation or individual accountability — as this misses the more complete story of state-organised perpetration of mass harm, although the individual stories — of perpetration, of harm and of help — must be told too. It is necessary that the story of harm gets told in its entirety and that we consider ways of addressing state crimes against humanity for what they are. Civic liability, as a framework for institutional accountability, has the potential to create conditions for structural reform that both address the state crime perpetrated and set up conditions for a sustainable peace. In so doing, law may provide the tools to partner transitional justice in its broader transformative project.

⁸² Mahmood Mamdani, ‘From Conquest to Consent as the Basis of State Formation: Reflections on Rwanda’ (1996) 216, *New Left Review* 3, 20.

⁸³ Ibid.

⁸⁴ Ibid.