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# TRANSITIONAL JUSTICE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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# PREFACE

Transitional Justice, it has been noted, is ‘a field on an upward trajectory’.<sup>A</sup> There is now a field ‘out there’ with its own research and theory, its own dedicated journals, encyclopaedia, international conferences, university curriculums, academic centres and training programmes. Simultaneously, transitional justice has become widely institutionalized. Recent years have seen a proliferation of transitional justice institutions in places as varied as South Africa, Peru, Colombia, Sierra Leone, Timor-Leste, Morocco, Tunisia and Northern Ireland. But far from being a local phenomenon, transitional justice has gone increasingly ‘global’. What we have seen in the early twenty-first century is a globalized discourse of transitional justice, widely supported by international donors and disseminated by powerful states and major transnational players – including, to name a few, the United Nations, the European Union, the Organization of American States, the African Union and, in the non-governmental arena, the New York based International Center for Transitional Justice.

With all this in mind, it makes sense to claim that transitional justice has become ‘normalized’, at least at the level of policy frameworks and commitments.<sup>B</sup> We should be careful here, however, not to equate ‘normalized’ with ‘uncontroversial’. After a phase of consolidation and relative consensus, during the 1990s and early 2000s, the field seems to have entered a new phase of critique and reassessment. Initially modelled on ‘third-wave’ democratization processes in Latin America and elsewhere, recent transitional justice discourses have increasingly questioned basic assumptions underpinning this ‘transition-to-democracy’ paradigm. What is transitional justice for, and whom is it for? And how (when, where, by whom and through which means) should it be pursued? Questions such as these are now widely and controversially discussed among transitional justice scholars and practitioners. However, this turn to self-questioning and self-reflexivity need not be evidence of ‘the field’s premature mid-life crisis’, as Bell has argued.<sup>C</sup> It may, rather, be a sign that the field is no longer in its infancy and that it is by now confident enough to face, openly and honestly, internal debate and criticism without retreat into defensiveness.

At any rate, it is in this spirit of critical inquiry that the present Geneva Academy Briefing is undertaken. Written by one of the field’s leading scholars, this Briefing addresses head-on a crucial – yet so far neglected – topic: the question of the rela-

A K. McEvoy, ‘Letting Go of Legalism: Developing a “Thicker” Version of Transitional Justice’, in K. McEvoy and L. McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, Hart Publishing, 2008, p 15.

B See R. Teitel, *Globalizing Transitional Justice: Contemporary Essays*, Oxford University Press, 2014, p xiv.

C C. Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’, 3 *International Journal of Transitional Justice* 1 (2009) 13.

tion between transitional justice and the European Convention on Human Rights (ECHR). While the Convention system as one of the world’s leading human rights regimes has been the subject of intense study, its role in promoting transitional justice concerns has received surprisingly little scholarly attention – a neglect that is all the more striking when one considers the considerable amount of scholarly work that has been dedicated to the Inter-American human rights system and its impact on transitional processes in the Americas. The present Briefing goes a long way to address this research gap. It systematically reviews and critically discusses the evolving ‘transitional’ jurisprudence of Europe’s main guardian of human rights – the Court in Strasbourg – across highly contentious issues such as amnesty and property rights, along with institutional reform and vetting.

If there is a central thesis underlying this Briefing it is this: we can profitably think of the ECHR system as a ‘transitional instrument’ positively shaping political transitions and conflict resolutions on the European continent. Insisting that this system grew out of a ‘transitory’ post-World War II context, this Briefing argues that the Strasbourg Court has played – and continues to play – an under-appreciated role in setting standards for and overseeing transitions to peace and democracy in places as varied as Northern Ireland, Bosnia, Turkey and Russia. While appreciative of the Court’s recent efforts to deal innovatively and flexibly with particular situations of conflict and transition, the Briefing warns against self-complacency and insists on the need to constantly rethink the Convention in the face of ever-expanding challenges. ‘The Convention’, it notes, ‘is a tool giving concrete language to human rights claims in the domestic sphere, but one that needs adjustment and creative expansion if it is to come to meet the expectations that have been set for it’ (p. 49).

The idea to produce this Briefing dates back to 2015, when Professor Fionnuala Ní Aoláin delivered her keynote lecture during the one-week Antonio Cassese Summer School on Transitional Justice, Human Rights and Conflict, co-organized and hosted by the Geneva Academy. We want to warmly thank Professor Ní Aoláin for her unfailing commitment to this project, despite a very busy schedule. We also thank our colleague Valentina Cadelo for her contribution and input within this project. We are pleased to present this Briefing in cooperation with the Transitional Justice Institute, Ulster University.

Our hope is that this Academy Briefing will generate, both inside and outside academia, a much-needed debate about the ECHR and its role in transitional contexts.

**Frank Haldemann and Thomas Unger**

**Geneva, 15 September 2017**

## KEY MESSAGES

- The Council of Europe (CoE) and European Court of Human Rights (ECtHR) are overlooked and under-appreciated transitional justice institutions. Moreover, the Court provides an important illustration in practice to better appreciate the myriad of ways in which regional human rights systems manage a range of complex transitional justice issues.
- The CoE system was born out of a transitional context, and involved a group of states grappling with the legacies of atrocity and systematic violence. As such, the early history of the Convention is deeply shaped by a response to that violence as well as providing the institutional framework to embed guarantees of non-repetition within the European human rights infrastructure. This historical pedigree shapes the contemporary engagement by the Court and the Council with transitional justice including the post-Cold War Eastern European transitions, as well as more contemporary transitions from war to peace in Northern Ireland and Bosnia.
- Country specific studies in this paper demonstrate the variability of ECtHR responses to situations of conflict and communal violence on the continent of Europe. Exploration of the Turkish and Northern Ireland cases demonstrate that the Court has rarely adopted a 'one size fits all' solution to situations of conflict and transition. Rather, it has taken highly specific approaches, dovetailing its jurisprudence to context, political capacity, and to the institutional capacity of the state. Nonetheless, and perhaps paradoxically, common motifs have emerged in the jurisprudence of state accountability that have been relevant not only to the specific states under review, but to the broader practice and jurisprudence of accountability in the CoE system. This tells us that transitional justice jurisprudence has an important and under-appreciated seepage into the ordinary law of many states.
- A review of ECtHR jurisprudence across the highly contentious issues of amnesty and property rights, along with lustration and vetting demonstrates the precarious path the Court has walked in developing a distinctly European approach to the most challenging legal issues emerging in post-conflict and post-repression contexts. In these contested political spaces, where the rule of law can be fragile and contested, the Court has avoided being mired in the peculiarities of the past alone, but in parallel seeks to drive a forward-looking vision for European human rights. This forward-looking vision remains likely to be tempered by ongoing engagement with transitional justice outworkings and setbacks in national legal and political contexts. The paper concludes with the view that the Court should not avoid these deliberative spaces, nor shy away from rights enforcement and setting jurisprudential standards in the aftermath of collective violence or repression. Given that transitional justice processes have a decades-long lineage, the Court has an obligation to remain appraised of these transitional issues, not least to ensure that the vision of human rights compliant, rule of law based states continues to bed down and thrive in societies that have started the transitional justice journey.

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# 1. INTRODUCTION TO TRANSITIONAL JUSTICE

The term “transitional justice” (TJ) first came to the fore as encapsulating the legal, moral, and political dilemmas in holding human rights abusers accountable at the end of authoritarian and repressive political regimes.<sup>1</sup>

It was generally understood that if societies were to move on from the violence and human rights violations that had occurred during periods of repressive government, there had to be some acknowledgement of and accountability for the violations that had taken place previously.<sup>2</sup> Grave human rights violations committed in societies including Chile, Guatemala, Peru, and Argentina were endemic and systematic. They affected large numbers of individuals and encompassed some of the most severe and egregious harms that any person or community can experience. Such harms included torture, extrajudicial execution, disappearance and prolonged detention. In many repressive and authoritarian settings, certain groups were particularly vulnerable to sustained negation of their human rights. Such groups included minorities, those with leftist political affiliations, students, trade unionists, political activists, women, and human rights defenders broadly defined.

Given the scale and nature of the human rights violations in question, one might presume that the ordinary processes of criminal law would and should be applied to make individuals accountable for the violations they had committed.<sup>3</sup> However, a core dilemma which gave rise to the practices and mechanisms of TJ early on was the pragmatic reality that those in power were responsible for enabling, abetting, and sometimes carrying out the violations in question. When those in power control the systems of law and governance, the capacity for ordinary criminal and civil law to function without hindrance is stymied. Moral dilemmas are plentiful in this context, including the enablement of impunity, the facilitation of moral ambivalence over dignity-based values, and unprincipled compromises on justice

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1 P. Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, 31 *Human Rights Quarterly* 2 (HRQ) (2009) 321; J. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, 2004; R. G. Teitel, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* (2003) 69.

2 L. M. Balasco, ‘The Transitions of Transitional Justice: Mapping the Waves from Promise to Practice’, 12 *Journal of Human Rights* 2 (2013) 198; L. E. Fletcher, H. M. Weinstein and J. Rowen, ‘Context, Timing, and the Dynamics of Transitional Justice: A Historical Perspective’, 31 *HRQ* 1 (2008) 163; N. J. Kritz, ‘The Dilemmas of Transitional Justice’, in N. J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace Press, 1995, p xix; J. E. Méndez, ‘In Defense of Transitional Justice’, in A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, 1997; M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Beacon Press, 1999; Teitel, ‘Transitional Justice Genealogy’, supra fn 1.

3 L. Mallinder, ‘The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America’s Amnesty Laws’, 65 *International & Comparative Law Quarterly* 3 (2016) 645.

principles to enable the end of violence and/or repression.<sup>4</sup> These dilemmas are exposed, for example, by the morally challenging ground of amnesty for serious violations of human rights. Here, amnesty enables a peaceful transition of power and encourages combatants to surrender their weapons to facilitate political compromise. This moral ground is frequently at odds with the principled absolutism that characterizes external and internal human rights responses to egregious and systematic human rights abuses during conflict and repression. There is an awkward paradox in transitional settings when pragmatic political process requires deal making with perpetrators and protagonists. This ambivalence is especially felt by those – including opposition parties and civil society activists – who have staked moral capital on the legitimacy deficit of repressive regimes because of their shameful human rights records. Moreover, a core goal for both human rights activities and democracy promoters is to encourage many of these political systems to move from practices of repressive governance to more liberal forms of political engagement.<sup>5</sup> But, transitional politics and accompanying TJ invariably require compromise. The nub of this dilemma is exposed when criminal and civil accountability come into play. It is antithetical to those who have exercised power ruthlessly to consider setting it aside if they are likely to be the targets of criminal prosecution and public scrutiny. Compromises in many societies transitioning from repressive to more liberal forms of governance were crafted to balance the demands for absolute justice by those harmed with the broader needs of society to move towards politically inclusive governance.<sup>6</sup> This conception of TJ as a vehicle for crafting and enabling complex compromises is somewhat at odds with increasingly trenchant impunity discourses in international law, allied with an emerging emphasis in TJ on transformative and holistic TJ.<sup>7</sup>

As I explore further below, because I situate the European Court of Human Rights (ECtHR) within the framework of TJ, these broader tensions in the field affect how we understand the efficacy and value of engaging TJ in the mainstream of a regional human rights body. These tensions are acute for an entity whose structural and normative framework is committed to a rights-based understanding of human rights enforcement. While human rights treaties, including the European Convention on Human Rights (ECHR), make provision for derogations, limitations and reservations, the global degree of compromise on core human rights provisions is inherently limited. This paper identifies some of the tensions and possibilities

4 C. S. Nino, 'Punishment as a Response to Human Rights Violations: A Global Perspective', in C. S. Nino (ed), *Radical Evil on Trial*, Yale University Press, 1998.

5 B. Leebaw, *Judging State-Sponsored Violence, Imagining Political Change*, Cambridge University Press, 2011.

6 J. Allen, 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission', 49 *The University of Toronto Law Journal* 3 (1999) 315.

7 See P. Gready and S. Robbins, 'From Transitional to Transformative Justice: A New Agenda for Practice', 8 *International Journal of Transitional Justice* 3 (2014) 339. But, see others who have argued for a more pragmatic approach to TJ and have concerns about 'overloading' the capacity of TJ, e.g., P. McAuliffe, 'The Prospects for Transitional Justice in Catalyzing Socioeconomic Justice in Postconflict States: A Critical Assessment in Light of Somalia's Transition', 14 *Northeast African Studies* 2 (2014) 77; K. Andrieu, 'Dealing with a "New" Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?', 11 *Journal of Human Rights* 4 (2012) 537; L. Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', 21 *Social and Legal Studies* 2 (2012) 171.

that emerge when European states engage TJ and the ECtHR then becomes the institutional setting which mediates the resulting legal consequences. In addition, the paper explores the idea that there is a de facto transitional dimension to the ECtHR's judicial engagement in conflicted and transitional European states which has not been explicitly studied in either TJ or ECtHR literatures.

TJ arose as a set of mechanisms and practices to reflect the complex transitions that initially occurred in the context of regime change in repressive societies.<sup>8</sup> The value placed on the process of political change required certain accommodations and compromises to be made around the demands of unfettered justice and formal accountability. It is within this testy political and morally hazardous ground that the concepts of amnesty, truth, forgiveness, reconciliation, lustration, vetting, and reparation came to dominate the terrain of political transition.<sup>9</sup> Though first deployed in politically repressive settings, TJ has had a second wave, primarily in societies transitioning from violent conflict to more tolerable forms of coexistence – a modality which is specifically relevant to the European transitional context.<sup>10</sup> As Campbell and I have noted elsewhere, in practice multiple transitions often occur in tandem, and conflict (war-to-peace) transitions often involve a political settlement (generally from less liberal to more liberal/democratic political arrangements), layering the transition space in challenging ways.<sup>11</sup> In conflict-focused transitions, which emerged primarily after the close of the Cold War, addressing systematic human rights violations by both state and non-state actors was equally pertinent. The challenges also involved complex moral choices of allocating and enforcing responsibility for atrocity crime against political and military actors who were simultaneously the necessary players in the drama of conflict ending,

8 Fletcher et al, 'Context, Timing, and the Dynamics of Transitional Justice', supra fn 2; Elster, *Closing the Books*, supra fn 1; Leebaw, *Judging State-Sponsored Violence*, supra fn 5.

