Part V

Transitional Justice and Justice Innovations: Lessons from the Global South

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Criminology, Peacebuilding and Transitional Justice: Lessons from the Global South

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Northern Peacebuilding and Transitional Justice as Captured Theory

Raewyn Connell's (2007) critique of North Atlantic social science and embrace of *Southern Theory* denote a division of labor whereby North Atlantic sponsors are lead theorists of a discipline. The job of scholars of the global South is then to apply or test those theories in a Southern society. At best, in this division of labor they can tweak theories from the metropoles into Southern relevance. In this North-South complex, theorists of the South who develop Southern theory from inductive reflection on Southern experience are largely ignored.

One might have hoped that the rise of peacebuilding and transitional justice research communities would be opportunities to reverse this dynamic. Because most recent transitions from war to peace have been of Southern societies, here is a special opportunity for privileging Southern theory. Instead we have seen a templating of Northern thought in peacebuilding and transitional justice. The most influential peacebuilding doctrines have been authored in New York by networks of predominantly Northern thinkers inside the United Nations (UN), in think tanks and universities around it and in nearby Northern cities. While the International Criminal Court is located in another

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Northern capital, The Hague, New York is the home of the International Center for Transitional Justice and much of the UN and academic thinking about transitional justice.

Yet there is limited debate around the injustice of the United States (US) not being subject to the International Criminal Court (while most Southern states are) or around whether it is correct to conceive leaders such as Barack Obama, Hilary Clinton or George Bush as war criminals concerning their conduct in theaters like Afghanistan, Pakistan, Iraq and Libya. This of course is not just a reality of this century. US prosecutors sponsored by their state laid the foundations of international criminal law at Nuremberg and the Tokyo war crimes trials. But there has been consistent silence about the failure to prosecute any American soldier or any allied soldier for rape of German women in 1945 when the number of German women raped by allied troops (mostly by Russian troops, but many American rapes too) exceeded 200,000. Lilly (2007) has written a revealing book on this subject, which has two cites in Google Scholar; Lilly had great difficulty in finding an interested publisher in English. Disinterest in applying a war crime frame to the firebombing of Dresden or Tokyo or to the nuclear targeting of the civilians of Hiroshima and Nagasaki is also stark.

Northern theory of transitional justice is, therefore, complicit in the cover-up of insidious forms of Northern crime. The cybercrimes of Chelsea Manning, Edward Snowden and the Russian hacking of Hillary Clinton's emails have their negative sides, but they do help expose the complicity of Northern transitional 'justice' and 'peacebuilding'. A shocking example was the stories, that we now know were fabricated, and that seemed so implausible at the time, that Libya's Muammar Gaddafi had issued Viagra to his troops in 2011 to fire them up to rape innocent civilians. The US made these allegations in a meeting of the UN Security Council in 2011 as it urged indictment of Gaddafi for the crime of using rape as a weapon of war and urged peace enforcement to honor the UN's 'Responsibility to Protect' civilians. The Chief Prosecutor of the International Criminal Court dutifully announced that there was evidence that Gaddafi seemed to be responsible for ordering rape in war (The Hague Justice Portal 2011; Cockburn 2011), launching an investigation into the matter. That investigation, the investigation of United Nations mission to Libya, of Amnesty and Human Rights Watch all found no evidence of this and indeed concluded that there was unusually little rape by Gaddafi's forces during the 2011 war (Braithwaite and Rashed 2014). More women were raped in Australia during this period than in Libya. Gaddafi himself was raped by a metal object before he was murdered to give him some of what he inflicted on the women of Libya. While video of Gaddafi's rape was available to all Western media, most chose not to report even a rape

allegation let alone show video evidence of the fact of the rape. One can understand suppression of sadistic images of Gaddafi's bloodied anus. Harder to excuse is the suppression of serious discussion of the rape by a Western media that preferred to focus on Hilary Clinton's jocular response to the fact that Gaddafi was killed in the process of his capture.

