

**TRANSITIONAL JUSTICE: WHEN JUSTICE  
STRIKES BACK CASE STUDIES OF  
DELAYED JUSTICE IN ARGENTINA AND  
SOUTH KOREA**

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Transitional Justice has been understood as a range of approaches to deal with widespread and systematic human rights abuses existing in a past regime as a new regime emerges in pursuit of peace and democracy.<sup>1</sup> With an increasing number of states experiencing these kinds of transitions in diverse ways,<sup>2</sup> the need for an innovative and flexible approach and an expansive conceptualization of Transitional Justice has inspired a range of research initiatives.

To date, one of the main debates in Transitional Justice has been whether a new regime ought to punish widespread and systematic human rights abusers from the past regime after a recent transition to a new democratic regime.<sup>3</sup> However, in some fundamental sense, this debate may be misplaced, because it is not so much whether one ought to punish but that one cannot punish in an overwhelming majority of cases, either in domestic or international judicial bodies. Hence, this Article seeks to present Delayed Justice as a useful mechanism of Transitional Justice. Notwithstanding the potential benefits emanating from bringing immediate legal prosecution and justice to past human rights abusers, it may be better to defer legal prosecution and remedy for a lengthy period while the new regime is established.

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1. *What is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUST., Feb. 2006, <http://www.ictj.org/en/tjl/>.

2. See Alejandra Vicente, *Justice Against Perpetrators, The Role of Prosecution in Peacemaking and Reconciliation 4* (BADIL Res. Ctr. for Palestinian Residency & Refugee Rts., Working Paper No. 2, 2003), available at [http://www.badil.org/Campaign/Expert\\_Forum/Ghent/paper09.pdf](http://www.badil.org/Campaign/Expert_Forum/Ghent/paper09.pdf) (discussing the development and use of truth commissions to document human rights violations such as torture and murder which would otherwise be covered up by repressive regimes).

3. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice 2* (Univ. of Chicago Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 40, 2003), available at <http://www.law.uchicago.edu/academics/publiclaw/index.html>.

To promote this Delayed Justice approach, this Article seeks to support a broad assertion about the discourse of Transitional Justice: that Transitional Justice is a long-term project that ought to shift its focus beyond civil and political human rights. In the same vein, Delayed Justice is presented as an integrated, comprehensive, and localized approach to Transitional Justice.

There are a few clarifications to be made beforehand. First, since each transitional case is different and unique, Delayed Justice is presented merely as an available, useful approach to Transitional Justice—not a one-size-fits-all solution. This Article seeks to present an alternative view to the narrow dichotomic debate of prosecution versus forgetting and amnesty immediately after the transition to a new regime. Second, the narratives about Argentina and South Korea that follow in no way reveal all dimensions of the events and dilemmas involved in the respective countries. It inevitably presents a skewed image and story based on this subjective selection. Yet, hopefully readers may benefit by extracting at least sketchy descriptions. Third, these two countries are not chosen as case studies to compare one against the other. Rather, this Article seeks to provide some reflections on theoretical insight into a situation where justice strikes back after its absence for several decades, and these two countries may provide useful mirrors for such reflections to be cast.

This Article will briefly describe situations in Argentina and South Korea where criminal and civil justice are being pursued following several decades without legal accountability. The descriptions will be followed by an analysis of the benefits of Delayed Justice over immediate legal prosecution and recourse. Then, a series of issues ranging from international law to social consideration, such as guilt and memory, will be examined to deduce arguments for and against Delayed Justice as a useful mechanism of Transitional Justice.

## I. ARGENTINA: 1983–2006

Argentina's *guerra sucia*, or Dirty War, which spanned from 1976 to 1983 under a military junta government, left a minimum of 8,961 persons dead or disappeared.<sup>4</sup> Furthermore, "tens of thousands of Argentines were detained without being charged with specific crimes."<sup>5</sup> In September 1983, after the Falkland Islands War, the junta decided to relinquish power by declaring a self-amnesty law (*Ley de Pacificación Nacional*, the Law of National Pacification), "which granted immunity from prosecution to suspected terrorists and members of the armed forces for human rights violations committed between May 25, 1973 and June 17, 1982."<sup>6</sup> It was followed by Decree No. 2756/83, "which ordered the destruction of all documents relating to the 'Dirty War.'"<sup>7</sup> The free elections took place on October 29, 1983, and President Raul Alfonsín (Alfonsín), a civilian, was inaugurated two months later.<sup>8</sup>

Alfonsín then issued Decree No. 158/83 "ordering the arrest and prosecution of the nine military officers who comprised the three military juntas from 1976 to 1983."<sup>9</sup> In December 1983,

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4. Mark Gibney, *The Implementation of Human Rights as an International Concern: The Case of Argentine General Suárez-Mason and Lessons for the World Community*, 24 CASE W. RES. J. INT'L L. 165, 170–71 (1992); see also Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'The Dirty War' in International Law*, 18 EMORY INT'L L. REV. 317, 322–25 (2004) (explaining how the disappearances were conducted as a part of an organized plan); Alison Brysk, *The Politics of Measurement: The Contested Count of the Disappeared in Argentina*, 16 HUM. RTS. Q. 676 (1994) (discussing the measurement of human rights violations in Argentina as a political dimension).

5. Gibney, *supra* note 4, at 171 (citing NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 447 (Writers & Scholars Int'l Ltd. trans., Farrar, Straus, & Giroux 1986) (1984)); see also Schwartz, *supra* note 4, at 321–22 (summarizing the manipulation of legal order staged by the first president appointed by the junta in the Dirty War, General Jorge Videla).

6. Gibney, *supra* note 4, at 171–72 (citing Law No. 22.924, [1983-B] A.L.J.A. 1681).

7. *Id.* at 172.

8. *Id.*; see also David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976–1983*, 75 MINN. L. REV. 1009 (1991) (discussing the types of and effectiveness of international human rights pressures in ending the Argentine Dirty War).

9. Gibney, *supra* note 4, at 172 (citing Presidential Decree No. 158, Dec. 13, 1983, [1983-B] A.L.J.A. 1943).

the Argentine Congress, with subsequent approval by the court, passed Law No. 23040 nullifying the self-amnesty law passed by the military junta.<sup>10</sup> The slow process of investigation by the Supreme Council of the Armed Forces, who were facing 2,000 private party criminal complaints, prompted the federal appeals court to take over jurisdiction.<sup>11</sup> In 1985, “the Court convicted . . . five of the former commanders and two former Presidents, Generals Jorge Videla and Roberto Viola,” which the Argentine Supreme Court subsequently upheld.<sup>12</sup>

There were divisions between political parties as to the treatment of the military.<sup>13</sup> Among the public, there were groups who were against any judicial prosecution,<sup>14</sup> while the human rights groups wanted trials and convictions of all officers and enlisted men who participated in the repressive regime, as well as measures that banned officers from being promoted if they were suspected of committing human rights violations.<sup>15</sup>

Meanwhile, Alfonsín established the Truth Commission, *Comisión Nacional Sobre la Desaparición de Personas* (the National Commission on Disappeared Persons or CONADEP), which published a report in September 1984 with accounts of abductions, torture, and detentions.<sup>16</sup> It estimated that approximately 9,000 individuals disappeared during the Dirty

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10. *Id.* at 172 (citing Law No. 23049, Feb. 14, 1984, [XLIV-A] A.D.L.A. 8).

11. Schwartz, *supra* note 4, at 330; Gibney, *supra* note 4, at 172–73.

12. Gibney, *supra* note 4, at 173; see also John Tweedy, Jr., *The Argentine “Dirty Wars” Trials: The First Latin American Nuremberg?*, 44 GUILD PRAC. 15 (1987) (detailing the treatment of these trials and backgrounds, including prosecutorial and defense strategies).

13. Tweedy, *supra* note 12, at 19–20.

14. See Lisa Avery, *A Return to Life: The Right to Identity and the Right to Identify Argentina’s “Living Disappeared”*, 27 HARV. WOMEN’S L.J. 235, 256–57 (2004) (“Even though most Argentine people did not accept the military’s attempts to minimize its crimes, the *Abuelas*’ task of public motivation was formidable in scope and glacial in progress.”). For example, a few days after the Supreme Council declared its inability to give judgment in a stipulated timeframe, a group of armed persons wearing stolen police uniforms entered the civilian court building in Rosario, and took crucial documents relating to human rights violations as well as large caches of arms being held as evidence against right-wing terrorists. Tweedy, *supra* note 12, at 21. Allegedly, police in the vicinity did nothing to stop the group. *Id.*

15. Tweedy, *supra* note 12, at 20.

16. Schwartz, *supra* note 4, at 327–29.

War and revealed a list of over 300 secret detention camps.<sup>17</sup> The report recommended the initiation of judicial proceedings.<sup>18</sup> Alfonsín also ratified a series of international human rights treaties such as the International Covenant on Civil and Political Rights,<sup>19</sup> the UN Convention Against Torture,<sup>20</sup> and the American Convention on Human Rights.<sup>21</sup>

On January 3, 1986, after five convictions, the Federal Chamber of Appeal announced four officers would stand trial for over 250 human rights abuses and also ordered the Supreme Council to begin investigation of other mid-level suspects.<sup>22</sup> In the end, around 700 officers faced charges for the Dirty War.<sup>23</sup> It is alleged that Alfonsín wanted to have limited trials, but the judiciary followed its own logic and expanded the investigation

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17. *Id.* at 328.

18. *Id.* at 329; *see also* Tweedy, *supra* note 12, at 17–18 (detailing the role of the Commission in investigating the Dirty War crimes).

19. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316/49 (Dec. 16, 1966) [hereinafter International Covenant]. Argentina ratified the International Covenant on Civil and Political Rights on August 8, 1986. Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, Status of Ratification, <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last visited Mar. 28, 2008).

20. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention Against Torture]. Argentina ratified the Convention Against Torture on September 24, 1986. Office of the United Nations High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Status of Ratification, <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last visited Mar. 28, 2008).

21. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. Argentina ratified the American Convention on August 14, 1984. Inter-American Commission on Human Rights, B-32: American Convention On Human Rights “Pact Of San Jose, Costa Rica”, <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Mar. 28, 2008). *But see* Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281 (1998–99) (analyzing the constitutionalization of international human rights treaties by Argentina after the Dirty War and reasons for their limited effects).

22. Tweedy, *supra* note 12, at 28.

23. *Id.*

to a full-blown examination of most military officials.<sup>24</sup> The first trial did not upset the military past the boiling point, because convicted generals had retired anyway, and the military perceived some convictions as inevitable.<sup>25</sup> But in addition to CONADEP's report, the ordering of this second wave of trials, which targeted officers who were at the heart of the command structure, caused the military to boil over. They felt the Armed Forces itself was on trial, not individuals.<sup>26</sup> Alfonsín tried to appease the military with promotions, military procurement, and salaries<sup>27</sup> to little avail.

Amid this military unrest, the Congress passed Law No. 23492, called the "Full Stop Law,"<sup>28</sup> which "imposed a 60 day deadline on the filing of any complaints or charges against alleged torturers."<sup>29</sup> Despite its presumed intent of curbing further criminal proceedings against the military, the prosecution managed to file over 300 summonses before the February 22, 1987 deadline,<sup>30</sup> which effectively neutralized Alfonsín's strategy of reducing the number of trials. As a result, by March 1987, fifty-one military and police officers were arrested for human rights violations, but only twelve of them were convicted and sentenced.<sup>31</sup>

The military's unrest began to take shape with Major Ernesto Guillermo Barreiro's Easter Rebellion in April 1987.<sup>32</sup> Although Alfonsín managed to quell the rebellion through talks with the military, he bowed to pressure by passing the law of "Due Obedience" on June 4, 1987.<sup>33</sup> "This law created an

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24. Andrew S. Brown, *Adiós Amnesty: Prosecutorial Discretion and Military Trials in Argentina*, 37 *TEX. INT'L L.J.* 203, 212 (2002).

25. Tweedy, *supra* note 12, at 28.

26. *Id.*

27. *Id.* at 30.

28. Law No. 23492, Dec. 24, 1986, [XLVII-A] A.D.L.A. 193; Gibney, *supra* note 4, at 173.

29. Gibney, *supra* note 4, at 173.

30. *Id.*

31. *Id.* See generally Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 *U. MIAMI INTER-AM. L. REV.* 491 (1986-87) (analyzing an Argentine junta trial).