9 N. T. Aiken, *Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies*, Routledge, 2013. Recently, policy makers have been using the terminology of 'political settlement' more frequently to describe various forms and modalities of political arrangement in conflict-affected, fragile and post-authoritarian states. The term is used by the Organisation for Economic Co-Operation and Development, a number of agencies operating in the humanitarian crisis and development fields, and the United Kingdom's Department for International Development (DFID). See DFID, *Building Peaceful States and Societies, A DFID Practice Paper*, 12 March 2010, <https://www.gov.uk/government/publications/building-peaceful-states-and-societies-a-dfid-practice-paper> (last accessed 16 July 2017); C. Bell, *What We Talk About When We Talk About Political Settlements: Towards Inclusive and Open Political Settlements in an Era of Disillusionment*, Working Paper, Political Settlements Research Programme, University of Edinburgh, 2015. See also F. Ní Aoláin, *The Relationship of Political Settlement Analysis to Peacebuilding from a Feminist Perspective*, University of Minnesota Law School, Research Paper no 16-02, 2016.

10 Minow, *Between Vengeance and Forgiveness*, supra fn 2; Ivan Simonovic, 'Dealing with the Legacy of Past War Crimes and Human Rights Abuses – Experiences and Trends', 2 *Journal of International Criminal Justice* (2004) 701.

11 F. Ní Aoláin and C. Campbell, 'The Paradox of Transition in Conflicted Democracies', 27 *HRQ* 1 (2005) 172. It is also noteworthy that a third transitional layer, namely economic transition, sits in the same space – engaging shifts from closed and managed economies to capitalist/open economy systems.

demilitarization, and agreeing to the distribution of available political power.<sup>12</sup> In unexpected ways, despite the formally democratic character of Council of Europe (CoE) Member States, these challenges have also arisen in the European context, and have invariably intersected with the regulatory framework of the ECtHR.

## 2. THE RELEVANCE OF TRANSITIONAL JUSTICE TO THE COUNCIL OF EUROPE

**With this broad introduction to the historical development of TJ and the tensions and challenges that animate the field, my analysis now turns to establish contemporary applications of the concept of TJ and the procedures that encompass its practice.**

Specifically, I address the pertinence of TJ conceptually and practically to the CoE system.<sup>13</sup> As Brems notes, '[S]ince its adoption, ECHR case law related to TJ has included hundreds of judgments and decisions dealing with a wide range of issues, mainly compensation and restitution, but also prosecution, lustration, memory and truth.'<sup>14</sup>

Given that the CoE (and the Convention as its primary legal instrument) were born out of a massive transition from war to peace on the European continent,<sup>15</sup> transition can be viewed as a motif for the early history of the ECHR. The ECHR was negotiated in the early 1950s, and came into effect in 1953.<sup>16</sup> The states that were primarily engaged in the drafting of the Convention were those that had just experienced a deeply traumatic war in their territories and were most affected by the destruction and monstrosity of the Second World War. These states also had a very clear interest in naming and accounting for atrocity, demonstrated by their commitment to the Nuremberg Tribunal and the enforcement of the Control Council laws.<sup>17</sup> These countries were not only dealing with a history of mass atrocities but were also struggling with the practical challenge of how to prevent the occurrence

13 Méndez, 'In Defense of Transitional Justice', supra fn 2; C. Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"', 3 *International Journal of Transitional Justice* 1 (2009) 5; P. G. McAuliffe, 'Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition', 2 *Journal of Conflictology* 2 (2011) 32.

14 E. Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights', 5 *International Journal of Transitional Justice* 2 (2011) 282.

15 E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford University Press, 2010.

16 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 3 September 1953; P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd edn, Kluwer Law International, 1998, pp 1–2. Since ratification, 11 protocols to the Convention have been created. However, not all of the protocols have been ratified by the Contracting States.

17 This view corresponds to realist and ideational theories of international law making that predict that established and committed democracies (e.g. the United Kingdom) would have been the primary supporters of binding human rights norms. See, e.g., L. R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1977) 273; A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 *International Organization* 2 (2000) 220–221.

12 M. Freeman and M. Pinsky, 'The Amnesty Controversy in International Law', in F. Lessa and L. A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, Cambridge University Press, 2012; T. S. Phakathi and H. van der Merwe, 'The Impact of the TRC's Amnesty Process on Survivors of Human Rights Violations', in A. R. Chapman and H. van der Merwe (eds), *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, University of Pennsylvania Press, 2008, p 116.

of similar events in the future. In parallel, a deeply pragmatic strain disposed states to tackle atrocity. This included the desire to dampen further aggression, through the criminalization of individual command responsibility.<sup>18</sup> Here, the dominant view was that international institutions would act as extensions of state power and reinforce rather than undercut the state-based system, and states had a limited sense of what any experiment in international criminal accountability would bring. Despite this, it is possible to view the ECHR as a constitutive response to the devastating human rights violations of the Second World War,<sup>19</sup> and as such it can be understood as a transitional legal instrument. This claim has some support from recent empirical analysis in the political science field addressing the early history of the ECHR, finding that ‘the primary proponents of reciprocally binding human rights obligations were . . . the governments of newly established democracies’.<sup>20</sup> This claim is founded on the idea that newly established (and re-establishing) democracies have the greatest interest in stabilizing the domestic political arena against non-democratic threats.<sup>21</sup> All societies facing the difficult process of political transition have addressed large-scale human rights violations meted out during the prior regime. In the immediate aftermath of the Second World War, Europe was facing both country-specific complex political transitions (e.g., Germany, France, Italy) as well as addressing the macro challenges – including the massive and systematic violations of human rights that affected peoples and communities across the continent – at a regional level.

One important early and contemporary motif of the European Convention is that it constitutes an institutional articulation of the principle of non-recurrence.<sup>22</sup> Simply put, by putting in place a system designed to prevent violations of human rights, and by creating a means for states to internalize compliance, the Convention was a far-sighted solution to the prevention and recurrence of atrocity crime. The European Convention was the earliest adaptor of the fundamental idea, internalized by states, that they were not to be fully trusted in the protection of their own citizens nor the protection of those under their control.<sup>23</sup> The Second World War’s atrocities taught many European nations that some external check was re-

18 See A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, *Cassese’s International Criminal Law*, 3rd edn, Oxford University Press, 2013, pp 185–187 (discussing how the doctrine of command responsibility crystallized into customary law shortly after the Second World War).

19 Van Dijk and van Hoof, *Theory and Practice of the ECHR*, supra fn 16.

20 Moravcsik, ‘The Origins of Human Rights Regimes’, supra fn 17.

21 The empirical evidence remains patchy and debate persists as to whether accountability (particularly criminal accountability) enables consolidated democracies to emerge.

22 For a contemporary articulation of the elements of non-recurrence, see Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN doc A/67/368, 13 September 2012.

23 Since 1953, the Convention has created an explicit (if limited) set of civil and political rights for all the persons within the jurisdiction of its Member States, whether those persons are aliens, refugees, stateless persons or citizens. Van Dijk and van Hoof, *Theory and Practice of the ECHR*, supra fn 16, p 3.

quired on state sovereignty to protect fundamental human rights.<sup>24</sup> The genius of all this was that while states agreed to self-check, they created a system in which states recognized that they needed some degree of supervision, and they provided recourse for individuals to access external remedies. The ECHR was revolutionary in its time because, at its drafting, individuals were not the subjects of international law nor were they understood to exercise rights outside their territorial states.<sup>25</sup> By creating a forceful instrument of enforcement (a Commission and a Court), European states were both responding to the experience of atrocity and pre-empting its future recurrence. Significantly, many European states have subsequently adopted the Convention into domestic law, both directly and indirectly,<sup>26</sup> leading the Court to proclaim that the Convention is a ‘constitutional instrument of European public order’.<sup>27</sup> Even as I historically contextualize the Convention as a transitional instrument, this raises the sequential questions of how to categorize the identity of the Convention system now and how one might define the role of the Court in relation to the field of TJ.

My starting point is to acknowledge that for some CoE Member States (see, e.g., Northern Ireland and Turkey, discussed below) the Court has functioned as a transitional actor in ways that stretch our understanding of the range and complexity of institutional actors engaged in TJ practice. In its broader jurisprudence on mechanisms of TJ (e.g., vetting, discussed below), the Court has played an important role in normative standard-setting, thereby contributing to both TJ and rule of law jurisprudence. A more nuanced institutional analysis is necessary to fully refine the variance of these contributions and to give us a better understanding of the interplay between TJ ‘work’ by the Court and supranational human rights enforcement and its engagement with national compliance.

It is important to note that the emphasis on individual rights and individual accountability as the granular point of enforcement in the European system is not without its detractors, either in human rights practice broadly understood or in TJ implementation. Specifically, with respect to the ascendancy of international criminal law in the past two decades and the dominance of carceral politics, scholars have articulated disquiet about the ways in which the demand side for criminal justice outstrips the supply capacity of legal systems in fragile and post-conflict states.<sup>28</sup> There is a growing concern that the emphasis on individual criminality

24 Fletcher et al, ‘Context, Timing, and the Dynamics of Transitional Justice’, supra fn 2. This system of review initially involved a Commission, Court and Council of Ministers. The Commission could investigate the case, seek to settle it, or forward it under certain circumstances to the Court, whose decisions governments are legally bound to follow. Two optional clauses of the ECHR, Arts 25 and 46, were subsequently adopted by all Member States; they permit individual and state-to-state petitions and recognize the compulsory jurisdiction of the Court. ECHR, supra fn 16, Arts 25 and 46.

25 E. M. Hafner-Burton, *Making Human Rights a Reality*, Princeton University Press, 2013.

26 A. Z. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study*, Oxford University Press, 1983.

27 ECtHR, *Loizidou v Turkey*, Judgment, App no 153118/89, 23 March 1995, §75.

28 See, e.g., in the context of gender justice, K. Engle, ‘Anti-Impunity and the Turn to Criminal Law in Human Rights’, 100 *Cornell Law Review* (2015) 1069.



detracts attention from collective and state responsibility. In the TJ realm, this has been articulated as facilitating a move away from identifying systems and patterns of gross violations towards an individuated narrowing of responsibility. Fletcher, among others, has argued for a more robust articulation of state responsibility for mass atrocity, and the invocation and re-invigoration of doctrines of state responsibility for systematic violations.<sup>29</sup> As I address further below, while the Convention system is clearly not a criminal justice mechanism (and should not be mistaken as such), its capacity to hold states responsible touches on this preoccupation with state-based responsibility for systematic violations of human rights. There are significant weaknesses in the Convention system in this regard, not least its procedural inability to address group claims, and the historic unwillingness of the Court to address patterns in state practice, though procedural innovations (see, e.g., the pilot judgment procedure) offer new possibilities in this regard. These new innovations also increase the institutional capacity of the Convention system to address systematic human rights violations, effectively boosting its TJ capacity.

<sup>29</sup> See L. E. Fletcher, 'A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes', 39 *Fordham International Law Journal* 3 (2016) 447.

### 3. THE TRANSITIONAL JUSTICE INTERFACE WITH THE COUNCIL OF EUROPE

**While the contemporary language of TJ is not generally used to frame the post-Second World War transitions, one can with little effort trace the interface between the European Convention and the field of TJ.<sup>30</sup>**

I start with the Convention's inception to understand the ways in which it constituted a key legal and political response to the atrocities that had taken place within states during the Second World War and Holocaust. Under-appreciating the extent to which the Convention, at the time of its creation, marked a clear point of departure for its contracting states is to mistakenly presume that only by using the word 'transition' do we mark the legal and political space in which lines are drawn around systematic human rights violations. Understanding the European Convention as a transitional document is an important means to frame the reach of TJ instruments and to better surface the relationship between human rights treaties and TJ concepts. Moreover, the deepening and strengthening of the Convention in the aftermath of the Cold War through the adoption of Protocol 11 can be tied to the new wave of democratization and transition being experienced by Eastern European states.<sup>31</sup> The Protocol was designed to streamline the procedures of the Court in advance of substantial geographical enlargement by creating a full-time permanent Court, ensuring direct access to the Court by all applicants, automatic jurisdiction over all inter-state cases by the Court, and the reworking of the Committee of Ministers' role to give it a critical supervision capacity in the execution of the Court's judgments. These were pre-emptive measures to support the wave of post-communist transitions in Eastern Europe and to bolster the system's effectiveness in that regard.

Considering the Convention as a transitional instrument primarily acknowledges the way in which it served as a conduit from a war-torn past to a rule of law defined future for Member States. Fundamentally, the treaty can be seen as an institutionalized guarantee of non-repetition by providing singular and sustained access for individuals to both internal (via absorption into domestic law) and external (via oversight and supervision of the Court) review of human rights compliance by states. As I have articulated previously, the individual focus of the system has dis-

<sup>30</sup> Council of Europe (CoE), *Travaux Préparatoires*, 1975.

<sup>31</sup> See Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1 November 1998; CoE, Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Controlling Machinery Established Thereby, 11 May 1994; IACtHR, *The European Human Rights Convention: Protocol No. 11 Entry into Force and First Year of Application*, 16 November 1999.

tinct limitations and has been stymied by judicial unwillingness to force legal and political acknowledgement of sustained and systematic human rights violations by Member States.<sup>32</sup> That said, the Court (and previously the Commission) plays an under-appreciated role in curbing domestic legal responses to violence, extremism and the allure of political opportunism. The tangible possibility of opprobrium serves as a form of prior restraint for some states (though clearly not for others, notably Russia), limiting the universe of political choice when a pathway to political expediency is littered with human rights violations.<sup>33</sup> In this sense, it would be a mistake to focus only on the jurisprudence of the Court that explicitly contains a TJ motif as illustrative of the TJ ‘work’ of the Convention. Rather, attending to the multiple and various ways in which political actors operating within conflicted and transitional sites are cognizant of the implications of breaching treaty obligations and compromising their good standing should direct our attention to the deeper capacity of the Convention to shape transitions and conflict endings on the continent. Here, it is useful to recall the language of Article 4 of the CoE’s 1949 Statute which affirms that states must be ‘willing and able’ to guarantee the rule of law, pluralistic democracy and respect for human rights, and make specific undertakings to remedy shortcomings in the constitutional, political and legal orders as part of the membership package.