My concern is not that the North Atlantic Treaty Organization (NATO) states and their fawning media organizations suppressed the rape of Gaddafi in favor of a gilded narrative of good defeating evil, democracy's triumph over tyranny, NATO honoring its Responsibility to Protect. Why would one expect them to do otherwise? My critique is that the transitional justice industry did not focus on the matter. This was not a minor case; it was the international criminal law case du jour in 2011. Not only did the International Criminal Court (ICC) Chief Prosecutor fail to apologize to the Gaddafi family for falsely accusing him of the crime of using rape as a weapon of war as a knee-jerk to reckless US propaganda, only to see him become a victim of that same crime, the voluminous Northern transitional justice literature quiescently failed to debate this failure. No one discussed whether some legal action should be taken against a Western intelligence agent (French) who was almost certainly the person who fatally shot Gaddafi. Some defended the Frenchman when I was in Libya, saying he did a humane thing by ending Gaddafi's traumatization by his captors. Others said French intelligence did not want Gaddafi taken alive because he would talk about deals he had done with President Sarkozy before the rise of the Arab Spring that allegedly included a 50 million Euro donation in a suitcase of cash for Sarkozy's successful 2007 presidential campaign (Willsher 2016). Again, the target of my critique here is not the French state but the transitional justice academy for its failure to critique an extremely high-profile case of the ICC. The ICC injustice to Muammar Gaddafi is part of a wider structural injustice of a UN system captured by the NATO powers and served by a subservient transitional justice scholarly discourse. That structural injustice was about the US, Britain and France riding roughshod over African leaders who at the behest of the African Union believed they had convinced Gaddafi to engage with a peaceful surrender of power and transition to genuine democracy (De Waal 2013). The US, United Kingdom (UK) and France also conspired to ride roughshod over the BRICS (Brazil, Russia, India, China and South Africa) as well as the lead African states and Germany who were emphatic that a NATO air strike to turn back the Libyan armored column marching toward Benghazi to protect civilians should be followed by a peace process rather than a war of regime change. In other words, the Northern theory of the Responsibility to Protect that was crafted in New York was appropriated by the US, the UK and France

in its first moment of determined application to a crisis to ride roughshod over the global South.

Northern feminist theory was also appropriated in the Libyan case by willfully misconstruing the facts on the ground in Libya to make it resonate with a rape-as-weapon-of-war narrative. This was a Hillary Clinton version of Laura Bush's co-optation of feminism to justify the invasion of Afghanistan to protect Afghan women from domination under the veil and denial of education. This Northern narrative failed to discuss how Afghan women experienced much more progress under the communism militarily opposed by the West at the cost of a million Afghan lives and that the progress toward women's liberation under the NATO-backed regime has been so limited that by 2014 Afghanistan was ranked 101st out of 102 countries on the Organisation for Economic Co-operation and Development Development Centre's Social Institutions and Gender Index (SIGI 2016).

Northern feminist theory is a good thing; so is a Responsibility to Protect civilians; transitional justice and peacebuilding theory have a core of good intentions and sound insights. But as Northern theoretical traditions, these doctrines have allowed themselves to be co-opted by Northern projects of domination of the global South. Worse, when Hillary Clinton laughed at the murder of Gaddafi, why did Northern feminist theorists not feel the imperative to forcefully articulate 'not in our name'? In fairness, most Northern feminists did say this about the 2003 invasion of Iraq, resisting regime change there in a way that they did not in Libya and did not push back against Laura Bush's co-optation of feminism to exploit the need for the war NATO 'had to have' in Afghanistan. Northern peacebuilding scholars were woeful at the time of the invasion of Afghanistan, failing to discuss alternative paths to ending terrorism without a military invasion of Afghanistan, with rare exceptions like Nils Christie (2010).

One challenge for preventing co-optation by Northern power politics is intellectual leadership that forces Northern theory to be more infused with Southern leadership from the moments of its invention. Hence a worthy objective considered in this article, following Connell (2007) and Carrington et al. (2015), is how to make Northern theory more Southern. First, however, we consider some limits of Southern criminology.