32. Gibney, *supra* note 4, at 173-74.

33. *Id.* at 174 (citing Law No. 23521, June 8, 1987, [1987-A] E.D.L.A. 260).

irrebuttable presumption that military personnel accused of committing human rights abuses were acting under orders and also were unable to question the legitimacy of these orders.”<sup>34</sup> In effect, the law “protected all military officers below the rank of Brigadier General.”<sup>35</sup> “The law even barred the judiciary from undertaking any case-by-case analysis to determine if a defendant’s actions were self motivated” or simply following orders.<sup>36</sup> “As a result, over 400 officers were effectively immunized.”<sup>37</sup>

Two big factors seem to generally account for the failure to pursue prosecution in the period between 1983 and 1987. First, even though the military’s power had dwindled by 1983, it was still strong enough to refuse to obey judicial orders.<sup>38</sup> The risk of another coup was looming, given the fact that by 1983, “the armed forces had ‘ousted every president elected’ in Argentina in the last fifty years.”<sup>39</sup> Second, the Argentine economy was in serious trouble.<sup>40</sup> Its external debt in 1983 totaled U.S. \$45 billion,<sup>41</sup> and “[h]aving declared a moratorium on debt repayment[,] . . . [Alfonsín] had to contend with a 400% annual inflation rate that . . . climbed to 658%” at one point.<sup>42</sup> An additional factor behind such a failure may have been a perceived inadequacy in the Argentine judiciary “to lead the assault on the military,”<sup>43</sup> as legal orders and the rule of law were manipulated and ignored constantly since the 1950s.<sup>44</sup>

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34. *Id.*; see also Kathryn Lee Crawford, *Due Obedience and the Rights of Victims: Argentina’s Transition to Democracy*, 12 HUM. RTS. Q. 17 (1990) (detailing the Argentine Supreme Court’s upholding of the constitutionality of the Due Obedience Law in 1987).

35. Gibney, *supra* note 4, at 174.

36. *Id.*; Crawford, *supra* note 34, at 27–28.

37. Gibney, *supra* note 4, at 174.

38. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2627–28 (1991).

39. Brown, *supra* note 24, at 210.

40. *Id.*

41. *Id.*

42. Tweedy, *supra* note 12, at 17.

43. *Id.* at 16.

44. *Id.* at 16–17. During regime changes since the 1950s, judges were sacked and replaced at will. *Id.* at 17. In March 1976, the Supreme Court had to approve the junta’s act that declared the constitution indefinitely suspended. *Id.* The ranks of judges were “purged anew.” *Id.* “It [was] almost impossible to obtain writs of habeas corpus for

Overall, however, the two laws successfully appeased the military,<sup>45</sup> and the government was able to concentrate on the rapidly declining economy.

By the time of Carlos Menem's election in 1989, the country's economic problems overshadowed the human rights issue.<sup>46</sup> Shortly after assuming office in October 1989, President Menem followed up Alfonsín's initiative by issuing a broad pardon covering nearly 280 people—those involved in the Easter Rebellion and those involved in human rights abuses during the Dirty War.<sup>47</sup> "A year later, . . . Menem pardoned and released the military junta leaders who directed the [dirty] war, including Jorge Videla, Roberta Viola, Emilio Massera and former army General Carlos Suárez-Mason[]." <sup>48</sup> Hence by the beginning of the 1990s, only ten convictions for human rights abuses accrued, all of whom had been pardoned or released anyway.<sup>49</sup> However, Menem did provide monetary reparations to victims who had filed complaints within two years of the post-junta government (i.e. by December 1985).<sup>50</sup>

A more than decade-long forgetting period was constantly confronted with shocking revelations of the past by military officers.<sup>51</sup> For example, Captain Adolfo Scilingo stated that about 1,700 detainees were "drugged, stripped, and thrown alive from planes into the Atlantic Ocean" between 1976 and 1977.<sup>52</sup> There were constant marches and protests by human rights groups such as the Mothers of the Plaza de Mayo seeking truth of the past.<sup>53</sup> The mood of change was further precipitated by a

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victims . . . [as its] issuance depended on proof that the person was in official custody, and the whole apparatus of terror was secret." *Id.* Even if issued, the writs of habeas corpus had almost no effect. *Id.*

45. Avery, *supra* note 14, at 245.

46. Schwartz, *supra* note 4, at 334.

47. Gibney, *supra* note 4, at 174.

48. *Id.*

49. Schwartz, *supra* note 4, at 334.

50. *Id.* at 335; *see also id.* at 336 (describing the formula of reparation, which was deemed as satisfactory by petitioners).

51. *Id.* at 337.

52. *Id.*

53. Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina*, 14 HARV. HUM. RTS. J. 128–29 (2001).

series of extraditions of former military officers by foreign countries in the early 2000s and the release of decades-old secret police archives by Argentine authorities.<sup>54</sup> Coinciding with the diminishing threat of the military and the improving economy, it was noted that the amnesty laws did not absolve the crime of kidnapping a minor, and the kidnapping charges were not included in the Menem pardons, which resulted in criminal charges against the relevant military officers.<sup>55</sup>

The floodgate was finally opened in March 2001 with the trials of “disappeared children” when Federal Judge Gabriel Cavallo declared the Full Stop and Due Obedience laws unconstitutional and void.<sup>56</sup> Judge Cavallo found the two amnesty laws in violation of the constitution, reasoning that there cannot be “amnesty for acts involving the usurpation of public power or state terrorism[,]” and such amnesty is an unconstitutional intervention of the judiciary’s power to adjudicate and is in conflict with Argentina’s obligation to bring to justice those responsible for crimes against humanity.<sup>57</sup> Also, Judge Cavallo claimed that declaring these laws unconstitutional had a retroactive effect, making it as if the laws never existed and were never passed by Congress.<sup>58</sup> The federal appeals court confirmed this holding in November 2001, and it was followed by “a series of decisions by federal and appeals courts declaring the invalidity and unconstitutionality of the amnesty laws.”<sup>59</sup> “The executive followed suit when President Néstor Kirchner took office in May 2003; his government’s proposal to annul the two laws was accepted by the legislature a few months later.”<sup>60</sup> As a final step, in June 2005, the Argentine

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54. *Argentina Releases Secret Files*, ASSOC. PRESS, Oct. 7, 2003, available at <http://www.guardian.co.uk/world/2003/oct/07/argentina>; see, e.g., *France Demands Argentine Extradition*, BBC NEWS, July 26, 2003, <http://news.bbc.co.uk/2/hi/americas/3098031.stm> (discussing Spain’s request for the extradition of forty-five former military officers).

55. Avery, *supra* 14, at 256–57.

56. Schwartz, *supra* note 4, at 338–40.

57. Brown, *supra* note 24, at 208–09.

58. *Id.* at 209.

59. Christine A.E. Bakker, *A Full Stop to Amnesty in Argentina: The Simón Case*, 3 J. INT’L CRIM. JUST. 1106, 1108–09 & n.13 (2005).

60. *Id.* at 1109.

Supreme Court declared the two amnesty laws unconstitutional and void.<sup>61</sup> The decision confirmed the opening of the floodgates for the prosecutions of human rights abusers involved in the Dirty War.<sup>62</sup>

Menem's pardons did not escape the pursuit of Delayed Justice either. Federal judges held that pardons granted by President Menem exempting senior officers from punishment were unconstitutional,<sup>63</sup> and, in September 2006, Argentina's second highest court, the Criminal Appellate Chamber, annulled the pardon extended to General Santiago Riveros by then-President Menem in 1989-90 for crimes against humanity (killings and tortures that took place under his command) committed under the 1976-1983 military regime.<sup>64</sup>

The overturning of the pardon is interesting, because it is not a mere judicial intervention in legislative power due to unconstitutionality; it is judicial intervention in the exercise of executive prerogative power.<sup>65</sup> In U.S. constitutional jurisprudence, which Argentine constitutional jurisprudence draws from heavily,<sup>66</sup> a pardon is "an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the

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61. *Id.* at 1106.

62. *Id.*

63. Luis Márquez Urtubey, *Non-Applicability of Statutes of Limitation for Crimes Committed in Argentina: Barrios Altos*, 11 SW. J. L. & TRADE AM. 109, 120 (2005).

64. *Argentina's Second-Highest Court Voids Pardon for Gen'l*, EFE WORLD NEWS SERV., Sept. 15, 2006, available at <http://www.westlaw.com/> (9/15/06 EFE News Serv. 00:00:00).

65. Cf. Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225 (2003) (discussing the history and scope of the presidential pardon power and Congress's attempts to regulate that power).

66. Emilio Fermin Mignone, Cynthia L. Estlund & Samuel Issacharoff, *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118, 132 (1984-85); see also Manuel José García-Mansilla, *Separation of Powers Crisis: The Case of Argentina*, 32 GA. J. INT'L & COMP. L. 307 (2004) (explaining the influence of the U.S. constitutional system in Argentina, the somewhat modified Argentine constitutional system as compared to the U.S. model, and a perspective on Argentine separation of powers).

punishment the law inflicts for a crime he has committed.”<sup>67</sup> It extends to every offense known to the law, and this executive power is not subject to the legislature,<sup>68</sup> or any significant judicial check.<sup>69</sup> Pardon, as a part of the constitutional scheme, serves public policy ends.<sup>70</sup> It determines that the public welfare will be better served by providing relief from harshness in the criminal justice system.<sup>71</sup>

Given the exclusive nature of the executive pardon power, it raises a constitutional issue for the doctrine of separation of powers and internal checks and balances within the government structure.<sup>72</sup> The presidential pardoning power functions to check the judicial power, and there seems to be genuine agreement in the United States that the president’s power to grant pardons must not be encroached upon by other branches of the government.<sup>73</sup> While the detailed analysis of this issue is outside the scope of this Article, the Argentine example highlights the flexible and creative paths available for transitional states to pursue Delayed Justice.

The passage of time and subsequent stability has undoubtedly caused many people to focus on their current private lives (as evidenced by dwindling internal and external support for the human rights movement in Argentina).<sup>74</sup> In light of the heavy reduction in military power, the number of officers

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67. Peterson, *supra* note 65, at 1232 (quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833)). See generally John R. Stanish, *The Effect of a Presidential Pardon*, 42 FED. PROBATION 3 (1978) (illustrating different views on the effect of a pardon—that it erases only a conviction, that it erases both a conviction and guilt, or that it doesn’t erase either).

68. Peterson, *supra* note 65, at 1233 (citing *Ex parte Garland*, 71 U.S. (4 Wall) 333, 380 (1866)).

69. *Id.* at 1234 (citing *Ex parte Grossman*, 267 U.S. 87, 121 (1925)).

70. *Id.* at 1234–35 (citing *Biddle v. Perovich*, 274 U.S. 480, 486 (1927)).

71. *Id.* (citing *Biddle*, 274 U.S. at 486); Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY L.J. 959, 1002 (1997) (quoting *Grossman*, 267 U.S. at 179).

72. Peterson, *supra* note 65, at 1234.

73. Steiner, *supra* note 71, at 987.

74. Karen Wilson, *Argentina’s Human Rights: Crisis in Transition*, 20 HUM. RTS. 28, 28 (1993).

who were involved in the Dirty War,<sup>75</sup> and the public outcry over expressions of nonrepentance by past human rights abusers,<sup>76</sup> Argentina's pursuit of Delayed Justice finally materialized in a form of criminal prosecution with seemingly popular public support.<sup>77</sup>

## II. SOUTH KOREA: SETTLING AND RECONSTRUCTING THE PAST: 1945–2006

It has been more than sixty years since Korea gained independence from Japan's colonial rule.<sup>78</sup> Yet legacies of Japanese colonial past still haunt today's South Korean society, hedging divisions and conflicts in various ways. There were many Korean people who actively collaborated with Japanese authorities before and during the colonial period lasting from 1910 to 1945.<sup>79</sup> While these people have been commonly termed as "betrayers of nation,"<sup>80</sup> the newly independent Korean

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75. Brown, *supra* note 24, at 216.