Apart from the contexts of its inception and enlargement, the European Convention has dealt with a range of transitional issues over the decades. These include regime legitimacy, systematic human rights violations committed by democratic states, amnesty, vetting, and violations committed during armed conflict. An early example of the centrality of democracy, transition, and the maintenance of the rule of law against atrocity is seen in the 1967 case taken by Denmark, Sweden, Norway and the Netherlands against Greece, where we see a classic set of TJ issues in play. The democratic regime in Greece was overtaken by an authoritarian reversion. An illiberal military government had overthrown the elected democratic government, and the derogation process (Article 15) of the Convention was being used by the Junta to justify its aberrational human rights record, including mass arrests, torture in detention sites, purges of the intellectual and political community, censorship and martial law. In its considerations of the merits, the (then) European Commission determined that no public emergency existed in Greece at the time derogation occurred. This meant that the military could not justify its aberrational restrictions on human rights norms based on some internal political exigency. The lack of deference to the military government in Greece can be explained by the need of the CoE (and by implication its judicial organs) to politically self-define in terms of democratic identity and institutions. This case was an early indication of the important relationship between transition and democratic

32 F. Ní Aoláin, ‘The Emergence of Diversity: Differences in Human Rights Jurisprudence’, 19 *Fordham International Law Journal* (1995) 101.

33 D. Kretzmer has described this diffuse constraint in the Israeli context of occupation as operating ‘within the shadow’ of the Court. See D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, 2002.

identity in Europe and beyond.<sup>34</sup> The imposition of an authoritarian military regime in Greece was a direct challenge to European political self-identity and was met by a staunch political and judicial response. The political response came in the form of willingness of four democratic European states to challenge the widespread violations of human rights by a fellow treaty signatory. The legal response was the robust position taken by the European Commission that the transition in Greece was an illegitimate and backwards move. The eventual rejoinder was the short-term withdrawal of Greece from the CoE, a result that might not have been unintended by the Commission’s own reasoning. Greece’s ultimate return to the CoE reflects the ‘pull’ of the regional institutional mechanism and gives the compliance puzzle an interesting dimension, namely that withdrawal may have been an important factor in nudging the state back towards more democratic practice. This case reflects the European Court’s capacity to generate transitional jurisprudence in real time, as the human rights violations were recent and ongoing at the time the Commission’s decision was released. The robustness of the Court’s response provides an interesting jump-off point to pending judicial consideration of Russia’s annexation of Crimea, and Russia’s role in propping up and supporting insurgency in Eastern Ukraine. Having meddled in the internal affairs of another CoE Member State, and defied the fundamental international rule of territorial integrity, Russia’s actions are now pending judicial oversight at the European Court.<sup>35</sup> A contemporary test of the Court’s robustness in the face of authoritarian and military prowess is pending.

The early tracing of the Convention’s creation in Section 2 sets the backdrop of massive atrocity crime on the continent of Europe and a preoccupation with the need to prevent recurrence of systematic atrocity, which were foundational impulses for the creation of the Council, its human rights instrument and its enforcement system. This background provides valuable insight to enable consideration of the intersection between the ECHR and the practice of TJ. I further identify the ways in which the motif of transition has operated as a meaningful point of reference for European states, particularly in the wave of Eastern European transitions that followed the end of the Cold War.<sup>36</sup> Here, one can see a profound strengthening of the human rights commitments following a wave of democratization and transition in Central Europe. Most cogently, the launch of Protocol 11, opened up for signature in May 1994, permitted the Court to assume the functions of the Commission and compelled all new signatories to accept compulsory jurisdiction and individual petitions.<sup>37</sup> The launch of the pilot procedure by the Court, to ad-

34 This motif would have deeper currency in the Latin American context in the wave of post-authoritarian transitions that occurred in the 1980s. See, generally, G. A. O’Donnell, *Counterpoints: Selected Essays on Authoritarianism and Democratization*, University of Notre Dame Press, 2003.

35 E.g., ECtHR, *Abdurashidova v Russia*, Judgment, App no 32968/05, 8 April 2010; ECtHR, *Finogenov and Others v Russia*, Judgment, App nos 18299/03 and 27311/03, 6 March 2012; ECtHR, *Khashiyev v Russia*, Judgment, App no 57942/00, 24 February 2005; ECtHR, *Medova v Russia*, Judgment, App no 25385/04, 15 January 2009; ECtHR, *Suleymanov v Russia*, Judgment, App no 32501/11, 22 January 2013; ECtHR, *Isayeva v Russia*, Judgment, App no 57950/00, 24 February 2005.

36 Moravcsik, ‘The Origins of Human Rights Regimes’, supra fn 17.

37 The first three countries to ratify Protocol 11 were three transitional democracies: Bulgaria, Slovakia and Slovenia. *Ibid.*, 245.

dress so-called repetitive cases deriving from a common dysfunction at the national level, can be seen as responsive to the structural challenges of absorbing new democracies.<sup>38</sup> Section 4 of this paper narrows in on a number of country studies including Northern Ireland, Turkey, Bosnia-Herzegovina and Russia to illuminate those contexts in which the Convention plays an outside role in regulating conflict and/or supporting transition. Section 5 specifically explores three sub-areas of TJ jurisprudence from the Court, namely amnesty, restitution in the context of property confiscation, and vetting/lustration. Section 6 explores the complexity of navigating complex political terrains and contested legal territory for the Court. This paper, it should be noted, focuses primarily on the jurisprudence of the ECtHR,<sup>39</sup> acknowledging that a wider range of TJ practice is reflected in the work of the Council of Ministers and other organs of the CoE.<sup>40</sup> My preliminary study opens up a new lens on the European Convention, surfaces its TJ work, and gives some concrete understanding of the contribution of the CoE system to TJ theory and practice. It stresses that there is much remaining work to be done to fully interrogate the intersection of TJ, conflict management and peace enforcement with the mandate of the ECtHR.

38 The first case in which the pilot judgment was used was *Broniowski v Poland*. It was subsequently codified in Rule 61 of the Rules of the Court adopted in February 2011. ECtHR, *Broniowski v Poland*, Judgment, App no 31443/96, 28 September 2005.

39 But acknowledging other relevant regional developments including the EU's support to transitional justice. See Council of the European Union, Council Conclusions on EU's Support to Transitional Justice, 16 November 2015, <http://data.consilium.europa.eu/doc/document/ST-13576-2015-INIT/en/pdf> (last accessed 16 July 2017); European Parliamentary Association (EPA) Res 1096, 27 June 1996, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en> (last accessed 16 July 2017).

40 See, e.g., Resolutions of the Parliamentary Assembly of the Council of Europe. Examples of those specifically concerned with classic TJ issues include, EPA Res 828, Enforced Disappearances, 26 September 1984; EPA Res 1371, Disappeared Persons in Belarus, 28 April 2004; EPA Res 1463, Enforced Disappearances, 3 October 2005 (addressing disappearances in Belarus and Chechnya); EPA, Missing Persons from Europe's Conflicts: The Long Road to Finding Humanitarian Answers, 3 September 2013. The role of the European Commissioner for Human Rights has also substantively addressed TJ issues. See, e.g., N. Muižnieks, 'Missing Persons in Europe: The Truth is Yet to Be Told', Human Rights Comment, CoE Commissioner for Human Rights, 28 August 2014, <http://www.coe.int/en/web/commissioner/-/missing-persons-in-europe-the-truth-is-yet-to-be-told> (last accessed 16 July 2017); Report by Nils Muižnieks, Commissioner for Human Rights of Council of the Europe, Following His Mission in Kyiv, Moscow, and Crimea from 7 to 12 September 2014, 27 October 2014, pp 7-12.

## 4. COUNTRY-SPECIFIC TRANSITIONAL JUSTICE

Over the years, TJ issues have emerged ad hoc in the European system, primarily through the exigencies of particular states struggling with challenges of democratic deficit, armed conflict, repression and legitimacy.

States that have struggled to maintain substantive as opposed to procedural democratic practice have been the primary TJ actors in the CoE system.<sup>41</sup> In this regard, Northern Ireland and Turkey have been two specific sites in which democracy has been plagued by gerrymandering, discrimination, political exclusion and the use of national security powers in ways that have interfered substantively with democratic engagement, particularly for minority communities.<sup>42</sup> In parallel, the challenges of violent conflict in the territory of a small number of CoE Member States have also given rise to jurisprudence that can properly be placed in the TJ oeuvre. In the past three decades, internal conflict has replaced inter-state conflict as the main type of conflict experienced globally, and Europe has not escaped the phenomena. The historical origins of conflict-directed TJ lie in the resolution of inter-state conflicts.<sup>43</sup> However, both in Europe and elsewhere, TJ has been reinvigorated by the rise of the negotiated 'peace agreement' in internal conflict. Negotiated settlements necessarily involve some compromise between the different parties waging war, and this compromise is translated into the design of legal and political institutions. This gives rise to ongoing dilemmas focused around law's possible role in achieving transition from violence. These dilemmas continue to challenge the enforcement of human rights norms, and are increasingly mediated through the CoE institutions, particularly the Court.

In particular, a plethora of cases from Northern Ireland and Turkey claiming systemic violations of human rights by democratic states experiencing internal conflict persistently challenged the Court and the CoE to respond adequately. Claims were centred on violations of the right to life (extrajudicial execution), extended detention, detention without trial, disappearances, torture, rape and violations of freedom of assembly and association.<sup>44</sup> The very fact of systematic human rights violations in these states posed existential, conceptual challenges to the ECtHR. In part, the fact of systematic violations ought rightly to have been an oxymoron in a human rights system composed of self-correcting democratic states formally com-

41 Here, the struggle has not only been about ensuring elections with more than one political party running, but rather addressing significant democratic deficits that affect the quality of the democracy. See, generally, D. M. Estlund, *Democratic Authority: A Philosophical Framework*, Princeton University Press, 2008.

42 Ní Aoláin, 'The Emergence of Diversity', supra fn 32, 101.

43 C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, Oxford University Press, 2008.

44 F. Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland*, Blackstaff Press, 2000.

mitted to human rights. The persistence of systematic human rights violations of formally democratic states has been a continued source of challenge to the legitimacy and efficacy of the European human rights system.

A common thread of the Turkish cases were allegations of ongoing human rights violations by Turkish security forces in the context of the bloody armed struggle against the Kurdistan Workers Party.<sup>45</sup> Turkish security forces allegedly committed extensive and systematic human rights violations, including forcible displacement of civilian non-combatants, deaths in detention as a result of excessive force, ‘mystery killings’, killings by ‘execution squads’, disappearances, and torture during detention or interrogation. Criticism also focused on Turkey’s suspension of civil and political rights, especially those of the Kurdish minority. In post-coup Turkey, doubtlessly many of these themes will be revisited as allegations of systematic human rights violations re-emerge. The depth of the Commission’s and Court’s jurisprudence on derogation, torture, the protection of the right to life, and the prohibition on rape as torture shows robust engagement with some states that clearly fall within a transitional paradigm.<sup>46</sup> Moreover, some of the Court’s decisions manifest a clear transitional quality, focusing on the paucity of adequate responses in domestic law, the need to ensure non-repetition, and an emphasis on institutional reforms – not merely individual remedy – as the basis for compliance with the Convention.

The Dayton Peace Agreement settlement brought about a formal end to the conflict in Bosnia and was the precursor for a series of similarly structured peace treaties that followed in Europe and beyond, including the peace settlement in Northern Ireland.<sup>47</sup> The European Convention was a central plank of the Dayton Agreement’s legal structure, essentially parachuting the Convention into the national legal system as a means to rebuild trust in the rule and capacity of law at a local level in the aftermath of genocide, war crimes and crimes against humanity. Here, I note the centrality of the Convention to the overall transitional settlement, and its presumed capacity to enable and support the rule of law rehabilitation needed at the domestic level. The Dayton Constitution formally attaches great im-

45 European Commission of Human Rights (ECommHR), Turkey: 2015 Report, 10 November 2015, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_turkey.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf) (last accessed 16 July 2017). The report states that there remain many shortcomings in Turkey’s guarantee of protection of human rights and fundamental freedoms, including the lack of a comprehensive framework law on combating discrimination, and of adequate oversight powers for law enforcement agencies. In addition, the report states there has been ‘no progress on normalizing bilateral relations with the Republic of Cyprus’ and expresses concern with changes in internet law and criminal cases against journalists, writers and social media users. See European Union (EU), EU Statement on Turkey, 22 July 2016, pp 5–6; <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> (last accessed 16 July 2017) (condemning the attempted coup and calling for observance of the abolition of the death penalty under Protocol 13 of the ECHR as an essential element of accession to the EU).

46 See, e.g., ECtHR, *Welfare Party v Turkey*, Grand Chamber, Judgment, App nos 41340–44/98, 13 February 2003; ECommHR, *Djavit An v Turkey*, Judgment, App no 20652/92, 20 February 2003.

47 The Dayton Peace Agreement was signed in Paris on 14 December 1995 and was witnessed by the presidents or prime ministers of the United States, the Russian Federation, the Federal Republic of Germany, the United Kingdom, France and by the EU special negotiator. See Security Council Report, General Framework for Peace in Bosnia and Herzegovina, UN docs A/50/790 and S/1995/999, 30 November 1995.

portance to international rules and principles, with a notable emphasis on human rights.<sup>48</sup> Article II, Paragraph 2 is the entry point for the European Convention, setting out that ‘the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.’<sup>49</sup> In addition to domestic effect, cases continue to seep through from Bosnia to the European Court itself, underscoring the slow process of legal change and the sustained limitations in domestic capacity.<sup>50</sup>

The Northern Ireland peace process offers a parallel example which illuminates the pivotal role that the ECtHR played in setting the legal agenda for accountability both during conflict and in the transitional phase. The TJ elements of the 1998 Northern Ireland Good Friday/Belfast Peace Agreement are substantial. In addition, the Peace Agreement is explicitly based on a consociational format, enabling a power-sharing structure between former adversaries, and bringing political actors previously associated with armed groups directly into government.<sup>51</sup> This peace process has been heralded as a success story by the international community and transplant has been actively encouraged.<sup>52</sup> For the Northern Ireland peace process, the jurisprudence emanating from the ECtHR was (and remains) critical to framing some of the key human rights elements of the transitional deal and remains critical to assessing the legality and conformity of new measures addressing the legacy of the past with the obligations of the Convention.<sup>53</sup> In Northern Ireland, violations of the right to life and breach of the torture prohibition protect-

48 These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights. However, concrete protection for human rights was markedly absent from the peace-making process. See Z. Pajic, ‘A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina’, 20 *HRQ* 1 (1998) 129.

49 Stein notes that drafters of constitutions in the post-communist states of Central and Eastern Europe tend to recognize that respect for basic rights and rule of law are foundations of a new democratic order and admission to the ‘Western European democratic community of nations’. See E. Stein, ‘International Law in Internal Law: Towards Internationalization of Central-European Constitutions?’ 88 *American Journal of International Law* 3 (1994) 429.

50 See, e.g., ECtHR, *Palić v Bosnia and Herzegovina*, Judgment, App no 4704/04, 15 February 2011. This case concerned the disappearance during the war in Bosnia and Herzegovina of a military commander leading one of the local forces at the time. In July 1995, after the opposing local forces (the VRS, mostly made up of Serbs) had taken control of the area of Žepa in Bosnia and Herzegovina, he went to negotiate the terms of surrender of his forces, and disappeared. His wife attempted numerous times to find out about his fate from official sources, without success. She complained that Bosnia and Herzegovina failed to investigate the disappearance and death of her husband and that she had suffered as a result for many years.

51 D. Rothchild and P. G. Roeder, ‘Dilemmas of State-Building in Divided Societies’, in D. Rothchild and P. G. Roeder (eds), *Sustainable Peace: Power and Democracy After Civil Wars*, Cornell University Press, 2005, pp 1–25.

52 See, e.g., G. Espiau Idoiaga, *The Peace Processes in the Basque Country and Northern Ireland (1994–2006): A Comparative Approach*, Working Paper, Institut Català Internacional per la Pau, March 2010, [http://icip.gencat.cat/web/.content/continguts/publicacions/workingpapers/arxiu/wp10\\_3\\_ang.pdf](http://icip.gencat.cat/web/.content/continguts/publicacions/workingpapers/arxiu/wp10_3_ang.pdf) (last accessed 16 July 2017).

53 See, e.g., Northern Ireland Office and the Rt Hon Theresa Villiers, *The Stormont House Agreement*, 23 December 2014, <https://www.gov.uk/government/publications/the-stormont-house-agreement> (last accessed 16 July 2017).

ed by the Convention continue to animate the TJ accountability debates.<sup>54</sup> As the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has noted, the tendency within the jurisdiction has been to individuate the experience of violation such that a broader emphasis on structural patterns and institutional responsibilities are lost.<sup>55</sup> There is no doubt that the easy recourse to the Convention mechanisms (domestically through the United Kingdom's Human Rights Act, and regionally) has contributed to a lack of clarity on collective harm and responsibility. Nonetheless, adherence to the European Convention's standards remains a benchmark for whether the transitional arrangements on human rights and accountability for past human rights violations are sufficient to meet the state's European obligations. This has led to a complex political and legal discourse on whether transitional measures – amnesty, criminal accountability, mechanisms for truth recovery, and reparations – are Convention 'compliant'. In an important way, this exchange attests to the capacity of the Convention to sustain legal and political engagement with the practice of TJ, and of one set of norms to influence and shape another.

What the Northern Ireland conflict reveals is that international law, and specifically international human rights law, matters to and is implicated by situations of internal conflict. If international law is to play the mediating role that Cassese (amongst others) has prescribed for it,<sup>56</sup> it cannot be seen simply to endorse or accommodate whatever claims the state may choose to make as to its security needs during conflict. It is also evident that the bite of international law can operate to buttress the relative autonomy of key legal norms such as non-derogable rights that may be critical to the manner in which conflict is then internally mediated by the state. However, supranational legal supervision has not always been robust in the jurisdiction. The relatively indulgent attitude adopted by the ECtHR to UK security claims in Northern Ireland during the actual course of the conflict calls into question the adequacy of international human rights norms and/or of interpretative mechanisms during conflict.<sup>57</sup> Specifically, it raises the question of whether the liberal-democratic character of the state serves as a shield against international

54 Note the visit of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in autumn 2015 and spring 2016 to Northern Ireland. UN Office of the High Commissioner for Human Rights (OHCHR), The Mandate of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Mandate.aspx>. (last accessed 16 July 2017).

55 OHCHR, 'Northern Ireland: "Twenty Years On, the UK Is Yet to Fully Address the Legacies of the Past" – UN Rights Expert', 19 November 2015, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16780&LangID=E> (last accessed 16 July 2017).

56 'If, as Cassese expresses it, international law functions not simply as a prescriptive framework, but also a mediating paradigm, this mediation turns on the autonomy of the law. Were it not for this autonomy, States would be free to use law in whatever way they wished; all would ultimately be reducible to politics, and there would be little point in examining the specific role played by law in transition (other than, perhaps, in exploring its role in legitimating purely political decision-making).' C. Campbell and F. Ní Aoláin, 'Local Meets Global: Transitional Justice in Northern Ireland', 26 *Fordham International Law Journal* (2002) 880.

57 ECtHR, *Ireland v The United Kingdom*, Judgment, App no 5310/71, 18 January 1978; ECommHR, *Brannigan and McBride v United Kingdom*, Judgment, App no 14554/89, 25 May 1993.

scrutiny, an issue I have explored at some length elsewhere.<sup>58</sup> Even acknowledging these limitations, the imprint of the Court's jurisprudence has been considerable, and continues to set the legal and political agenda on justice, truth, reparations and guarantees of non-repetition.

Finally, the ECtHR has long engaged with Russia, and in particular the undulating slew of cases emerging from Russia's engagement with armed conflict in the Chechen Republic of the Russian Federation.<sup>59</sup> At the time of writing, the Court has delivered more than 230 judgments finding violations of both derogable and non-derogable rights in connection with this armed conflict. Approximately 350 cases are still pending, and approximately 60 percent of the applications concern enforced disappearances.<sup>60</sup> Other violations include extrajudicial execution, torture, property destruction and due process denial. Notably, in respect of its actions in Chechnya, Russia has not entered any Article 15 derogations. Flagrant human rights violations were the order of the day in the Russian military actions in Chechnya, and are suspected of being present in the annexation of Crimea and Russia's ongoing military activities in Eastern Ukraine. Illustrative cases include *Tashukhadzhiyev v Russia*, which concerned the disappearance of a young man in Chechnya after he was detained by a group of military servicemen in 1996.<sup>61</sup> Russia remains a persistent violator and has shown no willingness to make the fundamental changes to its legal and political systems that would put an end to these patterns of violation. Its recent military activities, which have impinged upon the territorial integrity of a neighbouring CoE Member State, Ukraine, underscore its 'bad actor' reputation and raise profound questions about the suitability of its membership. Most notably, three cases have been lodged by Ukraine against Russia with the Court.<sup>62</sup> These cases add to the growing number of conflict-related inter-state cases now on the Court's docket, including

58 F. Ní Aoláin and C. Campbell, 'The Paradox of Transition in Conflicted Democracies', 27 *HRQ* 1 (2005) 172; in practical terms, contrast the Turkish case of ECtHR, *Aksoy v Turkey*, Judgment, App no 21987/93, 18 December 1996, and *Denmark, Norway, Sweden and Netherlands v Greece*, Judgment, App nos 3321/67, 3322/67, 3323/67, 3344/67, 25 March 1968, with the treatment of derogation cases emerging from the United Kingdom throughout the conflict. Notably, in *Brannigan and McBride*, the Court made explicit reference to the periodic reviews by Lord Colville (an expert appointed by the government to review the implementation of emergency powers), and these reviews were conducted explicitly along the lines of the 'response of the liberal democratic state'. British and Northern Ireland based NGOs were consistently critical of these internal review processes, which operated largely as whitewashing exercises for the state's use and accumulation of emergency powers, with little or no meaningful constraint. *Brannigan and McBride*, supra fn 57.

59 ECtHR, *Armed Conflicts*, 'Cases Concerning the Conflict in Chechnya', June 2016, pp 10–12, [http://www.echr.coe.int/Documents/FS\\_Armed\\_conflicts\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf) (last accessed 16 July 2017).

60 The pending cases against Russia can be tracked on the CoE's official website, [http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=&StateCode=RUS&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=RUS&SectionCode=) (last accessed 16 July 2017).

61 ECtHR, *Tashukhadzhiyev v Russia*, Judgment, App no 33251/04, 25 October 2011.

62 ECtHR, *Ukraine v Russia*, App no. 20958/14, 13 March 2014. The second case, *Ukraine v Russia II*, App no 43800/14, was lodged on 13 June 2014 and concerns the abduction of Ukrainian orphan children and a number of adults accompanying them. The third case, ECtHR, *Ukraine v Russia III*, App no 49537/14, was lodged in July 2014 and is concerned with the treatment of one particular individual, Hayser Dzhemilov, and alleged Convention violations committed during his period of extended detention in Simferopol.

*Georgia v Russia I*, and *Georgia v Russia II*.<sup>63</sup> They not only testify to an emerging role for the Court in determining the nature of and liability for human rights violations committed during armed conflicts, but also underscore the fragility of the inter-state system itself and a weakening of the grand ambitions that animated the Convention's creation.

Following the post-Cold War transitions, the CoE has been challenged to apply the Convention in a range of complex transitional sites, and specifically conflict zones in newly emerged democracies. In reviewing these transitions, one might make a core distinction between two groups of Central and Eastern European states: the group of states where 'consolidation' after transition was the *mot d'ordre*, and for which joining the CoE system was a way to prevent any backslide into nationalistic or populist authoritarianism;<sup>64</sup> and, by contrast, late joiners, most prominently Russia, that underscore the fragility of transition and the weakness of the rule of law systems that have followed. The flagrant and systematic violations of rights from members of this group as identified above (again Russia) call into question the authenticity of the transitional paradigm and its application. States in this category also include Georgia, which entered a derogation to the Convention in November 2007,<sup>65</sup> and Armenia, which derogated from the Convention in a series of communications with the Council in March 2008.<sup>66</sup> New challenges from states such as Poland and Hungary, where constitutional authoritarianism, civil society constraints and illiberal policies have emerged in recent years, underscore the difficulties of democratic consolidations. The challenges of incomplete transition in some post-communist European states, along with the emergence of new conflicts in Eastern Europe, have reinvigorated conversations about the relevance of TJ to contemporary human rights challenges on the continent.

63 ECtHR, *Georgia v Russia I*, Grand Chamber, Judgment, App no 13255/07, 3 July 2014; ECtHR, *Georgia v Russia II*, Public Hearing, App no 38263/08, 22 September 2011.

64 This pattern corresponds to Moravcsik's observation that during the creation of the ECHR system newly established democracies had significant interests in bedding down a reciprocity-based human rights system. See Moravcsik, 'The Origins of Human Rights Regimes', supra fn 17, 220 (characterizing the establishment of the ECHR '[a]s an act of political delegation akin to establishing a domestic court or administrative agency').

65 On 2 March 2006, Georgia availed itself of the right of derogation from Art 1 of Protocol 1 and Art 2 of Protocol 4 in response to the outbreak of H5N1 (bird flu) in the Khelvachauri district (withdrawn on 23 March 2006). CoE, Note Verbale addressed to the Secretary General of the CoE by the Permanent Representative of Georgia, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=332899&SecMode=1&DocId=967096&Usage=2> (last accessed 16 July 2017).

66 Armenia declared a state of emergency in the city of Yerevan on 2 March 2008 (lifted on 21 March 2008). The declared state of emergency allowed Armenia to ban meetings, rallies, demonstrations and strikes, and carry out other actions to suspend the activities of organizations, limit the freedom of movement of individuals, allow the means of transportation in the state to be searched by law enforcement bodies, limit the operation of the mass media, ban 'political propaganda', temporarily suspend the activity of political parties and other public organizations and remove persons from a given area who were deemed to violate the state of emergency or who did not officially reside in specific areas. Human Rights Watch (HRW), 'Armenia: Events of 2008', <https://www.hrw.org/world-report/2009/country-chapters/armenia> (last accessed 16 July 2017).

## 5. ECTHR JURISPRUDENCE ON CORE TRANSITIONAL JUSTICE CONCEPTS

**As I reflect on the deployment of TJ by the ECtHR, I focus in particular on three core areas: amnesty, the restitution of property rights, and lustration and vetting. These issues touch, in varying degrees, on the four generally acknowledged pillars of TJ: truth, justice, reparations, and guarantees of non-repetition.**

A lively policy and scholarly debate has emerged on the extent to which these four elements can be viewed (and implemented) independently of one another, or whether a holistic practice of TJ requires integration and overlap between them.<sup>67</sup> In this regard, Pablo de Greiff has reflected on the under-conceptualized state of the field, and lays claim to an emerging 'common sense' around TJ practice.<sup>68</sup> His preoccupations are driven in part by an identifiable frustration with piecemeal or 'pick and choose' transition, whereby states and international institutions think that different parts of the TJ 'package' can be traded off against one another. Instead, he argues for a normative conception of TJ, making strong claims for relationships between the constituent elements of TJ, yielding in his terminology a 'holistic' vision. De Greiff does so because he argues that normative theoretical work can guide action, and operate to make practical choices clearer or give their problematic elements greater exposure. Essential to his task is the identification of 'two mediate goals, namely recognition and civic trust and two final goals, reconciliation and democracy'.<sup>69</sup> He frames his overall argument with the claim that these four constituent elements 'give concrete expression *through law-based systems* to the necessarily more abstract notion of justice'.<sup>70</sup> This schematic application is often at odds with the reality of implementation on the ground. In many transitional sites (including European), TJ emerges piecemeal, with a range of constraints dictating which measure(s) will be deployed to address the legacy of systematic human rights violations. Moreover, not only are various elements deployed in an ad hoc way but there is rarely a linear or sequential progression to the application of TJ measures (e.g., reparations following a finding of criminal

67 Report of the of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN doc A/HRC/21/46, 9 August 2012, §20 ('Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof.').

68 P. de Greiff, 'Theorizing Transitional Justice', in M. S. Williams, R. Nagy and J. Elster (eds), *Transitional Justice: Nomos LI*, New York University Press, 2011.

69 Ibid, pp 33–34.

70 Ibid, p 34. Original emphasis.

liability). The specific issues (amnesty, property and vetting/lustration) addressed in this paper underscore the splintered and variable dimensions of TJ practice.

In all transitional sites, there is a singular preoccupation with the potential for prosecution. If early motifs of TJ forcibly brought attention to the dilemmas of prosecution and the need for compromise (leading to practices of amnesty and forgiveness), there is a greater contemporary reliance on the language of impunity and the imperative to prosecute where possible.<sup>71</sup> This is particularly evident in the trenchant emergence of international criminal law, the retreat from using amnesty laws, and the emerging requirement that national legal systems perform a meaningful part in enforcing domestic criminal law.<sup>72</sup> The European Convention has become an important site for these debates and contestations, best illustrated by the unresolved cases involving deaths from military and police shootings during Northern Ireland's conflict, for which victims of the deceased still seek prosecution and remedy. In these cases, the Court has developed a healthy jurisprudence on the duty to investigate deaths which have resulted from state action, and has underscored that such investigations have to be prompt and thorough, enable the participation of family members, and be capable of leading to a prosecution or civil remedy if the evidence leads to that end.<sup>73</sup> While the Court has not articulated a 'right to truth' per se, the cumulative effect of these procedural investigative requirements is to lend credence to the right of victims to know what happened to a loved one, and the nature of the state's responsibility in that regard. This is perhaps, in practice, as close as one can get to a right to truth, without the express use of that term. In addition, classic TJ issues including amnesty, double jeopardy and reparation have been the subject of European judicial consideration.<sup>74</sup> For the purposes of this assessment, I now turn to examine three key areas where the Court has developed a sizeable transitional jurisprudence: amnesty, property rights, and vetting.