76. *Id.* at 206 (explaining that Julio Simón, a former official of the federal police who operated in secret concentration camps during the Dirty War, "appeared on national television in 1995 and 1997 to defend his role in the dictatorship. He showed no remorse for his action. Simón took the position that all of his victims were dangerous terrorists, and he believed he was fighting to save Argentina . . . [H]e declared that he would do [torture] again . . . Simón [said] 'I don't repent for anything.'").

77. See Avery, *supra* note 14, at 263 ("A public opinion poll revealed that seventy-eight percent of the population supported Judge Cavallo's decision in 2001 and desired the resumption of the military trials.").

78. JOHN KIE-CHIANG OH, *KOREAN POLITICS: THE QUEST FOR DEMOCRATIZATION AND ECONOMIC DEVELOPMENT* 24 (Cornell Univ. Press 1999).

79. Asia for Educators, Columbia University, East Asian Curriculum Project, Imperialism, War and Revolution in East Asia: 1900–1945; Korea as a Colony of Japan, [http://afe.easia.columbia.edu/webcourse/key\\_points/kp\\_11.htm](http://afe.easia.columbia.edu/webcourse/key_points/kp_11.htm) (last visited Mar. 29, 2008).

80. 반민족행위자 재산환수에 관한 헌법적 검토 in 친일반민족행위자의 재산환수 특별법 공청회 자료집, 제 250회 정국국회 국정감사 자료집 1, 2004년 9월 17일, 국회의원 최용규 [Hun Hwan Lee, *Constitutional Review of Property Forfeiture of Anti-nationals*, in MATERIALS FOR PUBLIC HEARING ON SPECIAL LAW ABOUT RETURN OF PRO-JAPANESE ANTI-NATIONAL PERSONS' PROPERTY, 250TH INSPECTION OF THE ADMINISTRATION CONDUCTED BY NATIONAL ASSEMBLY 12, 14–20 (Yong Gyu Choi ed., Sept. 17, 2004)] (S. Korea) (arguing that the Korean provisional government inherited the pre-colonial Choson Dynasty and therefore collaborators' actions were not only antinational but also antistate).

government at the time failed to prosecute these pro-Japanese collaborators for political reasons.<sup>81</sup>

Despite the Korean government's initiative, the U.S. military administration, citing a lack of experienced officials to administer the country, kept the collaborators in office and preserved the pre-existing colonial structure to facilitate the establishment of a new, democratically-elected government in South Korea.<sup>82</sup> Reluctance on the part of the U.S. military administration, which sought to move forward rather than settle the past against rising Communism in the Korean Peninsula<sup>83</sup> and the presence of pro-Japanese officials in the government,<sup>84</sup> made it difficult to pursue any prosecution of betrayers of nation.

In July 1947, legislation was passed to establish a special court to prosecute pro-Japanese collaborators,<sup>85</sup> but it was soon submerged under the national election initiated by the U.S. military administration.<sup>86</sup> A pursuit of prosecution was renewed when a new constitution was passed in July 1948.<sup>87</sup> Article 101 expressly allowed the enactment of legislation to punish serious antinational conduct before independence.<sup>88</sup> In September 1948, the Anti-National Pro-Japanese Conduct Punishment Act was

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81. *Id.* at 27–28.

82. *Id.* at 22. Even police forces that prosecuted independence supporters/activists remained in office after 1945. 이세일, 부역자 재산몰수 해외사례 연구 in 친일반민족행위자의 재산환수 특별법 공청회 자료집, 제 250회 정기국회 국정감사 자료집 1, 2004년 9월 17일, 국회의원 최용규 [Se Il Lee, *Overseas Case Studies of Property Forfeiture of Betrayers*, in MATERIALS FOR PUBLIC HEARING ON SPECIAL LAW ABOUT RETURN OF PRO-JAPANESE ANTI-NATIONAL PERSONS' PROPERTY, 250TH INSPECTION OF THE ADMINISTRATION CONDUCTED BY NATIONAL ASSEMBLY 69, 69 (Yon Gyu Choi ed., Sept. 17, 2004)] (S. Korea).

83. Se Il Lee, *supra* note 82.

84. *Id.* at 77.

85. See Hun Hwan Lee, *supra* note 80, at 23–24 (describing the legislation).

86. *Id.* at 25.

87. *Id.* at 26–27.

88. *Id.* at 26. Article 101 no longer exists in the current South Korean Constitution. See generally CONST. OF THE REP. OF KOREA, available at <http://english.court.go.kr/home/english/welcome/republic.jsp> (showing that the July 1948 version of article 101 no longer exists and there are no analogous articles).

passed, which established a special committee to investigate the allegations of such conduct and refer it to a special prosecutor for adjudging by a special court.<sup>89</sup>

However, amid opposition from then-President Seung Man Lee, pro-Japanese factions planned assassinations of and carried out assaults on the members of the special committee.<sup>90</sup> Due to this fierce opposition and disruption, the committee's original limitation date of June 20, 1950 was changed to August 31, 1949, effectively ending the operation of the special committee without a single person being punished.<sup>91</sup> The apparent justification was to use the saved moral capital to build the constitution and the structure of the government and legal order in a way that was inclusive and built cohesive national identity.<sup>92</sup>

Since then, except for a few sporadic initiatives, there has been no serious political attempt to settle or reconstruct the colonial past by pursuing legal justice against pro-Japanese collaborators.<sup>93</sup> Settling the past has been difficult, because many of those in power inherited it from the pre-existing power structure in the colonial period.<sup>94</sup> However, it was rediscovered that, during the colonial period, the collaborators received special financial awards and bribes from the Japanese colonial government in return for their official and unofficial contribution towards the establishment of unequal agreements between Korea and Japan, before the colonial period, and with the Japanese colonial administration, during the colonial

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89. *Id.* at 27.

90. *Id.* at 26.

91. *Id.* at 28.

92. *Id.* at 28.

93. *Id.* at 12.

94. See Ahn Byung-ook, *The Significance of Settling the Past in Modern Korean History*, KOREA JOURNAL, Autumn 2002, at 10 (summarizing the Syngman Rhee policy of rehiring pro-Japanese collaborators in post-colonial Korea).

period.<sup>95</sup> Their awards became an origin of the pro-Japanese collaborators' massive property foundation.<sup>96</sup>

The original intention of those seeking prosecution as of 1945 was to confiscate all properties of pro-collaborators, but such measures did not materialize because of the U.S. military administration's reluctance.<sup>97</sup> Then, in the 1990s, it became known that family members of the most notorious pro-Japanese collaborators such as Wan Yong Lee, Byung Joon Song, and Jae Geuk Lee had been filing claims in courts to retrieve lands that the collaborators had received before and during the colonial period from Japanese authorities and the colonial government in return for their antinational collaboration.<sup>98</sup> The relevant lands were registered by the new, independent Korean government as state property after the independence, and family members sought the return of those lands based on their ownership rights obtained during the colonial period.<sup>99</sup>

While many South Koreans found these claims morally repulsive, a claim by family members of Wan Yong Lee succeeded at all three levels of the courts.<sup>100</sup> The reasoning of the court was that a law-governing country cannot take away private property rights without a legal basis, and excessive emphasis on natural justice or nationalistic concepts about the past disrupts social order.<sup>101</sup> The courts pointed out that after a failure of such legislation in 1948, there had been no legislation

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95. See 백동현, 친일파의 축재과정과 해방 후 친일파 후손의 재산반환소송 사례 - 매국형 친일파를 중심으로 in 친일반민족행위자의 재산환수 특별법 공청회 자료집, 제 250회 정각국회 국정감사 자료집 1, 2004년 9월 17일, 국회의원 최용규, 45 [Dong Hyun Baeck, *Studies of Property Accumulation by Pro-Japanese Groups and Property Retrieval Claims by Their Descendants*, in MATERIALS FOR PUBLIC HEARING ON SPECIAL LAW ABOUT RETURN OF PRO-JAPANESE ANTI-NATIONAL PERSONS' PROPERTY, 250TH INSPECTION OF THE ADMINISTRATION CONDUCTED BY NATIONAL ASSEMBLY 38, 45 (Yong Gyu Choi ed., Sept. 17, 2004)] (S. Korea) (containing a list of cases). About half of the list received awards roughly equivalent to U.S. \$1-2 million today, as a conservative estimate. *Id.* at 46.

96. *Id.* at 49; see also *id.* at 52 (featuring a list of monetary awards and properties received by Lee Wan Yong, one of the most notorious pro-Japanese collaborators).

97. *Id.* at 54.

98. *Id.* at 38.

99. *Id.* at 56.

100. *Id.* at 57-58.

101. *Id.*

enacted to deprive the collaborators of their property rights, and there was no legal basis for the government to take their property after independence.<sup>102</sup> It is estimated that as of September 2004, out of twenty-seven claims lodged by the collaborators' family members, almost half of them have succeeded in courts,<sup>103</sup> and there are more properties subject to such potential claims.<sup>104</sup>

In response to a series of losses in courts, and out of a desire to bring some means of legal justice after sixty years of its absence, in 2005, the majority party in the Parliament enacted legislation entitled "Special Law about Return of Pro-Japanese Anti-National Persons' Property"<sup>105</sup> (Property Special Law or PSL). The main purpose of the statute is to seek the return of the relevant property acquired by collaborators in the Japanese colonial period.<sup>106</sup> The statute defines "pro-Japanese collaborators" as those high officials who participated in Japan's Government-General Office in Korea or who advocated and promoted the Japan-Korea Eulsa Protectorate Agreement or Annexation Agreement, among others, that deprived Koreans of sovereignty.<sup>107</sup> Alternatively, the collaborators may include those who belong to the article 2 definition of the "Special Law about Examination of Truth of Anti-National Conducts" (explained below) and are deemed to be seriously pro-Japanese under that particular Truth Committee's report opinion.<sup>108</sup> The statute further defines "property of pro-Japanese collaborators"

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102. Hun Hwan Lee, *supra* note 80, at 29–30; *see also id.* at 30–31 (listing other cases containing claims made by family members of Jae Geuk Lee and Byung Joon Song).

103. Baek, *supra* note 95, at 45–46; *see also id.* at 47–72 (explaining details of several other claims).

104. Hun Hwan Lee, *supra* note 80, at 12.

105. 친일반민족행위자 재산의 국가귀속에 관한 특별법 [Special Law About Return of Pro-Japanese Anti-National Persons' Property], Nat'l Assembly, Law No. 7975 (amended Sept. 22, 2006) (S. Korea).

106. *Id.* art. 1; *see* 친일파의 축재과정에 대한 역사적 고찰과 재산환수에 대한 법률적 타당성 연구, 국회법제사법위원회 정책연구 04-1 [PARLIAMENTARY LEGIS. & JUDICIARY COMM., POLICY RESEARCH, Doc. No. 3-1, at 109, 109–40 (Dec. 2004)] (S. Korea) (containing studies of post-WWI France and post-civil war China).

107. Law No. 7975, *supra* note 105, art. 2(1).

108. *Id.* art. 2(1)(a)-(b).

as property of pro-Japanese collaborators acquired from the beginning of the Russo-Japanese War in 1904-05 to the independence day of August 15, 1945, by cooperating with Japanese imperialism or by being inherited, or property received with knowledge that it was pro-Japanese property.<sup>109</sup> The committee in charge will be established under the president,<sup>110</sup> and the relevant forfeited property will be used for memorial activities and education relating to the independence movement.<sup>111</sup>

The PSL raises many interesting legal issues—most prominently, the constitutional protection of private property rights under article 23 of the constitution.<sup>112</sup> While arguments for the protection of such rights are intuitively obvious, Korean academics attempt to justify the PSL's infringement of private property rights of the family members of the collaborators by various means.<sup>113</sup> First, one academic argues that the definition of a private property right is not objective or absolute but depends on society's formulation and interaction with other societal values and concepts.<sup>114</sup> He refers to the historically specific development of the private property concept and the availability of Korean legislation to deviate from the individual-based and rights-based western conception of the private property right.<sup>115</sup>

Second, he points out that Korea needs to shift towards a welfare state that promotes social justice and the welfare of its citizens instead of merely facilitating a liberal capitalist agenda.<sup>116</sup> Therefore, the absolute nature of the private property right needs to be modified at least subtly.<sup>117</sup> This argument disregards doubts about the existence of any political or legal consensus behind such a major shift in the nature of a polity.

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109. *Id.* art. 2(2).

110. *Id.* art. 4.

111. *Id.* art. 25.