71 K. Engle, 'Anti-Impunity', supra fn 28.

72 The Inter-American Court of Human Rights (IACtHR) has found in several cases that amnesty laws are in violation of Arts 1, 2, 8.1 and 25 of the American Convention on Human Rights (AmCHR). IACtHR, *Barrios Altos v Peru*, Merits, Series C no 75, 14 March 2001; IACtHR, *La Cantuta v Perú*, Merits, Reparations and Costs, Series C no 162, 29 November 2006; IACtHR, *Almonacid-Arellano et al v Chile*, Preliminary Objections, Merits, Reparations and Costs, Series C no 154, 26 September 2006. In addition, in 2012, Navi Pillay, the UN High Commissioner for Human Rights, stated, '[a]mnesties are not permissible if they prevent the prosecution of individuals who may be criminally responsible for international crimes, including war crimes, crimes against humanity, genocide and gross violations of human rights'. 'No Amnesty for Gross Human Rights Violations in Yemen, Top UN Official Says', *UN News Centre*, 6 January 2012, <http://www.un.org/apps/news/story.asp?NewsID=40892#.V6zNxpMrJE4> (last accessed 16 July 2017). Also, HRW has consistently urged governments to repeal laws providing amnesties to perpetrators of war crimes and crimes against humanity. See HRW, 'Afghanistan: Repeal Amnesty Law: Measure Brought into Force by Karzai Means Atrocities Will Go Unpunished', 10 March 2010, <https://www.hrw.org/news/2010/03/10/afghanistan-repeal-amnesty-law> (last accessed 16 July 2017); HRW, 'Nigeria: Reject Amnesty for Atrocities: Government Panel on Boko Haram Shouldn't Block Justice for Gravest Crimes', 2 July 2013, <https://www.hrw.org/news/2013/07/02/nigeria-reject-amnesty-atrocities> (last accessed 16 July 2017); HRW, 'South Sudan: No Amnesty for Serious Crimes: Negotiations, Peace Agreement Should Ensure Justice', 8 June 2014, <https://www.hrw.org/news/2014/06/08/south-sudan-no-amnesty-serious-crimes> (last accessed 16 July 2017).

73 These principles were forcibly articulated in the following cases: ECtHR, *Jordan v UK*, Judgment, App no 24746/94, 4 May 2001; ECtHR, *McKerr v UK*, Judgment, App no 28883/95, 4 May 2001; ECtHR, *Finucane v UK*, Judgment, App no 29178/95, 1 July 2003.

74 *Infra* Section A.

## A. AMNESTY

An amnesty law is any law that retroactively exempts a select group of people, usually military and government leaders, from criminal liability for crimes committed. Amnesty is one of the most controversial of all TJ mechanisms precisely because the prospect of escaping prosecution and punishment is considered anathema to victims, civil society organizations, judges and international actors.<sup>75</sup> Amnesty has a decent pedigree under international law, and is explicitly encouraged in Article 6(5) of Additional Protocol II to the Geneva Conventions, which regulates the actions of combatants in non-international armed conflicts:<sup>76</sup> 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.'<sup>77</sup> Despite this legal grounding, many commentators and policy makers take the position that there is a duty to prosecute certain heinous crimes under international law, and that this obligation cannot be abrogated by politically agreed amnesties.<sup>78</sup> Here, international crimes are understood to denote crimes that emanate from treaty or customary international law and provide for *individual criminal responsibility* before national or international criminal courts.<sup>79</sup> Long and substantial debates rage around the acceptability of amnesties, but they remain a steadfast practice within state peace and conflict-ending negotiations.<sup>80</sup>

The European Court has had limited engagement with amnesty, but its decisions have been significant and provide important legal markers on the legality and scope of amnesty practices. An important decision in this regard is *Korbely v Hungary*,<sup>81</sup> which originated in an action by a Hungarian national who alleged that he had been convicted of a crime which did not constitute an offence at the time it was committed, thus violating the principle of *nullum crimen sine lege*. The events

75 L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Hart Publishing, 2008. 'Increasingly innovative forms of amnesty, coupled with other transitional justice mechanisms, reveal that not all amnesties entail impunity, but rather some may offer alternative means of fulfilling the obligations of states under international law, where widespread prosecutions are not possible', p 3.

76 Additional Protocol II only applies to conflicts that 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. In fact, it specifically excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Art 1, 8 June 1977.

77 *Ibid.*, Art 6(5). The final text of Art 6(5) received 37 votes in favour and 15 against, with 31 abstentions.

78 See, e.g., OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, 2009, [http://www.ohchr.org/documents/publications/amnesties\\_en.pdf](http://www.ohchr.org/documents/publications/amnesties_en.pdf) (last accessed 16 July 2017).

79 See Bell, *On the Law of Peace*, supra fn 43, p 249 (discussing this trend in the literature).

80 Transitional Justice Institute, University of Ulster, *The Belfast Guidelines on Amnesty and Accountability*, 2013, [http://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines\\_TJI2014.pdf.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf) (last accessed 16 July 2017).

81 ECtHR, *Korbely v Hungary*, Grand Chamber, Judgment, App no 9174/02, 19 September 2008.

in question took place at the outbreak of the Hungarian revolution in Budapest in October 1956, when the applicant was a serving military officer. During the course of demonstrations, the applicant, with a group of military officers under his command, was charged to regain control of a building at a military school. Significant factual dispute surrounded the sequence of events that resulted, but it was not disputed that a number of insurgents were killed and injured during the operation. Proceedings in respect of these deaths were activated in 1993, when the Hungarian Parliament passed an act providing that certain acts committed during the 1956 uprising were not subject to statutory limitation (a classical piece of transitional legislation). The applicant was charged with a crime against humanity under the Fourth Geneva Convention as subsequently proclaimed by Hungarian law. After various domestic legal proceedings at Budapest Regional Court, the Supreme Court and various appearances before the Constitutional Court, the case came to the ECtHR. The Court found a violation of Article 7 of the Convention (the ‘no punishment without law’ provision). Fundamentally, the Court concluded that Korbely’s acts did not satisfy all the elements of a crime against humanity as constituted at that time.<sup>82</sup> The dissents in the case were particularly pointed, claiming that the majority went beyond its competence. Three of the dissenters accused the majority of overruling the findings of national courts on several points, stressing that national courts were far better placed than the ECtHR to address the facts and to interpret the relevant international law in the light of these facts.<sup>83</sup> The case raises characteristic TJ elements involving a reckoning with the past (the complexity of historical trials), the compatibility of addressing past injustice with principles of fairness and, finally, the proper scope for international courts to interfere with the process of political and legal transition (including accountability) taking place in the domestic sphere.

Another interesting set of TJ issues have been raised by the use of amnesty provisions by European states experiencing transition from conflict. In 2014, the ECtHR ruled on the question of whether political amnesties pose a barrier to subsequent legal prosecution by domestic legal systems. In *Marguš v Croatia*, the Grand Chamber gave a wide-ranging set of views on the status and practice of amnesty laws in general. It also addressed charges against Mr Marguš ranging from murder to theft during the Bosnian-Croatian conflict in 2007.<sup>84</sup> Marguš, a Croatian national and former commander of the Croatian army, was convicted in Croatia in 2007 of war crimes against the civilian population. Following conviction, Marguš complained inter alia that his right to be tried by an impartial tribunal and to defend himself in person had been violated by the domestic courts. He invoked a double jeopardy argument, claiming that the criminal offences of which he had been convicted were the same as those he had been the subject of during prior proceedings that were terminated in 1996 as a result of the application of the post-war General Am-

82 For a critique of the Court’s approach, see C. Droege, ‘Elective Affinities? Human Rights and Humanitarian Law’, 90 *International Review of the Red Cross* 871 (2008) 546.

83 *Korbely*, supra fn 81, Dissenting Opinion of Judges Fura-Sandström, David Thór Björginsson and Ziemele, §§8, 11 and 14.

84 ECtHR, *Marguš v Croatia*, Grand Chamber, Judgment, App no 4455/10, 27 May 2014.

nesty Act passed in Croatia. The passage of such broad-ranging amnesties has been part and parcel of transitional deals in many post-conflict states. These amnesties are frequently viewed as a means to dampen the spoiler effects of former combatants on domestic political processes, encourage security-sector reform as well as enable elite political compromises during peace negotiations.

In *Marguš*, the Court decided unanimously that there had been no violation of Article 6, Paragraphs 1 and 3(c) (right to a fair trial) of the European Convention. The Court found by a majority that Article 4 of Protocol 7 (right not to be tried or punished twice/double jeopardy) was not applicable to the offences which Mr Marguš had previously received an amnesty benefit from under the General Amnesty Act in Croatia. Simultaneously, the Court declared inadmissible proceedings under Article 4 of Protocol 7 regarding Mr Marguš’ right not to be tried or punished twice in respect of the charges dropped by the Croatian prosecutor in January 1996.<sup>85</sup>

The ECtHR held that there was a growing tendency in international law to view the granting of amnesties in respect of grave breaches of human rights as unacceptable. Specifically, the Grand Chamber opined:

The possibility for a State to grant amnesty in respect of grave breaches of human rights may be circumscribed by treaties to which the State is a party. There are several international conventions that provide for a duty to prosecute crimes defined therein (see the Geneva Convention of 1949 for the Protection of Victims of Armed Conflicts and their Additional Protocols, in particular common Article 3 of the Geneva Conventions ... and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).<sup>86</sup>

On one view, the Court’s position lends further credence to various international resolutions, recommendations and practices interlocking reparations with granting amnesty. While the Court acknowledged that, at that point, no international treaty explicitly prohibited granting amnesties, it repeated language from prior judgments emphasizing that amnesties contravene irrevocable rights recognized by international human rights law. In notable inter-system borrowing, the ECtHR framed its position by pointing out that the Inter-American Court of Human Rights had found that granting amnesties in respect of perpetrators of war crimes and crimes against humanity was incompatible with states’ obligations under international law to investigate and prosecute war crimes.<sup>87</sup>

Despite acknowledgement – pressed by an amicus brief from an eminent group of international lawyers to the Court – that granting amnesty can operate as a tool to

85 S. Bezinyan and S. Kostas, ‘Case Watch: European Court Rules on Amnesty and Double Jeopardy’, Open Society Foundations, 24 April 2013, <https://www.opensocietyfoundations.org/voices/case-watch-european-court-rules-amnesty-and-double-jeopardy> (last accessed 16 July 2017).

86 ECtHR, *Marguš*, supra fn 84, §132.

87 *Ibid*, §138.



end prolonged conflicts,<sup>88</sup> the Court seemed fundamentally unconvinced on this point. The Grand Chamber stressed that the emerging consensus from various international bodies, in particular the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, was that amnesty in respect of grave breaches of human rights was an impingement on the integrity of those treaty guarantees. Overwhelmingly, the density of soft law is hardening on the position that amnesties should not be granted to persons who have committed such grave violations of human rights and international humanitarian law. The Court ultimately concluded that the Croatian authorities were acting within the framework of the Convention. The fresh indictment against Mr Marguš and his conviction for war crimes against the civilian population were in compliance with the requirements of Articles 2 and 3 of the Convention and within the requirements of other international mechanisms and instruments.

This was not the first time that the ECtHR addressed amnesty issues, adding to the growing international jurisprudence on the acceptability of amnesties. The Court had previously ruled on amnesty laws, including in *Abdulsamat Yaman v Turkey* and *Yesil and Sevim v Turkey*, where it declared that amnesties, pardons or statutes of limitations should not apply to criminal cases involving torture and ill-treatment.<sup>89</sup> The Court had also said in its earlier finding, in *Ould Dah v France*, that amnesty is incompatible with states' duty to investigate and prosecute acts such as torture, which 'must hold true as regards war crimes' as well.<sup>90</sup> Ould Dah was a Mauritanian army officer. He claimed inter alia that his conviction in France for acts of torture committed in Mauritania under a universal jurisdiction statute was inconsistent with the protections offered by the European Convention. His acts had been previously amnestied in Mauritania. The European Court expressly limited the use of amnesty. In addition to extending that logic from *Ould Dah*, *Marguš* makes inroads on the ongoing practice of utilizing amnesties at the end of hostilities to enable or support contentious peace processes and to encourage combatants to lay down their arms on the basis of guarantees of non-prosecution. While the Court did not definitively prohibit the validity of a properly constituted amnesty under the ECHR's supervision, this case adds to the narrowing of permissive amnesty space under international law. Some key commentators, specifically Mallinder, argue that the European Court's decisions continue to leave an undefined space to enable amnesty under very specific domestic circumstances, particularly in the context of peace processes and/or reconciliation between deeply divided communities.<sup>91</sup> Mallinder's meticulous parallel assessment of Inter-American Court amnesty decisions illustrates that while there has been a distinct narrowing in the overall permissibility of amnesties, courts have not disavowed the acceptability of

88 Ibid, §139 ('Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as reconciliation process and/or a form of compensation ...').

89 ECtHR, *Abdulsamat Yaman v Turkey*, Judgment, App no 32446/96, 2 November 2004; ECtHR, *Yesil and Sevim v Turkey*, Judgment, App no 34738/04, 5 June 2007.

90 ECtHR, *Ould Dah v France*, Judgment, App no 13113/03, 17 March 2009.

91 L. Mallinder, 'Investigations, Prosecutions and Amnesties Under Articles 2 & 3 of the European Convention on Human Rights' Transitional Justice Institute Research Paper No. 15-05, 2 October 2015.

amnesties entirely, and state practice indicates a continued willingness to utilize amnesty provisions albeit in somewhat narrower ways.<sup>92</sup> In short, amnesty practice remains an active and contested space circled by demands to end impunity, a growing international criminal law apparatus, and enormous political pressure on conflict mediators to end protracted violence and simultaneously hold violators of human rights accountable for their actions. For now, a narrow ground for amnesty remains. Whether it holds is a different and unanswered question entirely.