112. PARLIAMENTARY LEGIS. & JUDICIARY COMM., *supra* note 106, at 141–42.

113. *Id.* at 150–51.

114. *Id.* at 143.

115. *Id.* at 144–45.

116. *Id.* at 148.

117. *Id.* at 146.

Third, there is an argument that property attained as a result of crime ought to be forfeited.<sup>118</sup> But this argument raises doubts about retroactivity<sup>119</sup>—whether such collaboration was a crime at that time. It may have been treason under Korea's customary law, but more research may be needed in that area. Fourth, it is argued that the conduct of collaborators vitiates the very existential foundation of the state, so the spirit of the state's constitution clearly sets out the boundaries to which ordinary statutes and rules (on property rights) must conform.<sup>120</sup>

Another controversial legal issue is the statute of limitations. Three arguments are notable against this issue. First, the statute of limitations is not applicable, because the PSL is a mere confirmation of the pre-existing Anti-National Pro-Japanese Conduct Punishment Act of 1948 and does not create a new legal relationship.<sup>121</sup> Also, all time periods passed can be viewed as having the effect of suspending the limitation period, because it had been genuinely impossible for the state to prosecute antinational collaborators so far.<sup>122</sup> Second, an exception can be made to the statute of limitations when there is an overriding public interest.<sup>123</sup> Third, collaborators may be viewed as a party to Japan's crimes against humanity, and one may view, by analogy, crimes against humanity and war crimes as not being subject to the statute of limitations.<sup>124</sup> Difficulty is also anticipated in a case where the collaborators disposed of the property to a bona fide third party after having won the claim against the government.<sup>125</sup> At a more fundamental level, the PSL may be viewed as punishing the next generation of family members for a crime for which they themselves were not

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118. *Id.* at 149.

119. Articles 13.1 and 13.2 of the Constitution forbid retroactivity while article 1.1 of the Criminal Act also states that the existence and punishment of a crime are to be governed by the law at the time. CONST. OF THE REP. OF KOREA arts. 13.1, 13.2, *available at* <http://english.ccourt.go.kr/home/english/welcome/republic.jsp>; Criminal Act, Nat'l Assembly, Law No. 7623 art. 1.1 (amended Jul. 29, 2005) (S. Korea).

120. PARLIAMENTARY LEGISLATION & JUDICIARY COMM., *supra* note 106, at 150.

121. *Id.* at 151.

122. *Id.* at 155.

123. *Id.* at 158.

124. *Id.* at 156–58, 159.

125. Hun Hwan Lee, *supra* note 80, at 35.

responsible. At ground level, much difficulty is also anticipated due to problems such as evaporation of evidence, the diminishing number of surviving witnesses, and fierce opposition from those who are related.

While the PSL deals with settlement of the past in relation to property, there is another special law aimed at settlement of the past in relation to truth-revelation. The Special Law about Examination of Truth of Anti-National Conducts<sup>126</sup> (Truth Special Law or TSL) is a government-initiated drive, which seeks to produce the names of pro-Japanese and antinational collaborators who are defined in the TSL as those who arrested, murdered, tortured or executed independence activists; those who signed or negotiated agreements that impeded Korean sovereignty; those who officially cooperated or participated with Japanese authorities; those who actively led or offered Korean women to serve as the Japanese army's comfort women; those who participated in the economic activities of Japanese colonial firms and banks as executive members in extorting Korean national property; and those who actively participated in the destruction of national culture and cultural inheritances, among others.<sup>127</sup> The TSL can establish a special committee to produce a report.<sup>128</sup> The committee also has power to summon witnesses and request any documents to be revealed.<sup>129</sup>

While there is an intuitive appeal to the TSL, there are also voices of caution. First, one needs to be careful not to place innocent family members at a disadvantage by operating a guilt-by-association system.<sup>130</sup> Second, Ahn points out that attribution of fault and guilt to a small group of people by naming and shaming them has the effect of ignoring the big-

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126. 일제강점하 반민족행위 진상규명에 관한 특별법 [Special Law about Examination of Truth of Anti-National Conducts], Nat'l Assembly, Law No. 7937 (amended Apr. 28, 2006) (S. Korea).

127. *See id.* art. 2 (giving a complete list of the types of people which the TSL attempts to identify as "pro-Japanese and antinational collaborators").

128. *Id.* art. 4(4).

129. *Id.* art. 21.

130. 일제강점하 친일반민족행위진상규명에관한특별법안 심사보고서, 과거사진상규명에관한특별위원회 [SPECIAL COMM. ON REVELATION OF THE PAST HISTORY, NAT'L ASSEMBLY, REPORT OF REVIEW ON SPECIAL LAW ABOUT EXAMINATION OF TRUTH OF ANTI-NATIONAL CONDUCTS 304 (Feb. 2004)] (S. Korea).

picture, for example, a deeper and wider reflection of how imperialism was tolerated or submitted to by most people at an individual level.<sup>131</sup> This is necessary, because large-scale collaboration and small-scale collaboration help to define each other.<sup>132</sup> Third, he also points out that the term “pro-Japanese collaborators” is difficult to define and subject to the risk of being over-simplified. It may present an indication of a moral requirement, but is too abstract to provide any lesson for the future, especially to have any deterrence effect.<sup>133</sup>

The TSL is faced with fierce political opposition and obstruction from the current leading opposition party—partially due to the fact that Korean ex-President Jung Hee Park is one of the alleged pro-Japanese collaborators, having served in the Japanese army against the Korean independence army, and a current leader in the leading opposition party is ex-President Park’s daughter.<sup>134</sup> Having submitted to and cooperated with Japanese colonial powers in the past, the main conservative newspapers are also against the TSL.<sup>135</sup>

On one hand, the process of truth-seeking is important for victims of a colonial past as well as for establishing a moral dimension to the truth. On the other hand, the nexus between truth and reconciliation is tenuous at best. In many cases, truth leads to anger, bitterness, outrage, and calls for vengeance, rather than healing, closure, and reconciliation. Also, truth carries politics at its heart. The way the nation is told the truth of the past is deeply politically-framed by choosing to include and focus on some while excluding others. It is equally easy for the TSL Committee to be politically manipulated.<sup>136</sup>

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131. 안병직, *과거청산과 역사서술 – 독일과 한국의 비교*, 177 *역사학보* [Byung Jik Ahn, *Settlement of the Past and Historical Narrative–Comparison between Germany and Korea*, 177 *HIST. GAZETTE* 225 (2003)] (S. Korea).

132. *Id.* at 241.

133. *Id.* at 237–38.

134. *Exposing Unpatriotic Actions*, *CHINA DAILY*, Sep. 8, 2004, available at LEXIS, ACC-NO: A20040907128-9248-GNW.

135. *Id.*

136. See Ruti Teitel, *Transitional Justice as Liberal Narrative*, in *OUT OF AND INTO AUTHORITARIAN LAW* 3, 9 (András Sajó ed., 2003) (explaining the importance of a transitional history that sets out the truth for a people moving from an authoritarian to a more liberal form of government).

Furthermore, excessive measurement of past truths may mean it is more likely that new institutions would be undermined, because there would be strong continuity between the two, as exemplified by a situation relating to the current leading opposition party in South Korea.<sup>137</sup> However, one factor favoring Korea's situation is that a lengthy period of time has passed since the end of colonialism; thus, the current regime is more likely to be viewed as having distanced itself sufficiently from the relevant past regime.<sup>138</sup> Overall, it is important that Korea's settlement of the past does not stop with these special laws and comprehensive research is carried out to obtain a complete picture.

### III. DELAYED JUSTICE: A MECHANISM FOR TRANSITIONAL JUSTICE

There are many advantages and benefits associated with seeking legal justice immediately after the transition from a regime that committed human rights abuses to one pursuing peace and democracy. They have been extensively researched and discussed by academics but are outside the scope of this Article and, thus, will not be discussed.<sup>139</sup>

Contrary to bringing immediate justice, Delayed Justice has its own appeal. To accommodate Delayed Justice as a distinct mechanism for Transitional Justice, there is a need for a shift in thinking. The view of Transitional Justice needs to be expanded beyond a narrow conception of the dichotomy between

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137. See *supra* note 134 and accompanying text.

138. See Office of the Prime Minister of Korea, Modern History—Contemporary Period, [http://www.opm.go.kr/warp/webapp/content/view?meta\\_id=english&id=66](http://www.opm.go.kr/warp/webapp/content/view?meta_id=english&id=66) (last visited Mar. 29, 2008) (discussing the many different governments and military uprisings which occurred from the end of the colonial period through the present government).

139. A few advantages and benefits: implantation of a culture of accountability, deterrence of potential future offenders, justice for victims, promotion of the judicial system, repudiation of collective guilt, presentation of collective memory, affirmation of the rule of law, meeting the duty to prosecute under international law, and promotion of respect for human rights. See Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 17–20 (2003) (discussing the short-term effects of trials, truth commissions, and amnesties).

prosecution on one hand and forgetting and moving on, with or without amnesty, on the other.<sup>140</sup> Transitional Justice ought to be understood as a long-term project achievable over a generation. Once this shift in thinking is accepted, it becomes clear that among several mechanisms available under Transitional Justice—such as prosecution, truth seeking, reparation to victims, institutional reform, and some social contextual measures necessary to ameliorate hate and division—it does not have to be a matter of choosing one over the other, but it may be a matter of sequencing.<sup>141</sup> For example, because Argentina initially found it difficult to pursue criminal prosecution due to political, security, and economic reasons, it first sought truth and built on its democratic institutions, including a more independent judiciary.<sup>142</sup> After a decade of stabilization, Argentina was able to devise an inventive legal strategy to overturn amnesty laws and pardons of the past and renew criminal prosecution.<sup>143</sup> Hence, Delayed Justice allows a holistic view of justice by allowing reform and the strengthening of civil society and governance before bringing legal justice. Delayed Justice provides a flexible alternative for a country in transition.

Furthermore, Delayed Justice is able to overcome some of the practical difficulties of instituting legal prosecution immediately after the transition, whether at domestic court or international tribunal. First, a criminal justice system inherited by a post-conflict society is often nonexistent, or it is difficult to

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140. See Alex Boraine, *Truth and Reconciliation Commission in South Africa: The Third Way*, in *OUT OF AND INTO AUTHORITARIAN LAW* 31, 34 (András Sajó ed., 2003) (discussing South Africa's three paths after apartheid: blanket amnesty, prosecuting all who were directly responsible for human rights violations, and creation of a committee to work for truth and reconciliation).

141. See Sang Wook Daniel Han, *The International Criminal Court and National Amnesty*, 12 *AUCKLAND U. L. REV.* 97, 115–18 (2006) (explaining the argument between pro-amnesty and pro-prosecution thought and the benefits that can be achieved from a combined approach).

142. See Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?*, 31 *COLUM. J. TRANSNAT'L L.* 1, 9–13 (1993) (detailing the problems that President Menem faced upon taking office and how he decided to go about dealing with the past human rights transgressions).

143. See Nino, *supra* note 38, at 2624–26 (explaining how Argentina overcame three legal obstacles to prosecute violators of human rights).

work on a rights-based framework, and, thus, it may be more susceptible to political pressure.<sup>144</sup> Delayed Justice provides a society with time to improve its criminal justice system, restock its members, and institutionalize legal rights necessary in modern legal system and trials.<sup>145</sup> For example, both Argentina and South Korea inherited police members who were trained to torture citizens and independence activists, and many legal officials were selected or trained by the previous regime, which could not be replaced because of the lack of institutional capacity.<sup>146</sup> Institutional reform of this kind often requires a long time, during which, with suitable political and public drive, a window of legal justice may open.<sup>147</sup>

Secondly, a transition period between regimes often leads to a spike in crime and political disturbance in light of enormous social, economic, and political changes.<sup>148</sup> Hence, Delayed

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144. See Garro, *supra* note 142, at 24–26 (discussing the lingering violence and abuses of the Argentine police forces); see also *id.* at 72–81 (detailing necessary reforms for the Argentine judiciary to become truly independent); *id.* at 99–102 (discussing wide-ranging institutional reforms necessary in Argentina, including the protection and preservation of fundamental rights and procedures such as rules against arbitrary arrests and procedures for declaring state emergency); Raul Granillo Ocampo, *Justice Reform in the Argentine Republic*, 52 SMU L. REV. 1731 (1999) (detailing Argentina's constant drive for judicial reform).

145. Cf. William A. Schabas, *The Rwanda Case: Sometimes It's Impossible*, in POST-CONFLICT JUSTICE 499, 502–04 (M. Cherif Bassiouni ed., 2002) (discussing Rwandan attempts at post-genocide justice and the obstacle posed by its severely limited legal resources).

146. See HUMAN RIGHTS WATCH, WORLD REPORT 2001: ARGENTINA: HUMAN RIGHTS DEVELOPMENTS (2001), available at <http://www.hrw.org/wr2k1/americas/argentina.html> (discussing Argentina's legacy of frequent instances of torture and deaths of citizens at the hands of the police and the military); FED. RESEARCH DIV., LIBRARY OF CONG., SOUTH KOREA: A COUNTRY STUDY 243–44 (Andrea Matles Savada & William Shaw eds., 1990) (detailing the embedded history of political torture and human rights violations by South Korean police throughout the 1900s). Argentina tried various reform measures to ensure her new judicial officials were independent. For example, article 114 of the 1994 constitution establishes the Council of the Judiciary, which is in charge of selection, promotion, and discipline of judges. See Garro, *supra* note 142, at 72–77.

147. See Garro, *supra* note 142, at 3–5 (discussing the transition from dictatorship to democracy as a gradual process that highlights the relationship between democracy formation and legal institutions).

148. Paul van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies*, in OUT OF AND INTO AUTHORITARIAN LAW 51, 56 (Andr as Saj o ed., 2003).

Justice allows the government to spend time and energy on dealing with the current situation, while preserving legal recourse dealing with the past for a later opportunity. For example, South Korea has been mired with periods of political protests and military coups for over forty years, effectively undermining any chance of dealing with their colonial past via legal justice.<sup>149</sup> Argentina was also faced with a potential return to a military coup and a military government that forced it to stop its pursuit of prosecution.<sup>150</sup>

Thirdly, post-conflict governments are often in dire economic situations, lacking resources to spend on dealing with the past, especially for conducting expensive and time-consuming legal trials.<sup>151</sup> They are often met with more pressing needs such as the building of hospitals and schools.<sup>152</sup> Delayed Justice would provide the society with an opportunity to spend its limited resources on meeting social needs, thereby giving time to build an institution sufficiently strong to accommodate legal recourse during a later period.<sup>153</sup> For example, the extent of serious rupture in the Argentine and Korean economies after their transitions was such that it is reasonably doubtful whether those countries would have been able to withstand trials without causing extensive damage to their economic and social safety.<sup>154</sup>

Delayed Justice is also valuable in that it reflects another potential shift in thinking about Transitional Justice. Transitional Justice promotes human rights and justice by

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149. See Modern History—Contemporary Period, *supra* note 138 (providing an overview of a series of military coups that occurred in South Korea between 1948 and 1987, which resulted in a suspension of the country's constitution and a crippling of the government's political unification scheme).

150. Brysk, *supra* note 4, at 680.

151. Van Zyl, *Justice Without Punishment*, *supra* note 148, at 57.

152. *Id.*

153. See BEN CHIGARA, AMNESTY IN INTERNATIONAL LAW: THE LEGALITY UNDER INTERNATIONAL LAW OF NATIONAL AMNESTY LAWS 48–49 (2002) (explaining how the “needs of State” doctrine can lead to a state picking conditional present amnesty in order to focus limited resources on more pressing needs than the prosecution of past atrocities).

154. See Modern History—Contemporary Period, *supra* note 138 (reviewing the politics and economics of South Korea since 1948); Garro, *supra* note 142, at 8–12 (describing the economic crisis in Argentina after the Dirty War and the struggle of how to redress past human rights violations).

focusing on civil and political rights and criminal justice through legal prosecution of past widespread and systematic human rights abusers.<sup>155</sup> However, excessive focus on civil and political rights comes at the cost of other important parts of human rights, namely Economic-Socio-Cultural (ESC) rights.<sup>156</sup>

The notion of individual criminal justice, understood in terms of concepts like responsibility, crime, and punishment, stems from the law of war and was largely developed in relatively stable states.<sup>157</sup> Transitional Justice has been largely modeled on the international criminal justice system.<sup>158</sup> However, excessive focus on criminal justice and related civil and political rights carries the risk of ignoring widely-diverse local contexts and needs in times of transition.<sup>159</sup> To capture the dynamics of transition in each society, Transitional Justice must not represent a particular approach to transition (i.e. bringing criminal justice), but it must become a discourse and a comprehensive project that attempts to satisfy justice in its full sense—taking account of ESC rights as well as civil and political rights. Transitional Justice must reach to and beyond perpetrators and crimes committed prior to and during the oppression. One needs to look beyond the oppression and at ESC rights, which leads to questions about “the needs of victims and the imperative to reform state institutions to ensure that human rights abuses [do] not recur.”<sup>160</sup>

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155. See Snyder & Vinjamuri, *supra* note 139, 26–31 (giving an overview of how the efforts of Argentina, Ethiopia, Rwanda, Kosovo, East Timor and Indonesia, Sierra Leone, and Cambodia at post-transition justice through trials have faced shortcomings).

156. See Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future of Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 37–39 (2006) (explaining why socio-economic rights have fallen behind civil and political rights).

157. David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2621–22 (2006).

158. See van Zyl, *Justice Without Punishment*, *supra* note 148, at 60–64 (discussing transitional states obligations under international law to prosecute human rights violations).

159. Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST-CONFLICT JUSTICE 55, 57 (M. Cherif Bassiouni ed., 2002).

160. Paul van Zyl, *Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, in POST-CONFLICT JUSTICE 745, 746 (M. Cherif Bassiouni ed., 2002).

A common assumption about ESC rights—that they will be automatically achieved once a society moves on by satisfying civil and political rights—has not been factually or theoretically validated.<sup>161</sup> In essence, “justice is as much an economic and social right as one belonging to the civil and political category,”<sup>162</sup> and there is no hierarchy of rights. Hence, adopting a Delayed Justice mechanism by focusing on ESC rights and social justice (security and development) first and bringing criminal justice later can be a very useful option depending on local circumstances.<sup>163</sup>

A concern may be raised as to the potentially excessive scope Transitional Justice will gain by accommodating ESC rights.<sup>164</sup> However, Transitional Justice should distinguish itself from mainstream justice by enabling itself to be more creative and flexible, which is a necessary requirement for a discourse dealing with such a diverse variety of transitional societies who have different experiences, different historical and local contexts, and contested cultures, among other diversities.<sup>165</sup> Delayed Justice and initial advancement of ESC rights do not mean there will be a total absence of judicial involvement at the initial stage of transition.<sup>166</sup> A court can enforce ESC rights, such as the right to health and adequate housing, as exemplified by South Africa.<sup>167</sup>

There are significant risks and drawbacks associated with the Delayed Justice mechanism. For Delayed Justice to succeed as a mechanism, it should be accompanied by a strong and

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161. See Wiles, *supra* note 156, at 45 (stating that socio-economic rights are “positive” rights requiring active measures from the state to ensure these liberties).

162. Schabas, *supra* note 145, at 502.

163. Enhancement of some ESC rights does not necessarily require a long-term commitment and may be immediately realizable. Wiles, *supra* note 156, at 55. An example would be correcting forced abandonment of housing in the past. *Id.* at 62.

164. See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 222 (2001) (describing the concern that “[a] constitution that protects socioeconomic rights might . . . jeopardize constitutional rights altogether, by weakening the central function against preventing the abusive or oppressive exercise of government power.”).

165. Garro, *supra* note 142, at 2.

166. See SUNSTEIN, *supra* note 164, at 225 (noting that in certifying South Africa’s new constitution, the Constitutional Court found ESC rights to be justiciable).

167. *Id.* at 221.

relentless political will (by politicians and the public) to pursue legal justice even as time passes. Otherwise, dwindling political support for legal justice may render Delayed Justice impossible to achieve even when sufficient time has passed.<sup>168</sup> A good example is South Africa, where not a single prosecution followed the end of the Truth Commission's work due to the lack of political will from both political leaders and the public.<sup>169</sup> Hence, the Delayed Justice mechanism carries a risk of being subject to political manipulation and being used as a mere excuse by (succeeding) politicians to delay legal accountability and prosecution indefinitely. One way to minimize this risk is to strengthen civil society so that it is kept aware of the need for legal and criminal justice and accountability, as exemplified by Argentina's the Mothers of the Plaza de Mayo and South Korea's nationalistic movements against Japan.<sup>170</sup>

#### IV. DUTY TO PROSECUTE

Many international lawyers, relying on the principle of *nullum crimen sine poena* (no crime without a punishment), insist the state has a duty to prosecute certain atrocious international crimes such as genocide, torture, and crimes against humanity.<sup>171</sup> The Delayed Justice mechanism agrees with the need for punishment but merely points out that it can be a matter of sequencing, and such punishment can come later

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168. See Gibney, *supra* note 4, at 194 (explaining that in Argentina, public enthusiasm for justice dwindled as the body originally in charge of prosecutions proved to be more interested in protecting military personnel than pursuing justice).

169. Van Zyl, *Unfinished Business*, *supra* note 160, at 760.

170. See Ernest Sabato, *Prologue* to NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 422, 426 (Writers and Scholars Int'l, Ltd. trans., Farrar, Straus & Giroux 1986) (discussing the Mothers of the Playa de Mayo); Modern History-Contemporary Period, *supra* note 138 (discussing passage of a law against antinational activities in response to the history of Japanese imperialism).

171. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540 (1991) (explaining that a state is obligated under customary international law to punish repeated and notorious human rights abuses).

in time.<sup>172</sup> However, if international law does impose such a duty, it would be a reasonable interpretation to imply a duty to prosecute within a reasonable time period.

The Genocide Convention of 1951<sup>173</sup> imposes a duty on state parties to prosecute alleged offenders of genocide.<sup>174</sup> Article 4 provides that persons committing genocide shall be punished, and article 6 expressly mentions that such an offender shall be tried either in a national or an international penal tribunal.<sup>175</sup> Hence, the Convention imposes a duty on state parties to prosecute alleged offenders of genocide, although the Convention is binding only on contracting state parties and no person has ever been prosecuted in accordance with the terms of the Genocide Convention thus far.<sup>176</sup>

As to crimes against humanity, there are various general human rights conventions, such as the International Covenant on Civil and Political Rights,<sup>177</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>178</sup> and the American Convention on Human Rights<sup>179</sup> that generally impose a duty on states to investigate and give effect to the

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172. *See supra* Part III.

173. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

174. *Id.* art. I. Among the drawbacks of the Genocide Convention is the strict and narrow definition of genocide—acts, which excludes acts against political groups. *Id.* art. II. Also, under article II, “even the most depraved violations would lie beyond the scope of the Convention unless ‘committed with intent to destroy, in whole or in part,’ one of the specified groups ‘as such.’” Orentlicher, *supra* note 171, at 2565; *see also* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 517 (1999) (explaining that under both the Genocide Convention and the Rome Statute, genocide is an act done “with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such”).

175. Genocide Convention, *supra* note 173, arts. IV, VI.

176. Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT’L L.J. 297, 319 (2000); *see also* Han, *supra* note 141, at 105 (analyzing the Geneva Convention of 1949 and its irrelevance to Transitional Justice analysis).

177. International Covenant, *supra* note 19, art. 15.

178. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

179. American Convention, *supra* note 21.

protected rights, but none of them expressly impose a duty to prosecute the alleged offenders of crimes against humanity.<sup>180</sup>

The Inter-American Court of Human Rights in the *Velasquez Rodriguez Case*<sup>181</sup> held that article 1.1 of the American Convention on Human Rights, requiring states to ensure the rights set forth in the Convention, obligates States to investigate and punish any violation of the rights recognised. However, it is merely a non-binding judgment of a regional international court that does not enjoy particularly high status and popularity.<sup>182</sup>

Besides, the vague wording of the Conventions would be insufficient to impose such a rigorous duty on state parties.<sup>183</sup>

It is also difficult to discern any clear answer from customary international law. The side supporting such a duty for crimes against humanity

usually base their arguments on non-binding General Assembly resolutions, declarations of international conferences, and international conventions that are not widely ratified. On the other hand, there is a body of State practice which supports amnesty for crimes against humanity . . . . Examples of such state practice include amnesties in Argentina, Chile, El Salvador, Zimbabwe, Uruguay, Mozambique, South Africa, Haiti, Uganda, and the Democratic Republic of Congo.<sup>184</sup>

Such a wide range of state practices shows that the acts of states are not sufficiently consistent to support a duty to prosecute crimes against humanity in treaties or customary international law.<sup>185</sup>

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180. Scharf, *supra* note 174, at 517–18; Orentlicher, *supra* note 171, at 2568–79.