## B. PROPERTY RIGHTS

I now turn to address property rights. The ECtHR has a substantial jurisprudence on this issue. The restitution of property has figured prominently in the jurisprudence of the Court, with the majority of cases coming from former Soviet Bloc states, though post-conflict states have also featured. Indeed, this is classic TJ jurisprudence, although human rights lawyers tend not to see it that way, and TJ experts have ignored property restitution in important ways.<sup>93</sup> Two points are to be made here. First, the Court initially was highly reluctant to take these cases. One challenge was the 'out of time' argument, founded on a core jurisdictional element of the treaty, namely that a state does not hold liability for human rights violations committed before the treaty came into effect domestically. In many of these cases, the disputed property seizure occurred before the state became a member of the CoE, so individuals had the problem of arguing *locus standi*. Innovative solutions to some of these procedural challenges have been found through the articulation of the doctrine of 'continuing violation'.<sup>94</sup> In this conceptualization, the focus of the Court's attention is not the point at which the human rights violation occurred (the property 'taking'), but rather the ongoing loss of use, enjoyment and access resulting from the denial of property rights. Second, the scale of property takings were so extensive in many Eastern European states that the Court understandably felt a capacity challenge in meeting the likely flood of cases from newly minted CoE Member States. In some ways, one can sense the Court's awareness that a wholesale undoing of property holdings based on historical grievance would undermine transitional settlements by undoing elite buy-in and the economic order that needed to be shored up in transition. The Court's procedurally rigorous position on prior violations being excluded from the preview of judicial review was an easy way to short-circuit this difficulty. Sticking to the scrupulous view that only acts occurring after a state had become a party to the European Convention could

92 Mallinder, 'The End of Amnesty or Regional Overreach?', supra fn 3, pp 677–678:

[A]lthough there is a regional trend to limit past amnesty laws, this trend does not represent a wholesale rejection of amnesty and an embrace of penal sanctions for all instances of serious human rights violations. Instead, it represents a partial and nuanced move away from certain forms of amnesty towards more limited and conditional approaches that relate to the different roles that amnesty can play within different types of transitions.

93 On property restitution in TJ practice, see A. Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina*, School of Human Rights Research Series 25, 2008. See also, R. C. Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, International Center for Transitional Justice, 2007.

94 ECtHR, *Loizidou*, supra fn 27, Judgment, App no 40/1993/435/514, 18 December 1996.

be subject to Court review was an easy way to avoid the flood of cases that were likely to come from ‘new’ joiners, and undoing the complex bargains that had enabled political transition in many Eastern European states.

The key case in this regard is *Loizidou v Turkey*, which constitutes a significant TJ case involving property rights in Northern Cyprus. Northern Cyprus has technical autonomy but there is a relationship of administration and oversight, or effective control, by Turkey following a period of occupation that activated the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The case was based on the fact that the applicant family could not access their property in Northern Cyprus; the Court argued that this lack of access in itself constituted a breach of the ECHR. Notably, the jurisdictional challenge was that the seizure of the property occurred before Turkey joined the ECHR. The Court innovatively articulated a jurisprudence of ongoing violations, or sustaining violations.<sup>95</sup> Essentially, to paraphrase, the Court found that the loss of property is not a ‘one-off’ experience. Rather, the lack of sustained access to and enjoyment of the property constitutes an ongoing, persistent violation running from the moment the taking occurred to the present time. This argument has significant value from a TJ point of view, particularly given that this case occurred in a situation of ongoing (albeit low-level) hostilities and occupation, and the Court articulated the loss of property as a violation that is not a one-off harm, but rather a persistent and enduring loss with sustained ramifications for a person’s (and a community’s) life.

National practices of property restitution across former Soviet Bloc states have been highly variable and this variability makes jurisprudential cohesion difficult.<sup>96</sup> In countries like the Czech Republic, the reparation program was partial and restrictive. For example, the cut-off date selected for restitution excluded Jewish victims of the Nazi era, as well as 3 million ethnic Germans who were expelled from the territory shortly before the communist takeover.<sup>97</sup> In addition, a citizenship requirement excluded persons who had fled and, as traitors, had their property confiscated. A cogent feature of the Czech property restitution claims was that the claims were ‘old’; nationalization and punitive confiscation, as well as the claims of Jewish and Sudeten Germans, ran to fifty years, rendering quite extraordinary the temporal challenges and placing a large portion of Czech restitution claims in the ‘intergenerational’ redress framework rather than in conventional TJ

95 See, e.g., ECtHR, *Makuc and Others v Slovenia*, Written Comments of the Equal Rights Trust, App no 26828/06, 15 October 2007, §4:

Irrespective of the date of entry into force of the European Convention of Human Rights... for member states the concept of continuing violations of Convention rights is clearly well established in the jurisprudence of the Court. The Court and Convention organs have recognized this concept to mean “violations which started prior to the critical date and which will continue.” In effect this enables the Court to consider the ongoing violations of rights which commenced at a time prior to (a) the application of the Convention for the member state; or (b) a point in which the Court had the jurisdictional competence to do so. (Internal citations omitted.)

96 A. Gelpert, ‘The Law and Politics of Reprivatization in East-Central Europe: A Comparison’, 14 *University of Pennsylvania Journal of International Business Law* (1993) 325.

97 R. Hochstein, ‘Jewish Property Restitution in the Czech Republic’, 19 *Boston College International and Comparative Law Review* (1996) 434.

restitution.<sup>98</sup> This concept encapsulates the idea that harm is not just experienced by individuals; there are also collective and generational harms that necessitate acknowledgement. In the context of property loss, this notion captures the idea that property moves generationally, passed on from one generation to another. Property confiscation not only takes something away from the individual who owns it at the time but denies future generations that asset too. In terms of implementation, the Czech Republic applied a highly decentralized process of review and decision making, with a corresponding lack of coherence and national standard setting.<sup>99</sup> These longitudinal claims directly bounced against the presumption in the Court’s jurisdictional rules that it can only address complaints that took place after the state acceded to the ECHR. This rule of jurisdiction, *ratione temporis*, meant that any challenges were formally only accepted after the 1992 accession of the state to the Convention. The Court has stuck to this rule rigidly in the Czech context.<sup>100</sup> Despite the opening to continuous violation in *Loizidou*, the Court’s hesitancy may be explained by a couple of factors. Notwithstanding its limitations, the Czech government had embarked on a sizeable program of restitution and the Court had a limited desire to actively meddle in a large-scale administrative program. Moreover, unlike Cyprus’ occupation stalemate, when Czech litigation was taking place there was an active transitional process in play, and the Court sought to avoid entanglement in one segment of a grander political mosaic<sup>101</sup>.

The complexity of the restitution terrain is further complicated by post-conflict cases involving property restitution, such as property claims in transitional Bosnia. Here, national standard setting and implementation was complimented by wide-ranging norm setting added to the enforcement power of international oversight entities. In Bosnia, displacement was a key conflict resolution issue, with over 2 million persons displaced by the war, and the ebbing patience of European host countries spurring the resolution matrix. As a result, implementation was focused, and was in relative terms speedy with over 200,000 homes being returned

98 J. Steinberg, ‘Reflections on Intergenerational Justice’, in A. Henkin (ed) *The Legacy of Abuse: Confronting the Past, Facing the Future*, The Aspen Institute, 2002, p 71. Note the relevance of Steinberg’s continuum of transitional and intergenerational justice here.

99 Williams, *The Contemporary Right to Property Restitution*, supra fn 93.

100 See, ECtHR, *Malhous v The Czech Republic*, Grand Chamber, Decision as to the Admissibility of App no 33071/96, 13 December 2000, p 16:

In the present case, the property of the applicant’s father was expropriated in June 1949 ... long before 18 March 1992, the date of the entry into force of the Convention with regard to the Czech Republic ... Therefore, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date. In this regard, the Court refers to and confirms ... established case-law according to which deprivation of ownership ... is in principle an instantaneous act and does not produce a continuing situation of “deprivation of a right ...”

101 Importantly, challenges to the Czech programs have continued in other fora, specifically the UN Human Rights Committee (HRC). There is an interesting interplay between the HRC jurisprudence and the ECtHR holdings. The ECtHR’s decisions are deemed binding, however, and in 2002, the Court issued a decision on a claim brought by expatriates who challenged the citizenship requirement under the ECHR with explicit reliance on the HRC’s views in the case of *Simunek, Hastings, Tuzilova and Prochazka v The Czech Republic*. While the ECHR case was ultimately found inadmissible on technical grounds, the decision forced the government to articulate the grounds for its exclusion of citizens living abroad.

and almost half of those displaced having actual or economic access to the assets that had been taken. Bosnia is also that rare case of mass restitution involving a tailor-made domestic institution, the Commission for Real Property Claims of Refugees and Displaced Persons.<sup>102</sup> Critically, from an ECHR perspective, the Dayton Peace Agreement established a national Human Rights Chamber, set out as a high court to monitor Bosnia's prospective compliance with the European Convention, bringing in theory a high degree of European integration into a range of domestic treaty implementation practices. Crucially, drawing on *Loizidou*, the Chamber has found that the failure to reinstate persons in their apartments gives rise to continuous violations of the right to property and respect for home.

Initially, the Court was hesitant to move in any direction that would open the floodgates to older claims, fearing that it would then receive an unmanageable number of cases. Recently, we have seen some signs of judicial softening in this area. One approach has been for the Court to examine processes of restitution that were put in place after the state signed the ECHR and/or concurred with transition.<sup>103</sup> In this context, the Court has found that the states that agreed to restitution did so in certain ways that were procedurally inconsistent with due process rights under the ECHR. In a large number of these cases, the claims are not concerned that much with restitution in itself, but rather with the ways through which these claims were adjudicated, how individuals had access to these processes and how judicial and administrative authorities in all these states have in fact executed their obligations. So, within this line of cases one sees the Court emphasizing the importance of due process rights that are at the heart of the Convention system. This motif of due process rights as a means to safeguard a just transition has a number of advantages for the Court. First, due process rights and procedural guarantees are a hallmark of the Court's jurisprudence.<sup>104</sup> The Court has consistently felt at its most confident and comfortable in the domain of due process, and has been highly

102 R. C. Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia Herzegovina: Implications for International Standard-Setting and Practice', 37 *New York University Journal of International Law and Politics* (2006) 478.

103 See, e.g., ECtHR, *Preda and Others v Romania*, Judgment, App nos 9584/02, 33514/02, 38052/02, 25821/03, 29652/03, 3736/03, 17750/03 and 28688/04, 29 April 2014.

104 On due process rights within the ECHR: '[W]ithin the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Art 6(1) would not correspond to the aim and the purpose of that provision'. ECtHR, *Delcourt v Belgium*, Judgment, App no 2689/65, 17 January 1970. More than half of the Court's judgments finding violations between 1998 and 2008 involved Art 6 due process rights. Icelandic Human Rights Centre, 'The Right to Due Process', <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-ach-pr-iachr-echr-hrc/the-rights-to-due-process> (last accessed 16 July 2017). Case law includes ECtHR, *Cyprus v Turkey*, Judgment, App no 25781/94, 10 May 2001 (finding use of military courts to try civilians was a violation of due process rights); ECtHR, *Harutyunyan v Armenia*, Judgment, App no 36549/03, 28 June 2007 (finding use of violence and torture to extract evidence violated due process); ECtHR, *Jalloh v Germany*, Grand Chamber, Judgment, App no 54810/00, 11 July 2006 (finding forced regurgitation of evidence was a violation of freedom from self-incrimination).

innovative in this sphere.<sup>105</sup> Moreover, due process is an unobtrusive but highly effective entry point into more contentious rights issues, and has functioned as a bridgehead for the Court over many decades. The extension of due process analysis from ordinary situations to historical reckoning contexts is a less threatening move than the move that takes on issues of 'the past,' per se. Hence, the emphasis on due process is a way to ensure that when and if a state chooses to deal with the past, here in the context of property restitution, it does so in a way that affirms European Convention norms and provides continuity to the Court's oversight role.

As the short case studies on Bosnia and the Czech Republic reveal, national variances have meant that country-by-country analysis yields significantly better data on the success of restitution as a TJ measure supervised by the CoE system than does global reckoning. In this arena, there is evidence, despite the avowed rejection by the Court of dealing wholesale with property rights and restitution, that national systems operate 'in the shadow' of the Court, and have affected the procedural enforcement of national rights to remedy.

### C. VETTING AND LUSTRATION

Lustration and vetting are TJ mechanisms associated with the principle of guaranteeing non-repetition of human rights violations, and are usually linked with reform of the security sector, including the vetting of security institutions and personnel.<sup>106</sup> 'Vetting' and 'lustration' are foremost among a number of terms (including 'screening,' and 'administrative justice') used to describe processes that exclude or purge certain officials of prior regimes and other human rights violators from public office. Administrative justice is significantly bound up with the institutional reforms that increasingly accompany transitional processes. This institutional reform aspect of vetting has been mainstreamed by international organizations involved in post-conflict societies, and has been used selectively by a number of states, most notably in East Europe following the transition from communist rule.

As de Greiff has noted:

Vetting the members of security institutions can make significant contributions to transitional justice processes, which explains their abiding attractiveness despite the relative dearth of successful experiences. The challenges faced by vetting processes are significant. Vetting awakens strong political opposition; it lends itself to political manipulation; it depends upon infor-

105 Note, for example, the ways in which the Court has used due process and procedural protection as a means to address the substance of the right to life under Art 2. Here, the emphasis on proper investigations, adequate inquests, notice to next of kin and many more procedural guarantees have become the hallmark of the Court's core protection of the right to life itself. See, e.g., ECtHR, *McCann and Others v UK*, Grand Chambers, Judgment, App no 8984/91, 27 September 1995; *Jordan*, supra fn 73; ECtHR, *McKerr*, supra fn 73.

106 See Report of the UN High Commissioner for Refugees, Questions Relating to Refugees, Returnees and Displaced Persons and Humanitarian Questions, UNGA Rep A/70/483, 2 December 2015 (specifically addressing lustration and vetting in the context of guarantees of non-repetition).

mation that is not always available, especially in post conflict settings, and vetting programs are usually highly complex and resource intensive.<sup>107</sup>

Though highly significant to institutional transformation and embedding the rule of law over the long run, vetting remains below the radar in many transitional societies, and has not garnered the same level of interest as criminal accountability or truth commissions; thus, resources and international support for vetting practices remain at low levels. As a result, the importance of vetting as a mechanism to correct the partiality, selectivity and other limits of paradigmatic TJ – for instance, through a joint consideration of institutional and personnel transformation – remains to be fully realized.