181. Case of Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

182. Han, *supra* note 141, at 106.

183. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (defining the means for interpreting treaty language).

184. See Han, *supra* note 141, at 106.

185. *Id.*; Int'l Law Comm'n, *Report of the International Law Commission Fifty-Eighth Session*, para. 216, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (Aug. 11, 2006).

There may be an argument that a duty to prosecute those who committed crimes against humanity derives from a peremptory norm of *jus cogens*.<sup>186</sup> However, such a proposition is doubtful in light of “traditional approaches to international law, which require consistent and uniform state practice based on *opinio juris* for a rule to be considered a customary one.”<sup>187</sup> Also, the threshold of forming *jus cogens* is very high.<sup>188</sup>

As to a crime of torture, article 7 of the Convention against Torture<sup>189</sup> requires a case to be submitted for prosecution.<sup>190</sup> In comparison to the Genocide Convention, the wording of the Convention against Torture is weaker, and the imposition of a duty is not as clear.<sup>191</sup> However, the use of mandatory language gives a *prima facie* assumption of the imposition of such a duty, and it is at least an indication favoring the imposition of a duty to prosecute for a crime of torture on state parties.<sup>192</sup>

There is an argument that the Torture Convention’s duty to prosecute does not apply to events before 1984, when it was opened for signature.<sup>193</sup> But if torture is committed by state agents as part of a state policy, it is a crime against humanity and may be retroactively applied under the Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes Against Humanity of 1968.<sup>194</sup>

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186. Bakker, *supra* note 59, at 1113 (citing opinion of Justice Dr. Don Juan Carlos Maquda, ¶ 57, in *Simón, Julio Héctor y otros s/privacion ilegítima de la libertad*, Suprema Corte, Causa No. 17.768 (June 14, 2005) (S.1767.XXXVIII)).

187. *Id.* at 1114.

188. *Id.*

189. Convention Against Torture, *supra* note 20, art. 7.

190. Karlijn van der Voort & Marten Zwanenburg, *Amnesty and the Implementation of the ICC*, in SUPRANATIONAL CRIMINAL LAW: A SYSTEM *SUI GENERIS* 305, 308 (Roelof Haveman et al. eds., 2003).

191. *Id.*

192. Han, *supra* note 141, at 106.

193. Bakker, *supra* note 59, at 1115.

194. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity arts. 1–2, Nov. 26, 1968, 8 I.L.M. 68 (1969) [hereinafter Statutory Limitations Convention].

Based on analysis, at least for crimes of genocide and torture, state parties have a duty to prosecute.<sup>195</sup> Paul van Zyl points out that excessive focus on the “duty to punish” drowns out the exploration of other strategies that deal with the past.<sup>196</sup> Nino also emphasizes the same point, arguing that the mandatory imposition of such a duty does not always help the relevant society.<sup>197</sup> International pressure stemming from the duty to prosecute may end up weakening the government and its policies through the loss of legitimacy in society and the loss of international prestige, thus benefiting only the perpetrators.<sup>198</sup> Also, such a duty does not really bridge the gap in the common discourse between the government and perpetrators.<sup>199</sup> Rather, it may lead to reactionary attitudes from some parts of society against perceived foreign pressure, which is exercised against weak states.<sup>200</sup>

Van Zyl’s and Nino’s points are highly valid and persuasive. The mandatory imposition of a duty to prosecute is contrary to the flexible and creative nature of Transitional Justice and its Delayed Justice mechanism.<sup>201</sup> One needs to escape from this strict and limiting framework.

#### V. LEGAL JUSTIFICATION FOR NONCOMPLIANCE WITH DUTY TO PROSECUTE

Even if there is a duty on state parties to prosecute for crimes of genocide and torture, among others, Delayed Justice would still be compatible with such an international law obligation if it can qualify as a legal justification available for noncompliance.<sup>202</sup> In other words, if the relevant regime can

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195. Han, *supra* note 141, at 105–06.

196. Van Zyl, *Justice Without Punishment*, *supra* note 148, at 53.

197. Nino, *supra* note 38, at 2632–33.

198. *Id.* at 2632.

199. *Id.* at 2634.

200. *Id.*

201. *See supra* note 165 and accompanying text.

202. *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in Int’l Law Comm’n, *Report of the International Law Commission Fifty-Third Session*, ch. V., para. 1, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Aug. 10, 2001) [hereinafter *Draft Articles*].

lawfully avoid the duty to prosecute immediately following the transition, it would open an avenue for it to pursue Delayed Justice later. For the purpose of this brief analysis, this Article will refer to the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>203</sup> (Draft Articles), which is expected to best reflect the current legal trend.

The first departure of analysis concerns article 25, which deals with necessity.<sup>204</sup> While the defense of necessity is available for the state parties to avoid international obligations such as the duty to prosecute, article 25.1 specifies two conditions: first, the state's breach of the relevant obligation must be "the only way for the State to safeguard an essential interest against a grave and imminent peril," and secondly, the breach must not "seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."<sup>205</sup> Article 25.2 further qualifies the availability of this defense by specifying that the defense is not available if the state has contributed to the situation of necessity.<sup>206</sup> Because of concern over possible abuse, the defense of necessity is rarely available and is subject to strict limitations.<sup>207</sup>

As to the first condition of article 25.1, it would be difficult for the relevant state to argue that suspension and delay of execution of the duty to prosecute for crimes of genocide and torture is the only way to safeguard an essential interest of the state such as the physical security of the state. A question like whether military coups would have in fact occurred had the government pursued prosecution, as in Argentina's case, is very difficult to prove in court. A counter-factual argument that

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203. *Id.* paras. 30–77; see also Int'l Law Comm'n, *Report of the International Law Commission Fifty-Seventh Session*, paras. 108–91, U.N. GAOR, 60th Sess., Supp. No. 10, U.N. Doc. A/60/10 (Aug. 5, 2005) (discussing the effects of armed conflicts on treaties; it is still at the infancy stage).

204. *Draft Articles*, *supra* note 202, art. 25.

205. *Id.*

206. *Id.*

207. *Id.* art. 25, commentary para. 2. The article is cast in negative language to show its rare availability. *Id.* art. 25, commentary para. 14.

prosecution coupled with prudent political maneuvering would have safeguarded the state's essential interest is difficult to rebut. The court and supporters of the duty to prosecute may point to Rwanda as a prime example of the feasibility of the duty to prosecute in a transitional period.<sup>208</sup>

As to the second condition of article 25.1, supporters of the duty to prosecute may argue that the relevant state's suspension of the duty to prosecute seriously impairs an essential interest of the international community towards which this duty to prosecute exists, namely an interest in bringing an end to a culture of impunity towards widespread and systematic human rights abuses.<sup>209</sup> Whether such a duty to prosecute is owed by the state to the international community as a whole may be a moot point. But, if such interpretation is adopted, it is likely that the court and other states would deem it as a serious impairment, especially when the scale of crimes of genocide and torture committed is large.

In addition to these difficulties facing the transitional state in availing itself of the defense of necessity, another hurdle lies in the meaning of "state" as employed by article 25.2.<sup>210</sup> Article 4.1 of the Draft Articles specifies that "[t]he conduct of any State organ shall be considered an act of that State under international law," and article 7 specifies that such conduct of a state organ "shall be considered an act of the State under international law if the organ, person or entity acts" in the empowered capacity within delegated governmental authority, "even if [the conduct] exceeds its authority or contravenes instructions."<sup>211</sup> A problem in the context of some cases of Transitional Justice, especially for Argentina's situation but also applicable to many others, is that the military's conduct is also attributable to the state.<sup>212</sup> Thus, if the state is placed in this situation (where it is necessary for the state to breach its duty to prosecute) because of the pre-transitional military's extensive

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208. Schabas, *supra* note 145, at 499.

209. American Convention, *supra* note 21, art. 25.

210. See *Draft Articles*, *supra* note 202, at pt. I, ("Part One defines the general conditions necessary for State responsibility to arise.").

211. *Id.* arts. 4.1, 7.

212. Orentlicher, *supra* note 171, at 2611.

commitment of genocide and torture<sup>213</sup> or post-transitional military's intimidation to stage a coup, the necessity defense may not be available to the state at all under article 25.2.<sup>214</sup> Orentlicher points out that a legal requirement like article 25.2 assumes that the conduct of state organs is always under the control of the government, which is often untrue for transitional societies in relation to the military.<sup>215</sup>

Article 10.1 is also relevant for Transitional Justice. It specifies that "the conduct of an insurrectional movement<sup>216</sup> which becomes the new Government of a State shall be considered an act of that State under international law."<sup>217</sup> It provides a positive sign for the transitional state, because its commentary explains that, for the sake of national reconciliation, article 10.1 should not be vigorously enforced in a peace agreement made between the existing government and insurrectional forces that brings insurrectional leaders into a part of the new government.<sup>218</sup> This is a good example of a general international law rule being aware of one of the Transitional Justice contexts.

Another alternative to the defense of necessity that is available in the Draft Articles is the doctrine of *force majeure*—"the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."<sup>219</sup> *Force majeure* is different from necessity, as *force majeure* deals with a situation where the breach is involuntary or involves no element

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213. See *Draft Articles*, *supra* note 202, art. 4, commentary paras. 7, 13 (commenting that there is no distinction to be made between acts of superior and subordinate officials as long as they are acting in their official capacity; further, the argument is aided by the fact that whether such person had improper motives or may be abusing power is irrelevant).

214. *Id.* art. 25.2; Orentlicher, *supra* note 171, at 2610.

215. Orentlicher, *supra* note 171, at 2611.

216. See *Draft Articles*, *supra* note 202, art. 10, commentary para. 9 (defining insurrectional movement).

217. *Id.* art. 10.1; see also *id.* art. 9 commentary (explaining the three conditions that must be met under article 9 in order for conduct to be attributable to the state).

218. *Id.* art. 10, commentary para. 7.

219. *Id.* art. 23.1.

of free choice.<sup>220</sup> The requirements of an “unforeseen event” and “material impossibility” seem like a very high threshold to satisfy, especially in the context of a transitional state.<sup>221</sup> Also, article 23.2 imposes the same limiting condition on *force majeure* as article 25.2 does on the defense of necessity.<sup>222</sup>

Article 41 may be viewed as placing a further obstacle on the legality of Delayed Justice under international law.<sup>223</sup> Article 41.1 provides that if there is a serious breach (gross or systematic failure) of an obligation arising under a peremptory norm of general international law, the states shall cooperate to stop the breach through lawful means, and article 41.2 provides that, in such a case, no state should give aid or assistance to the state in breach in maintaining that situation.<sup>224</sup> In effect, it may be interpreted that international law forces other states to exert pressure on the transitional state to stay away from the Delayed Justice mechanism and promptly execute the duty to prosecute. However, while the obligation not to commit torture may be peremptory, it does not necessarily follow that the obligation to prosecute for a crime of torture is also a peremptory norm of general international law.

The above analysis of international law on a state’s duty to prosecute and the availability of the defense of necessity and *force majeure* show that, except for article 10.1, international law does not really contemplate common situations of Transitional Justice and is rather contrary to the flexible and diverse nature of Transitional Justice.<sup>225</sup> Within the framework of this strict legalistic notion of international law, the

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220. *Id.* art. 23, commentary para. 1.

221. *See id.* art. 23, commentary para. 3 (“*Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example, due to some political or economic crisis.”).

222. *Id.* arts. 23.2, 25.3; *see also* Orentlicher, *supra* note 171, at 2607 (explaining that the doctrines of necessity and *force majeure* are similar in that they bar a state’s wrongfulness in not complying with its international obligations only in exceptional circumstances).

223. *See Draft Articles, supra* note 202, art. 41 (stating that all states need to cooperate to end serious breaches within the meaning of article 40 through lawful means).