Vetting and lustration practices are not entirely straightforward from a human rights perspective. Both affect due process rights in fundamental ways. The lack of well-coordinated and fair process in multiple sites, perhaps most infamously in the de-Baathification process in Iraq, is a sharp reminder of the contemporary salience and controversy that attaches to vetting.<sup>108</sup> As with the European experience of property restitution, vetting has manifested in multiple forms in European transitional societies. In addition to the role of the Court, the CoE's advisory body on constitutional issues, the European Commission for Democracy through Law, also known as the Venice Commission, which contributes to the development of democracy through opinion formation via advisory opinions and briefs, has weighed in on the lustration issue.<sup>109</sup> The ECtHR often relies on the Venice Commission's opinions and reports,<sup>110</sup> but the Commission has been criticized as having little direct influence on conditions driving any practical application of the legal norms at issue. In the context of lustration, the Commission has issued opinions on the validity and operation of lustration laws, shaping both local and regional views in the process.<sup>111</sup> Both the Commission and the Court's approaches to lustration maintain a strong emphasis on due process rights, fair balancing of individual rights and state interest as well as due deference to the kinds of political accommodations reached domestically.<sup>112</sup>

107 P. de Greiff, 'Vetting and Transitional Justice', in: P. de Greiff and Alexander Mayer-Rieckh (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Social Science Research Council, 2007, p 522.

108 S. Moore, 'Ex-Baathists Get a Break. Or Do They?' *New York Times*, 14 January 2008.

109 W. Hoffmann-Riem, 'The Venice Commission of the European Council – Standards and Impact', 25 *European Journal of International Law* 2 (2014) 579–580.

110 *Ibid.*, 585–587. The Court has referred to opinions of the Commission in over 50 cases.

111 See, e.g., in the context of Ukraine, European Commission for Democracy Through Law, Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine adopted by the Venice Commission 101st Plenary Session, CDL-AD(2014)044-e, 12–13 December 2014.

112 For example, in the case of ECtHR, *Ždanoka v Latvia*, Grand Chamber, Decision, App no 58278/00, 16 March 2006, §100. On disqualification from running as a candidate in parliamentary elections, the Court has stated: 'However, in order to respect human rights, the rule of law and democracy, lustration must strike a fair balance between "defending the democratic society on the one hand and protecting individual rights on the other."'

In general, formalized vetting is in fact quite rare, and de facto vetting is the medium most often used, giving rise to the terminology of 'soft' or 'indirect' vetting. In fact, total vetting – which would imply the complete abolishment of an institution – has not occurred in any European state: direct vetting involves evaluating the personnel of an institution and determining who should be separated from it, and indirect vetting refers to institutional reform measures that require personnel to undertake new selection procedures in the future.<sup>113</sup> Lustration has a long pedigree in the European context, including cases that stretch back decades and follow from ongoing institutional reform in the aftermath of fascist regimes.<sup>114</sup> By way of specific illustration, in the Greek transition, Sotiropoulos describes 'differentiated' vetting, in which a form of variable geometry was applied to various aspects and agents in the state apparatus.<sup>115</sup> Here, no uniform vetting was applied to all state agents; rather, issues of institutional placement and the need to maintain functional law enforcement became critical to the form of vetting applied from one institutional setting to another within the state. Facing differently situated challenges, Poland's transition from authoritarianism was marked by the need to absorb and address the up to 70,000 secret police employed by the state.<sup>116</sup> Domestic law was finally advanced in 1997, when the first lustration act was adopted, and was significantly influenced by Resolution 1096 of the Parliamentary Assembly of the CoE, which called on states to dismantle the heritage of former totalitarian states. The lustration law was notable for the range of actors it targeted including judges, lawyers, tax advisors, certified accountants, court enforcement officers, journalists, diplomats, municipal officials, university teachers, heads of public and private educational institutions, heads of state-controlled companies and members of the management and supervisory boards of companies listed on the stock exchange.<sup>117</sup> It was subject to extensive domestic critique for overreach and was challenged at the Polish constitutional court (the Constitutional Tribunal). Challenges ultimately ended up before the ECtHR, the first of which was *Matyjek v Poland*, where the ECtHR held that there had been a violation of Article 6 of the Convention based on various procedural irregularities associated with the lustration procedure.<sup>118</sup> The Court's decision emphasized the importance of procedural safeguards and due

113 These terms are deployed in R. Duthie, 'Introduction', in P. de Greiff and Alexander Mayer-Rieckh (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Social Science Research Council, 2007.

114 Such cases include, ECtHR, *Vogt v Germany*, Judgment, App no 17851/91, 26 September 1995 (no mention of the term 'lustration', but important precedent); ECtHR, *Glaser v Germany*, Judgment, App no 9228/80, 28 August 1986 (no mention of the term 'lustration', but important precedent, particularly re: vetting); ECtHR, *Kosiek v Germany*, Judgment, App no 9704/82, 28 August 1986 (no mention of the term 'lustration,' but important precedent, particularly re: vetting).

115 D. A. Sotiropoulos, 'Swift gradualism and Variable Outcomes: Vetting in Post-Authoritarian Greece', in: P. de Greiff and Alexander Mayer-Rieckh (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Social Science Research Council, 2007.

116 M. Kaj and M. Metzger, 'Justice or Revenge? The Human Rights Implications of Lustration in Poland', *Humanity in Action*, <http://www.humanityinaction.org/knowledgebase/165-justice-or-revenge-the-human-rights-implications-of-lustration-in-poland> (last accessed 17 July 2017).

117 *Ibid.*

118 The applicant had been stripped of their parliamentary mandate and deprived of the right to engage in various public official activities for a period of 10 years.

process rights, and in particular the principle of equality of arms between state criminal proceedings and the rights of the accused. Subsequent cases (listed below) have concentrated on the same motif. The Court has maintained the validity of lustration as an appropriate measure to confront human rights violations by officials during prior regimes. However, it insists that there can be no compromise on core protections for individual rights. The core requirements include first, that lustration laws have to be accessible and foreseeable. Second, lustration proceedings cannot exclusively serve the purpose of punishment or revenge. Rather, some broader social or communal goods must be implicated. Third, a domestic law providing for the restriction of Convention rights must be sufficiently precise to determine the individual responsibility of the person identified and must contain procedural guarantees. Finally, national systems have been reminded that lustration laws are temporary in nature and the necessity of restricting individual rights naturally diminishes over time.<sup>119</sup>

**Table 1: ECtHR Cases Addressing Lustration and Vetting**

#### POLAND

<i>Joanna Szulc v Poland</i>	13 November 2012	Case no 43932/08 [Fourth Section]
<i>Moscicki v Poland</i>	14 June 2011	Case no 52443/07 [Fourth Section]
<i>Zawisza v Poland</i>	31 May 2011	Case no 37293/09 [Fourth Section]
<i>Zablocki v Poland</i>	31 May 2011	Case no 10104/08 [Fourth Section]
<i>Kwiatkowski v Poland</i>	19 April 2011	Case no 24254/05 [Fourth Section]
<i>Moczulski v Poland</i>	19 April 2011	Case no 49974/08 [Fourth Section]
<i>Gorny v Poland</i>	8 June 2010	Case no 50399/07 [Fourth Section]
<i>Rasmussen v Poland</i>	28 April 2009	Case no 38886/05 [Fourth Section]
<i>Jalowiecki v Poland</i>	17 February 2009	Case no 34030/07 [Fourth Section]
<i>Luboch v Poland</i>	15 January 2008	Case no 37469/05 [Fourth Section]
<i>Bobek v Poland</i>	17 July 2007	Case no 68761/01 [Second Section]
<i>Matyjek v Poland</i>	24 April 2007	Case no 38184/03 [Fourth Section]
<i>See also Matyjek decision as to admissibility of application</i>	30 May 2006	

#### SLOVAKIA

<i>Turek v Slovakia</i>	14 Feb 2006	Case no 57986/00 [Fourth Section]
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#### MOLDOVA

<i>Petrenco v Moldova</i>	30 March 2010	Case no 20928/05 [brief discussion of lustration principles; see Joining Concurring Opinion of Judges Garlicki, Sikuta and Poalelungi]
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#### LATVIA

<i>Ādamsons v Latvia</i>	24 June 2008	Case no 3669/03 [Third Section] [FRENCH, press release in ENGLISH]
<i>Ždanoka v Latvia</i>	16 March 2006	Case no 58278/00 [GC]

#### LITHUANIA

<i>Rainys and Gasparavicius v Lithuania</i>	7 April 2005	Case nos 70665/01 and 74345/01 [Third Section]
<i>Sidabras and Dziautas v Lithuania</i>	27 July 2004	Case nos 55480/00 and 59330/00 [Second Section]

#### ESTONIA

<i>Soro v Estonia</i>	3 September 2015	Case no 22588/08 [First Section]
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<sup>119</sup> These principles are set out in ECtHR, *Ādamsons v Latvia*, Judgment, App no 3669/03, 24 June 2008.

## 6. A TRANSITIONAL REGIME WITHIN THE CONFINES OF THE CONVENTION

**As with all human rights treaties, with the exception of the African system, Article 15 of the ECHR provides for a derogation regime. Derogation is the lawful right of a state under a treaty to limit the full application of certain rights, in case of emergency or crisis (and war).**

The derogation provision exists because states are rational, self-interested actors, whose self-interest demands that they do not sign or ratify treaties that do not work for them. Thus, the derogation system is a state-oriented, state-based mechanism that states utilize as they recognize that there will always be times when they cannot enforce rights to the full extent.<sup>120</sup> Importantly, as I have noted in other work, the derogation regime has substantial similarities to transitional regimes.<sup>121</sup> This is, in part, because the law is exceptional in both these types of regimes. Both systems make compromises on the full and generalized application of legal rules in response to a political recognition of an unusual or particularly challenging set of circumstances. Both derogation and transition constitute exceptional regimes, and I have mapped some of the overlaps between ECtHR derogation jurisprudence and its approach to transitional issues.

Moreover, derogation regimes frequently apply when states experience hostilities. These situations of inter-state or internal armed conflict give rise to the parallel application of the law of armed conflict in tandem with international human rights law. In situations of derogation, we understand the application of human rights norms as qualified and part of a derogation or emergency.

There are, however, qualifications to be made to my general claims about overlap between the specialized regime of derogation and the wholesale application of TJ. First, it is important to bear in mind that the Convention remains consistently a treaty document focused on individual rights. The European Convention has rarely addressed in broad terms group or mass claims of violation (though individual violation often stands as emblematic of such patterns). I have argued elsewhere that this is one of the weaknesses of the European Convention system and is particularly a weakness of the ECHR in relation to mass atrocities and to patterns of

120 O. Gross and F. Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge University Press, 2005.

121 F. Ni Aoláin, 'Transitional Emergency Jurisprudence in Transitional Jurisprudence and the ECHR', in A. Buyse and M. Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge University Press, 2011.

systematic violations.<sup>122</sup> These are precisely the kinds of violations that are essentially the most relevant to our discussion of TJ. Second, derogation is a particular legal structure focused on national security exceptionalism. While TJ can be described as exceptional justice,<sup>123</sup> the meaning of exceptionalism is quite different in both contexts.

Reflecting on the limitations of the Convention as an individually focused system of inquiry, a key challenge also faced in derogation cases that come before the Court is that each case comes on its own merits and must be reviewed *de novo*; the issue is analysed for the first time, and the violation before the Court is examined as if it has never been seen before.<sup>124</sup> A pertinent example in this context is the use of lethal force in Northern Ireland.<sup>125</sup> For two decades, a series of cases made their way from the courts in Northern Ireland to the ECtHR in Strasbourg. Coming one by one, these cases overwhelmingly had fact patterns in which individuals had been killed by members of the security forces or the police in 'suspicious circumstances'.<sup>126</sup> In many of these cases (though not all), the Court found a violation of Article 2 of the Convention, which sets out the requirement that member states protect the right to life. Arguably, however, something was lost in the individuation, not least the broader claims that a pattern in the use of force could be discerned over the course of the conflict and that this pattern was intimately and directly connected to the nature and form of the state's active engagement in the conflict.<sup>127</sup> In parallel and more recently, we are seeing a plethora of cases emanating from Russia's engagement, including claims of systematic extrajudicial execution, sustained torture, deprivation of due process and lack of access to justice, bloodying the ECHR system. These systemic problems of course move us into a territory that is familiar to TJ, where it is precisely the systematic and cohesive nature of the violations that demonstrate the need for transition. One of the challenges of individually focused human rights treaties, like the ECHR, is simply that by virtue of its architecture, and the reality of a certain judicial rigidity, one loses the systematic patterns and

122 Ni Aoláin, *The Politics of Force*, supra fn 44, pp 101-142; O. Gross, "'Once More Unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', 23 *Yale Journal of International Law* (1998) 437.

123 D. Venema, 'Transitions as States of Exception: Towards a More General Theory of Transitional Justice', in N. Palmer, P. Clark and D. Granville, *Critical Perspectives in Transitional Justice*, Intersentia, 2012, p 73.

124 D. Shelton, 'Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights', 16 *Human Rights Law Review* 2 (2016) 303, 321.

The pilot judgment procedure has helped in a few instances to conclude large numbers of cases and Court recommendations under the Art 46 heading in its judgments may also serve to address repetitive cases, but the real problem is a lack of political will to ensure enforcement of judgments and the changing nature and growing number of violations... [d]isadvantaging applicants by limiting access to the Court does not resolve any of these problems', 321.

125 F. Ni Aoláin, 'The Evolving Jurisprudence of the European Convention Concerning the Right to Life', 19 *Netherlands Quarterly of Human Rights (NQHR)* (2001) 21.

126 E Comm. HR, *Stewart v United Kingdom*, Decision, App no 10044/82, 10 July 1984 (finding discharge of soldier's weapon and use of plastic bullet that killed a boy was lawful to quell a riot under Art 2(2) of the Convention). ECtHR, *McCann and Others v UK*, Grand Chambers, Judgment, App no 8984/91, 27 September 1995; ECtHR, *Kelly and Others v United Kingdom*, Judgment, App no 37715/97, 4 May 2001.

127 Ni Aoláin, 'The Emergence of Diversity', supra fn 32.

the Court does not call out the mass scale of violations, including the systematic features of the problem. Here, we see the same hesitancy as in the territory of TJ, a terrain that is defined by mass atrocity and systematic violations of human rights.

One might also observe that TJ practice is increasingly encountering the individualisation problem. The emphasis both internally and externally is on international criminal justice, combined with a sustained focus on impunity. This has tightened claims for individual justice more sharply in recent years, with a focus on investigation, prosecution and punishment.<sup>128</sup> Increasingly, victims and those who represent them expect that TJ will deliver individual criminal accountability, and many argue forcefully that justice equates with and implicates attached criminal responsibility. In many societies, the likelihood of scalar criminal justice is meagre, though the capacity for a small number of individual cases to be processed in the aftermath of atrocity crimes is real. Limited criminal accountability follows from the forceful realities of the passage of time, the dearth of evidence, the failures of memory sufficient to prove criminal process of responsibility and the application of full due process rights to any accused person making shortcuts unlikely. As a result, we have seen an emerging emphasis in critical TJ theory and practice on transformative justice, highlighting structures, patterns and broad issues of responsibility and liability, rather than a narrow focus on criminal acts.<sup>129</sup>

For the European Convention, ongoing and new conflicts and fracturing – for example, Turkey, Ukraine and Crimea – mean that the tensions and claims of TJ are not going away. In the contemporary moment, it remains important that the Convention continues to provide a guaranteed pathway for individual claims and that individual rights can be redeemed under the CoE system. At the heart of claims to TJ is a notion of victim-centred justice, with legal processes responding to needs and harms experienced at the micro level. The ECHR continues to provide a salient pathway for individuals to access justice in a way that affirms the value of the individual, and the importance of each singular violation. Nonetheless, systematic violations demand systematic responses and recognition. It is increasingly true that piecemeal acknowledgment is unsatisfactory and in some cases serves to occlude the true scale and form of human rights violations, rather than reveal them. Thus, the Court has an important balance to strike as it maintains a strong and robust tradition of individual rights protection while simultaneously developing a language and jurisprudence of systematic and structured violation.

<sup>128</sup> See Special Issue: The Role of International Criminal Justice in Transitional Justice, 7 *International Journal of Transitional Justice* 3 (2013).

<sup>129</sup> Gready and Robbins, 'From Transitional to Transformative Justice', supra fn 7.

## 7. THE COMPLEX ROLE OF THE COURT IN MODERATING TRANSITIONAL 'DEALS'

**Indisputably, the scope and scale of TJ practice is growing. TJ practice in multiple conflict and post-conflict sites includes defining the terrain of peace-process negotiations, security-sector reform, lustration and vetting, constitution writing, rule of law reform, post-conflict reconstruction and governance.**

The expansion of the TJ domain has coincided with the deployment of TJ mechanisms as a salve or solution to the contemporary plague of cyclical and entrenched conflict.<sup>130</sup> This has been no less true in Europe than it has been elsewhere, and the ECtHR finds itself to be one of the arbitrators of the 'deals' made.

One of the most challenging TJ dilemmas adjudicated by the Court has resulted from its de facto oversight role in overseeing regional peace agreements whose outworkings have ended up on the Court's docket. In both Bosnia and Northern Ireland, the Court performs a sustained and intersectional role in adjudicating the human rights components of the peace deals. These deals hew particularly to power-sharing and consociationalism type arrangements, which are intended to deal with the political fracturing that has both produced and followed systematic atrocity. While these peace agreements have generally been lauded for ending violence, there is a dark side to governance arrangements in post-conflict settings with implications for human rights protections, specifically in terms of compliance with the established norms of the European Convention.

Bosnia is one cogent example of a Frankenstein form of state emerging from transitional settlement in which consociationalism and power-sharing play a central role. It illustrates some of the most cogent examples of the limitations of transitional deal-making, and significant problems in human rights compliance.<sup>131</sup> In a couple of important and high-profile cases, including *Sejdic and Finci v Bosnia and Herzegovina*,<sup>132</sup> the Court addressed the issue of a post-conflict power-sharing system and its compatibility with equality norms contained within the Convention. The power-sharing system was a complicated set of arrangements that included bi-

<sup>130</sup> T. O. Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field', in S. Buckley-Zistel, T. Koloma Beck, C. Braun and F. Mieth (eds), *Transitional Justice Theories*, Routledge, 2014, p 105.

<sup>131</sup> K. Brown and F. Ni Aoláin, 'Through the Looking Glass: Transitional Justice Futures Through the Lens of Nationalism, Feminism and Transformative Change', 9 *International Journal of Transitional Justice* 1 (2015) 127.

<sup>132</sup> ECtHR, *Sejdic and Finci v Bosnia and Herzegovina*, Grand Chamber, Judgment, App nos 27996/06 and 34836/06, 22 December 2009.

cameral legislature and a tripartite presidency. The mechanism required self-identification by candidates as one of the constituent peoples in Bosnia to ensure broader political buy-in of particular political constituencies, and thus be eligible for electoral participation. If a person self-identified as anything other than one of the three constituent peoples, they were excluded from some of the power-sharing arrangements. The case raised issues under Protocols 1 to 3, Article 14 and Protocol 12. The Court's decision ultimately came under Protocol 12, and it treated the matter as one of straightforward discrimination on racial grounds, 'a particularly egregious kind of discrimination' which required 'special vigilance and a vigorous reaction' from the authorities.<sup>133</sup> In this case, the judges – concerned about the way in which the arrangements conflicted with Convention norms – felt it appropriate to 'undo' a key element of the Balkan peace deal. Only one judge (the Maltese judge) dissented, arguing forcefully that there was no judicial mandate to meddle with peace agreements. He was clearly of the view that judicial tampering with the political process, which in his view was still fragile, would be a catastrophe for the integrity of the deal.<sup>134</sup>

The Court extended its position more recently in the case of *Zornić v Bosnia and Herzegovina*. Here, the applicant declined to identify as a member of any group, but identified herself as a citizen of Bosnia and Herzegovina, which had the effect of mandating her exclusion from electoral politics.<sup>135</sup> The Court found that there was no justification for this mechanism 18 years after the end of the Balkan conflict, and found the exclusion incompatible with the Convention.<sup>136</sup> Both of these cases raise very complex issues about the role of the Court more broadly in arbitrating peace negotiations, and 'unpicking' deals, even a decade plus after they have been concluded.<sup>137</sup> On the one hand, there is a tangible sense that prima facie discrimination in administrative and representational politics in post-conflict societies is incompatible with our notion of 'liberal' peace, and that it goes against the potential for multi-ethnic and social support of a diversity of identities to thrive in the aftermath of a sustained conflict. However, there is serious discomfort with courts (even well-intended courts) inserting themselves into the fulcrum of political agreements, particularly when the provisions of such 'deals' are densely connected, and undoing one thread can unmake the garment. Sweeney has argued that there should be a space for 'transitional relativism',<sup>138</sup> giving states emerging and being remade in the aftermath of atrocity a breathing space, and in that realm one ought to forgo some of the absolutes that define the review and oversight of consolidated democracies. In some sense, this argument harkens back to the core

133 Ibid, §43.

134 His language was particularly forceful, describing the Court's decision as 'an exercise in star-struck mirage building which neglects to factor in the rivers of blood that fertilized the Dayton constitution'. §54

135 ECtHR, *Zornić v Bosnia and Herzegovina*, Judgment, App no 3681/06, 15 July 2014.

136 Ibid, §43.

137 See C. McCrudden and B. O'Leary, 'Courts and Consociations, or How Human Rights Courts May Destabilize Power-Sharing Settlements', 24 *European Journal of International Law* 2 (2013) 477.

138 J. A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, Routledge, 2013.

imagery that illuminates the field of TJ, namely that justice in transition occupies an exceptional space shaped by compromises that are being made precisely as one undertakes transition. Sweeney's argument precisely extends the justice claims one further logical step to the ways in which the international legal (and justice) order treats such states as they become part of the international establishment.

The argument is attractive and should give pause to over-zealous judicial meddling, but I close with caution. A persistent challenge for the field of TJ is to define its beginning and end points. Transition, as per its etymology, implies a journey, a beginning and an end. This matter of start and finish is not merely academic, precisely because it implicates practical questions of standards, oversight, legitimacy and compliance. There is some general consensus in the literature that the inception of transition demands compromise and accommodation for newly minted (or reordered) states as they move away definitively from atrocity, violence and harm. But the tipping point to greater oversight and a lull in that compromise has never been well-defined. How do we know? One stage at which we know a tipping point has been reached, I would argue, is when states have the capacity to apply for and meet the criteria of membership for a regional human rights organization such as the CoE. This would suggest that an even keel has been established, and that there is confidence in and capacity for the rule of law at a domestic level. In these circumstances, which are to be differentiated from the tempestuous post-conflict period or the fragile shift from authoritarian governance to unsure democracy, demands can be made and better practice can be expected of the state. Moreover, external systems (like an echo chamber) are precisely powerful and relevant because they provide the bulwark against backsliding, a perennial problem in transitional states. European supervision is important because successful transition is not guaranteed, because the rule of law does not have deep roots in many post-conflict and post-authoritarian societies, and because the state may need to be reminded that there are persistent costs in disregarding human rights, or failing to account for human rights norms in transitional legal processes. This more robust view of the European Court's capacity encourages judicial engagement and innovation, as needed, to grow relevant jurisprudence as applied to and engaged with TJ, and to remain deeply engaged with transitional norms and practices in CoE Member States that deploy them.



## 8. CONCLUSION

**The ECHR is not a system or a jurisprudence marked by a preoccupation with group or minority rights, nor is its jurisprudence generally noted for confronting situations of gross and systematic violations of rights.<sup>139</sup>**

A number of commentators have remarked upon the limited capacity of the European system to confront mass violations of human rights.<sup>140</sup> If we acknowledge that the European human rights order has struggled to gain institutional capacity in confronting massive human rights violations, premised not only on individual denials of rights, but also upon destructive policies aimed at groups, we better grasp the scale of the institutional challenges. In this regard, Bosnia, Russia and Ukraine will continue to be testing grounds for the relevance and the capacity of the system to confront systematic atrocity. The European Convention has yet to learn a language for systematic violations and must evolve mechanisms or modify its current tools (pilot judgments), either through the adjustment of individual rights or through the creative absorption of group issues into the individual rights prism, in order to confront the kinds of violations that have taken place in post-conflict and transition sites adequately.<sup>141</sup> There should be no expectations that the Court has tailor-made solutions to the scale and type of human rights violations that take place during wars, ethnic cleansing, occupation and genocide.

Positively, the use of the Convention in Bosnia, Northern Ireland, Turkey and Ukraine may set a new and innovative course for the European system in its dealings with the hard issues of group identity in divided societies and the appropriate remedies necessary to confront gross violations of rights. These are the kinds of issues that continue to lie ahead for the Convention as it addresses the ongoing chal-

<sup>139</sup> See Gross, "Once More unto the Breach", supra fn 122, 500–508 for a discussion on the Inter-American Human Rights system. The AmCHR was born out of the experience of the hemisphere. See D. L. Shelton, 'The Inter-American System for the Protection of Human Rights: Emergent Norms', in I. Cotler and F. Pearl Eliadis (eds), *International Human Rights Law: Theory and Practice*, Canadian Human Rights Foundation, 1992, p 369. The AmCHR was adopted in 1969, see American Convention on Human Rights 'Pact of San Jose, Costa Rica', 22 November 1969, Art 693. The IACTHR was formally instituted in 1979, and consists of 7 judges elected by State Parties to the Convention. AmCHR 'Pact of San Jose, Costa Rica', Arts 52, 53. As I have previously pointed out: "... it should be pointed out that the Inter-American Commission, as a body of the O.A.S. Charter, has functioned reasonably well in its dealings with situations of gross and systematic violations of human rights occurring in the territory of Member States'. Ní Aoláin, *The Politics of Force*, supra fn 44, p 131.

<sup>140</sup> See A. Reidy, F. Hampson and K. Boyle, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey', 15 *NQHR* (1997) 161. See also, M. T. Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?', 12 *NQHR* 2 (1994) 153 (commenting on the disappointing experience of the Convention in its supervision of gross and systematic violations of human rights).

<sup>141</sup> The struggle for this language and an adequate response to systematic violations are not unique. The European Court and Commission have been historically plagued by these issues, particularly in respect of human rights violations in Turkey. One response by the Court has been to place a greater emphasis on the implementation of Art 13 of the Convention in the domestic context.

lenges of Russian, Turkish and Ukrainian human rights violations.<sup>142</sup> For these sites, it should be evident that there is no panacea to confront the human rights violations of these countries, past and present. The Convention is a tool giving concrete language to human rights claims in the domestic sphere, but one that needs adjustment and creative expansion if it is to come to meet the expectations that have been set for it. Equally important to grasp is the reality that notwithstanding the impressive importation of rights and freedoms from international human rights law, they cannot by themselves undo the damaging effects of the establishment of political entities with single or dominant ethnicities or transitional states when ethnicity-based politics is consolidated by consociational political regimes, entrenched and systematic violence, and the destruction of the infrastructure and functionality of the rule of law.

The ECHR was born out of atrocity, but also armed conflict. If we look at the preamble of the ECHR, although people might not think of it as a TJ instrument, we see a very specific acknowledgement of the past. The ECHR places itself at the point of understanding that what commits states to do these things – to protect the enumerated human rights in the treaty – is the acknowledgement that in some sense they failed and that there has been a betrayal of their most cherished values. Equally, the ECHR is very much a forward-looking document. The forward-facing dimension of the Convention affirms its capacity to address and confront new (and cyclical) challenges and to maintain its relevance to the contemporary moment. In the contemporary European context, there can be little doubt that this means robust and consistent engagement with the legal and political terrain of TJ.

<sup>142</sup> On the issues related to Russia's accession to the Council of Europe, see B. Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes', 6 *European Human Rights Law Review* (EHRLR) (1997) 628. Bowring raises the early concern that Russia's non-compliance with the Convention will have major consequences for the legitimacy of the CoE. R. Ryssdall also pinpoints concerns about the expansion of the Council, which has implications for the capacity, effectiveness and relevance of the Convention in transitional settings. He states:

...the Convention community will be exposed to new influences and traditions. It is no secret that despite the best efforts of these states their legal traditions are not yet in a position to meet the standards required by the Convention. When the Convention was drafted, the rights selected for protection... were presumed to be already guaranteed in the legal order of those states. The Convention was thus based on already existing constitutional rights. For many of the new Member States the situation has been inverted; their new constitutions, in so far as they concern human rights, have often drawn heavily on the Convention.

See R. Ryssdall, 'The Coming of Age of the European Convention on Human Rights', 1 *EHRLR* (1996) 26–27. See also, S. Marks, 'The European Convention on Human Rights and its "Democratic Society"', 66 *The British Yearbook of International Law* 1 (1996) 209 (commenting on the relationship between democracy and rights in the Convention).

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