224. *Id.*

225. *Id.* arts. 10.1, 23, 41.

international community may benefit from developing special rules of international law about the duty to prosecute and the defense of necessity specifically governing Transitional Justice situations, but its feasibility is another issue.<sup>226</sup> Otherwise, the relevant areas of international law may continue to be disregarded by some transitional states that choose to tread on reality rather than stride towards an ideal.

## VI. DELAYED JUSTICE AND THE STATUTE OF LIMITATIONS

For Delayed Justice to successfully prosecute decades after the commission of crimes and transition, the statute of limitations and the retroactivity of new legislation present significant hurdles.

The statute of limitations question is answerable to some degree by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Statutory Limitations Convention).<sup>227</sup> Article I provides that there is no statutory limitation applicable for war crimes and crimes against humanity irrespective of the date of their commission.<sup>228</sup> The definition of crimes against humanity under the Statutory Limitations Convention covers “[c]rimes against humanity whether committed in time of war or in time[s] of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945” (Charter).<sup>229</sup> The Charter defines crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.”<sup>230</sup>

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226. Such a response would accord well with the Draft Articles, as its article 55 provides that the articles do not apply where the content or implementation of the particular international responsibility is governed by special rules of international law. *Draft Articles*, *supra* note 202, art. 55.

227. Statutory Limitations Convention, *supra* note 194.

228. *Id.* art. I.

229. *Id.*

230. Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279.

A concern may be raised about the scope of the Statutory Limitations Convention. While the Statutory Limitations Convention seeks to cover crimes against humanity committed both in times of war and in times of peace, the crimes against humanity as defined in the Charter is quite narrow—the definition covers first, inhumane acts committed “before or during the war,” and second, persecutions “in connection with any crime within the jurisdiction of the Tribunal”—which are crimes against peace, war crimes, and crimes against humanity as in inhumane acts committed before or during the war.<sup>231</sup>

A possible interpretation of the scope of the Statutory Limitations Convention in relation to crimes against humanity is that the meaning of crimes against humanity committed in times of peace may be viewed as being qualified by the two definitions offered in the Charter, thereby confining crimes against humanity covered by the Statutory Limitations Convention to such crimes committed during and around war time.<sup>232</sup> Under such an interpretation, the Statutory Limitations Convention would be relevant for Transitional Justice mainly in civil war contexts, if the Convention’s reference to war also contemplates civil war as well as inter-state war.<sup>233</sup> But a problem with such an interpretation is that it may render the phrase “in times of peace” as almost redundant.

Article 31 of the Vienna Convention on the Law of Treaties provides that the context and purpose of the treaty is important in its interpretation.<sup>234</sup> The context and purpose of the Charter is the punishment of World War II (WWII) war criminals.<sup>235</sup> The Statutory Limitations Convention presumably seeks to capture the Charter’s purpose of ensuring that unaccounted WWII war criminals do not escape punishment by relying on a statute of limitations and condemning crimes against humanity committed by the policies of apartheid in South Africa and the oppressive

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231. *Id.* art. 6.

232. *Id.* art 6(c); *see also supra* text accompanying note 230.

233. Charter of the International Military Tribunal, *supra* note 230, art. 6 (illustrating that the Tribunal has power to punish persons who act in the interests of the European Axis countries, thus contemplating inter-state war).

234. Vienna Convention on the Law of Treaties, *supra* note 183, art. 31.

235. Charter of the International Military Tribunal, *supra* note 230, art. 1.

policies of colonizing powers against African states seeking decolonization and independence.<sup>236</sup> The Statutory Limitations Convention applies to peacetime situations.<sup>237</sup> To reflect the latter parts of the purpose of the Convention, crimes against humanity, as covered by the Convention, should be given an expansive reading so that it also covers inhumane acts committed in times of peace.<sup>238</sup> Such a reading would greatly increase the relevance of the Convention to Transitional Justice and would capture such circumstances as the torturous acts and forced disappearances committed by Argentine military juntas, for example.

A common drawback of the treaty is that it is binding only on contracting state parties.<sup>239</sup> However, it is arguable that the Statutory Limitations Convention codified pre-existing customary law, so it would still be applicable even if the relevant state accedes to it after the commission of crimes, expiration of a domestic limitation period, or promulgation of amnesty laws.<sup>240</sup> Another argument that can be made against expiration of a domestic limitation period and other constitutional impediments, such as Argentine amnesty laws, is that the relevant crimes are captured by *jus cogens*, so those domestic impediments are inapplicable.<sup>241</sup>

A statute of limitations ought to be viewed as procedural rather than substantive, especially in circumstances where victims' and society's requests for justice are still loud, offenders are nonrepentant, and decisions of when and whom to prosecute are not solely a matter of judicial arbitrary discretion but a matter under detailed public scrutiny.<sup>242</sup> In this regard, a domestic statute of limitations provides little obstacle to obtaining legal justice later under a Delayed Justice mechanism.

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236. Statutory Limitations Convention, *supra* note 194, pmb1.

237. *Id.* art. I(b).

238. *Id.*

239. Vienna Convention on the Law of Treaties, *supra* note 183, art. 26.

240. *Id.* art. 38.

241. Urtubey, *supra* note 63, at 123–24.

242. *See id.* at 120–21 (giving examples of statutory limitations deemed not to have run because of a human rights violation).

## VII. RECONCILIATION

Reconciliation of a once fiercely divided society is an important goal for an emerging regime and Transitional Justice to pursue. While what it would take for each individual to reconcile depends on diverse subjective values and desires, Transitional Justice's approach ought to be more structural, and society should focus on preventing recurring conflicts by removing causes of conflicts.<sup>243</sup>

Many of the benefits to reconciliation available under immediate prosecutions, such as formation of collective moral conscience and inclusion of victims, may be achievable to differing extents under a Delayed Justice mechanism. On the other hand, Delayed Justice can overcome or sufficiently build up civil society to absorb several risks that immediate prosecution poses to reconciliation.<sup>244</sup> One particular example is that Delayed Justice can postpone what are potentially very divisive trials until society has sufficiently stabilized to absorb the divisional impacts of such trials.<sup>245</sup>

However, given that immediate prosecution may be a practically impossible choice to make for the relevant state in many transitional societies,<sup>246</sup> discussion of the relative advantages and disadvantages of immediate prosecution over Delayed Justice may not be fruitful. Rather, this Article discusses the impact Delayed Justice may have on society's reconciliation effort when it tries to bring legal justice and find remedies several decades after the transition.

Those who would be targeted, as well as significant sections of the relevant society, would question the practical value of bringing legal justice and remedies several decades after the transition when the negative consequences of having failed to

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243. Van Zyl, *Unfinished Business*, *supra* note 160, at 745–46.

244. *But see* Gibney, *supra* note 4, at 194–95 (arguing that Delayed Justice causes the formation of opposition forces in society).

245. *See, e.g.*, Nora Drew Renzulli, *Comments*, 4 N.Y.L. SCH. HUM. RTS. ANN. 810, 834 (1987) (describing an immediate prosecution which resulted in outcries from human rights groups as well as the military).

246. *See* Gibney, *supra* note 4, at 168, 172 (citing examples of barriers to prosecution faced by the Argentine government).

prosecute have already been absorbed.<sup>247</sup> They would question the wisdom of punishing those who have already integrated with the new regime.<sup>248</sup> Many would prefer to focus on more urgent issues such as economics.<sup>249</sup>

However, while there may be an appearance of stability and unity on the surface after several decades, the lack of political pressure to put it on the agenda does not mean that it is not boiling underneath. Argentine and South Korean examples prove that one cannot escape from confronting the past: the choice is either you confront the past or have the past confront you.<sup>250</sup> A theme of “better late than never” is equally applicable.<sup>251</sup>

Therefore, one of the crucial questions is whether delaying legal justice and remedies provides a less polarizing and more stable platform to absorb and withstand potentially divisive trials or simply allows time for splintered opposition forces to coalesce.<sup>252</sup> Many factors and local contexts ought to be taken into account. For example, the second generation, who was not directly affected by the events, may have different feelings and agendas than the first generation.<sup>253</sup> The perceived independence or effectiveness of the judiciary may shape citizens’ belief in the futility of new legal proceedings.<sup>254</sup> In

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247. Susana Kaiser, *To Punish or Forgive? Young Citizens’ Attitudes on Impunity and Accountability in Contemporary Argentina*, 4 J. HUM. RTS. 171, 179–80 (2005).

248. *Id.*

249. *Id.* at 179.

250. Compare Gibney, *supra* note 4, at 193–94 (explaining that justice is an integral part of democratization), with Geoff Gentilucci, Note, *Truth-Telling and Accountability in Democratizing Nations: The Cases Against Chile’s Augusto Pinochet and South Korea’s Chun Doo-Hwan and Roh Tae-Woo*, 5 CONN. PUB. INT. L.J. 79, 83 (2005) (discussing South Korea’s decision to prosecute former leaders).

251. See Kaiser, *supra* note 247, at 180 (discussing how justice could be a condition for future advancement).

252. Gibney, *supra* note 4, at 195.

253. Kaiser, *supra* note 247, at 181–82.

254. Nino, *supra* note 38, at 2630–32. See generally Alejandro Carrió, *The Argentine Supreme Court Ruled “There Are No Crimes” and Former President Menem Walked Away: That’s What Friends Are For*, 8 SW. J. L. & TRADE AM. 271 (2001) (“Argentina’s highest tribunal . . . cast its legitimacy into doubt by interpreting statutes dealing with racketeering and organized crime in order to protect influential government officials from serious criminal sanctions.”)

examining this complex issue, a cautious reflection can be made by juxtaposing the Argentine and South Korean stories. There seems to be a relatively coherent consensual support for Delayed Justice in Argentina following nearly twenty years of constant protests and demonstrations by civil society as exemplified by the Mothers of the Plaza de Mayo.<sup>255</sup> On the other hand, South Korea is relatively divided in its support for Delayed Justice and truth-seeking after more than fifty years of a series of military coups that suppressed any talk of settling the past using legal recourse.<sup>256</sup> This suggests a lesson for Delayed Justice in relation to reconciliation: a need for a strong and awakened civil society to keep raising awareness and pursuing legal justice and remedies, thereby ensuring public institutions are committed to meeting this objective.

#### VIII. RULE OF LAW

One concern associated with Delayed Justice is its implication for the rule of law. While immediate prosecution is generally understood as promoting the new regime's rule of law, seeking legal justice decades after the commission of crimes may be deemed as damaging the respect for the rule of law.<sup>257</sup> This is especially so when Delayed Justice involves overturning previously-issued amnesty laws, pardons, or statutes of limitations, as in Argentina's case, and it may also involve an issue of double jeopardy if there was a sham trial with the same defendants for the same crimes in the early transitional period.<sup>258</sup> In these cases, Delayed Justice may be criticized as the breach of a constitutional guarantee that damages the foundation of a legal system.<sup>259</sup> While there may be valid and sound legal arguments offered by the legal community as to the validity of overturning such actions, whether ordinary citizens also understand it is questionable.

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255. Gibney, *supra* note 4, at 194.

256. *See supra* note 149 and accompanying text.

257. Nino, *supra* note 38, at 2620, 2622.

258. *See id.* at 2624 (discussing how the retroactive modification of amnesty laws would violate the mandate that defendant's be prosecuted under the law existing at the time the offense was committed).

259. *Id.* at 2625.

Another interesting implication for the rule of law is the equal distribution of justice among alleged offenders: Delayed Justice leads to a situation where only those who survive long enough get punished.<sup>260</sup> A decision to execute Delayed Justice may appear arbitrary because the state's decision to bring legal justice and remedies would be viewed as having been made discretionarily based on popular political will rather than based on concrete legal guidelines.

### IX. INSTITUTIONAL REFORM

Delayed Justice can more easily accommodate institutional reform by saving time and resources. Institutional reform allows the society to deal with structural causes of the pre-transitional conflict such as the expropriation of land or discrimination.<sup>261</sup> For example, Argentina was able to undertake the institutional reform of the military by examining questions like: “[h]ow . . . the military came to wield so much power[,]” and “[w]hat steps . . . [are necessary] to reduce the military's power” in the political arena?<sup>262</sup> Fully committed institutional reform is also necessary to avoid “paint[ing] a distorted picture of the true nature of human rights abuse[s]” under the previous regime via a number of criminal trials.<sup>263</sup>

It may be better to execute criminal justice beforehand in order for institutional reform to have better success. Kritz points out that the sense of impunity makes judicial reform more difficult as public confidence is lost in the judiciary.<sup>264</sup> However, this argument can be accommodated when Transitional Justice is viewed in a long-term framework rather than as a short-term

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260. *Id.* at 2625–26.

261. Van Zyl, *Unfinished Business*, *supra* note 160, at 758; *see also* Paul van Zyl, *Promoting Transitional Justice in Post-Conflict Societies*, in SECURITY GOVERNANCE IN POST-CONFLICT PEACEKEEPING 209, 213 (Alan Bryden & Heiner Hänggi eds., 2005) (calling for institutional reform and reparations to victims of human rights violations who have suffered from discrimination or expropriation of land).

262. Gibney, *supra* note 4, at 196. *See generally* Steven O. Fought et al., *Restructuring the Military: The Argentine Model*, 2 BROWN J. WORLD AFF. 189 (1995) (discussing Argentine military restructuring).

263. Van Zyl, *Unfinished Business*, *supra* note 160, at 748.

264. Kritz, *supra* note 159, at 86.

project. Delayed Justice as part of a long-term project allows sufficient time to gradually rebuild public confidence in the judiciary and to carry out judicial reform.<sup>265</sup>

Miller points out that increased democracy does not necessarily lead to a higher respect for the judiciary.<sup>266</sup> For example, in Argentina in 1991, seventy percent of the public expressed little or no confidence in the judiciary.<sup>267</sup> In 1997, in a similar poll conducted by the same surveyor, ninety-two percent expressed the same view.<sup>268</sup> However, Argentina's case is unique in that the lack of public confidence was largely due to the packing of the Supreme Court by ex-President Menem.<sup>269</sup> Miller's point goes to prove the importance of the long-term effort and commitment necessary for Transitional Justice to succeed.

## X. MEMORY

The role of memory in Delayed Justice is two-fold—how Delayed Justice contributes to the formulation of common memory about the pre-transitional life on the one hand and how memory of pre-transitional life helps to sustain the pursuit of Delayed Justice.

First, it is generally agreed that there is a need for a unifying common memory about the past, especially memories relating to widespread and systematic abuses of human rights.<sup>270</sup> One may argue that a trial contributes significantly to

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265. See *supra* notes 75–77 and accompanying text.

266. See Jonathan M. Miller, *Evaluating the Argentine Supreme Court Under Presidents Alfonsín and Menem (1983–1999)*, 348 SW. J. L. & TRADE AM. 369, 372 (2000) (chronicling the Argentine people's loss of trust in its judiciary even after fifteen years of democracy).

267. *Id.* at 372–73.

268. *Id.* at 373.

269. *Id.* at 373–74; see also Carrió, *supra* note 254, at 271 (reviewing a case that exemplified why the public lacked confidence in the judiciary); Geronimo Perez, *Argentina's Supreme Court Enters the Political Fray in a Move Aimed at Surviving the Public Calls for Impeachment*, 8 SW. J. L. & TRADE AM. 357 (2001) (reviewing a number of controversial cases presided over by the Supreme Court of Argentina in the early 2000s).

270. Elizabeth Jelin, *The Politics of Memory: The Human Rights Movements and the Construction of Democracy in Argentina*, 21 LATIN AM. PERSP. 38, 48–50 (1994).

this formulation of a common memory, and the more trials are delayed, the more difficult the task becomes. However, a trial is aimed at establishing the guilt or innocence of particular individuals charged with particular acts while being constrained by rules of evidence and other formalities, so a trial only reveals limited, even distorted, pictures about the past.<sup>271</sup> Delayed Justice can help to remedy this problem by promoting nontrial means of studying the past (e.g. academic historical research) before bringing a trial or legal remedy. An essential message is that common memory ought to be formulated by employing both legal and judicial means, as well as nontrial means. It may simply be a matter of sequencing between the two means, so it may not provide a sufficient obstacle against Delayed Justice as a Transitional Justice mechanism.

Second, the memory of pre-transitional human rights abuses held by civil society can play a dynamic and constructive role in sustaining a pursuit of Delayed Justice. Paolantonio's idea of the "memory of justice" is useful for the purpose of this analysis.<sup>272</sup> Paolantonio argues that even a failed attempt to achieve justice immediately after the transition deposits a memory of justice in people and acts as a catalyst for people's persistent normative aspirations for legal prosecution and punishment.<sup>273</sup> Institutional reform geared towards the human rights movement will be helpful in this regard.<sup>274</sup> He further explains that the memories of past human rights abuses coupled with the memory of having failed to achieve criminal justice constitutes such normative aspirations, even where a government imposes instituted determinations by refusing or being reluctant to pursue prosecution and punishment.<sup>275</sup>

Paolantonio highly regards the capacity of civil society, viewing it as a body that cannot easily be dominated or subordinated but a body that can actively contest and

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271. Gray, *supra* note 157, at 2628.

272. Mario Di Paolantonio, *A Memory of Justice as a Democratic Pedagogical Force*, 28 REV. OF EDUC., PEDAGOGY, AND CULTURAL STUD. 141, 142, 152 (2006).

273. *Id.* at 141–42.

274. *Id.* at 151.

275. *Id.* at 154.

constitute.<sup>276</sup> The large scale of Transitional Justice would make it difficult for the government to remove Delayed Justice from the public agenda by politically subordinating civil society.<sup>277</sup> Such memory-inspired normative aspirations would provide and protect the intergenerational link in civil society<sup>278</sup> and constitute a force behind contesting the toppling of a set of positive laws (such as amnesty laws or a statute of limitations) and related positive legal concepts (such as the power to pardon or double jeopardy) for the sake of achieving Delayed Justice.

In assessing Paolantonio's theory, there are several obvious counterexamples that come to mind, such as South Africa, whose civil society has failed to demand legal prosecution and punishment after the release of the Truth and Reconciliation Commission's final report.<sup>279</sup> The South African example does not vitiate Paolantonio's theory but rather shows the importance of the role of civil society in the success of Transitional Justice and the Delayed Justice mechanism. Civil society always needs to be vigilant in aspiring to demand the prosecution and punishment of human rights violators and in pursuing that aspiration rather than merely relying on and expecting a given institution, like the Truth Commission, to totally settle the past for everyone involved.

## XI. GUILT

Jaspers emphasizes the need to differentiate between different types of guilt.<sup>280</sup> He first identified criminal guilt, which is guilt from a crime in the ordinary sense dealt with by formal court proceedings.<sup>281</sup> The second type is political guilt, which arises from everyone in the state bearing the consequences of what the state has done.<sup>282</sup> The third type is moral guilt, which arises from an individual being responsible

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276. *Id.* at 155.

277. *Id.* at 156.

278. *Id.* at 157–58.

279. Van Zyl, *Unfinished Business*, *supra* note 160, at 754.

280. KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 28 (E.B. Ashton trans., Capricorn Books 1961) (1947).

281. *Id.* at 31.

282. *Id.*

for all of his or her deeds based on his conscience.<sup>283</sup> The fourth type is metaphysical guilt, which arises from everyone in the world being co-responsible for every wrong committed in the world.<sup>284</sup> Jaspers' differentiation between concepts of guilt is useful, because it highlights the need for a broader understanding of guilt—that past widespread human rights abuses did not occur in isolation from an individual, but involved systems, climates, and ideology.<sup>285</sup>

Transitional societies' publics often feel relieved after a (immediate) criminal trial, but it absolves only criminal guilt.<sup>286</sup> Delayed Justice helps to amend this shortfall by leaving sufficient room and time for the expansive conceptualization of guilt and the formulation of creative and flexible measures to deal with each type—such as memorial days, monuments and documentaries—to help society as a whole confront the past and accept metaphysical guilt.<sup>287</sup>

## XII. CONCLUSION

Argentine and South Korean case studies suggest the possibility and potential benefits of the Delayed Justice mechanism. They show that sometimes factors such as the military, a fragile judicial system, deteriorating socio-economic conditions, foreign will, and internal divisions render the delay of legal justice inevitable. Because of diverse and subtle local

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283. *Id.* at 31–32.

284. *Id.* at 32.

285. See Gray, *supra* note 157, at 2629–35 (arguing that mass atrocities cannot occur in the absence of a society that sanctions them via its laws and social norms).

286. See Kingsley Chiedu Moghalu, *Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions*, in *FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY* 197, 197 (Ramesh Thakur & Peter Malcontent eds., 2004) (describing the relief felt by an old Rwandan woman when Jean-Paul Akayesu was convicted for genocide and crimes committed against humanity); JASPERS, *supra* note 280, at 114–17 (explaining that even those who are not overtly guilty of a crime against humanity are not innocent because political guilt still exists for the crimes carried out by the state).

287. GERMAN COMM'N FOR JUSTICE AND PEACE, MEMORY, TRUTH, JUSTICE, RECOMMENDATIONS ON DEALING WITH BURDENED PAST 1, 20 (2003), <http://fesportal.fes.de/pls/portal30/docs/FOLDER/WORLDWIDE/ASIEN/VERANSTALTUNGEN/VERGANGENHEITSAUFARBEITUNG0406/DE04JEP-BELASTETE+VERGANGENHEIT.PDF>; see also JASPERS, *supra* note 280, at 115–23 (discussing how to deal with guilt).

and contextual differences, one needs to be careful in formulating a guideline to which a transitional society ought to conform in order to avail itself of the Delayed Justice mechanism. It is especially so in light of modern transition cases such as Cambodia, Morocco, and Turkey, where there are incremental processes of transition rather than traditional sudden ruptures of transition.<sup>288</sup> In these cases, the Delayed Justice mechanism, which reflects an expansive conceptualization of Transitional Justice, may be a useful tool.

If the relevant state is able to absorb immediate prosecution as well as other necessary measures, such as institutional reforms, realization of ESC rights, reparation, and truth-seeking, at the same time, the Delayed Justice mechanism would be of no use. Also, any modified form of the mechanism may be used, such as the amalgamation of the international tribunal's prosecution of a select few with a Delayed Justice mechanism.

Delayed Justice allows one to broadly conceptualize Transitional Justice as a long-term project and to better accommodate ESC rights, but it must not be a political excuse for the endless avoidance of bringing legal justice. An active role of an awakened civil society, which would help victims feel inclusive and build preventive measures against future risks of abuses, is necessary for a relentless pursuit of legal justice.<sup>289</sup> The Delayed Justice mechanism emphasizes that a criminal trial or remedy through civil law is only one of the many necessary measures for Transitional Justice, which may need to

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288. See Aaron J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice*, in POST-CONFLICT JUSTICE 635 (M. Cherif Bassiouni ed., 2002) (discussing the slow pace of institutional change in Cambodia after the reign of the Khmer Rouge); Pierre Hazan, *Morocco: Betting on a Truth and Reconciliation Commission*, 165 SPECIAL REP. OF U.S. INST. OF PEACE 1 (2006), available at <http://www.usip.org/pubs/specialreports/sr165.pdf> (discussing Moroccan transition from monarchy to democracy and its use of the TRC); George Schöpflin, *Turkey's Crisis and the European Union*, OPENDEMOCRACY, July 23, 2007, [http://www.opendemocracy.net/democracy\\_power/future\\_turkey/elections\\_2007](http://www.opendemocracy.net/democracy_power/future_turkey/elections_2007) (reviewing the state of Turkish democracy after the Armenian genocide).

289. See van Zyl, *Promoting Transitional Justice*, *supra* note 261, at 760 (discussing how the importance of the TRC's work and how it prevented a recurrence of abuse); see *supra* pp. 84–85 (explaining the different forms of guilt and how individuals need to feel responsible for all the wrongs committed in the world).

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be sequenced, pursued, and insisted upon consciously.<sup>290</sup> It may be appropriate to conclude with a famous phrase from Zalaquett: “It is the courage to forgo easy righteousness, to learn how to live with real-life restrictions, but to seek nevertheless to advance one’s most cherished values day by day to the extent possible. Relentlessly. Responsibly.”<sup>291</sup>

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290. Van Zyl, *Promoting Transitional Justice*, *supra* note 261, at 760.

291. José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *HASTINGS L.J.* 1425, 1438 (1992).