Making Southern Criminology Less Criminological

Criminology is like other disciplines in being an invention of North Atlantic universities. Northern criminology invented some useful and progressive things in its early centuries that were then used to excess. The invention of the

penitentiary as a humane alternative to capital punishment, corporal punishment or banishment illustrates this. Advocates of the penitentiary, such as Bentham and de Tocqueville, failed to listen to Australian voices who correctly argued in the nineteenth century that transportation in the particular colonial context of Australia was a more humane and reintegrative option, indeed a 'restorative' one as Governor Macquarie put it (Braithwaite 2001), than confinement in English prisons. It was more restorative for the convicts, though not for the traditional owners of the continent. Imprisonment became the standard response to serious crime instead of an exceptional response for circumstances where the community needed protection from a danger.

The invention of criminal law itself had good effects in distinguishing criminal harms as the only kinds of harms that could justify imprisonment or execution, thus putting some limits on tyrants who aspired to rid society of anyone they regarded as harmful. With corporate crime, it was particularly valuable for business regulators to be able to say that corporate reform was needed because the behavior that caused catastrophes like the global financial crisis was not just harmful, but criminal. Criminal law acquired normative power as an institution. The biggest contribution of criminal courts was in helping to reduce homicide rates progressively and dramatically in Europe from about the fifteenth century by giving victims of violence an alternative to a blood feud with the family of the offender (Eisner 2003; Broadhurst et al. 2015; Cooney 1997; Pinker 2011; Spierenburg 2013).

For all this progressive content, the punitive prescriptions of Northern criminological theories such as deterrence theory and Northern jurisprudence made for excess when applied in the North, and even more excess in application to the global South. Restorative justice became a helpful corrective social movement in respect of the historical error of expanding carceral archipelagos (Foucault 1977). It draws so much of its inspiration from the South—from old Polynesian theories of dispute resolution, from Confucian, Buddhist, Hindu, Islamic and pre-Islamic traditions for responding to theft and violence (Zhang and Braithwaite 2017; Braithwaite 2017). Some still write of restorative justice as a North American invention; some Northern universities scramble to recruit fee-paying Southern students to sit in their criminology courses while refusing to learn anything relevant to Northern circumstances from Southern restorative justice. But for the most part restorative justice has allowed a limited degree of Southern analysis to influence Northern theory. One path to criminological reform is interrogation of fields where Southern philosophies of justice have been given at least some degree of voice and restorative justice is certainly one of those.

Philosophically, some of us have argued for a restorative justice that is motivated by a republican political theory that Philip Pettit (1997) has correctly

associated with origins in the Roman republic (Skinner 1998; Pocock 2009). That conceded, I have nevertheless been concerned to find incipient pre-Roman origins, particularly of republicanism's conception of a rule of a law that constrains the powerful (especially the ruler) and its restorative justice components before and during the Persian Empire and in the influence of Confucius on ancient Chinese empires (Braithwaite 2017). Moreover, Zhang and Braithwaite (2017) have construed Sun Yat-Sen's early twentieth century constitutionalism for his Chinese Republic as an inspiring republican architecture of the regulatory state superior to that to be found in North America and Europe.

The core value of republican political theory in the Persian footsteps of Cyrus the Great that later infused successor Islamic law regimes, such as the contemporary Iranian Islamic Republic, is *azadi*, which we have read to mean freedom as non-domination (Zhang and Braithwaite 2017; Braithwaite 2017; Braithwaite and D'Costa 2017: Chap. 4). The meaning of *azadi* is similar to the historical essence of freedom as non-domination in the Roman republican tradition. It is freedom from the condition of being a slave, freedom from living under the arbitrary will of a tyrant. Cyrus the Great famously freed the Hebrew slaves and other slaves captured by his empire and empowered the free workers who toiled to build his capitals with decent working conditions (in ancient terms) (Briant 2002). Pettit's journey to republican political philosophy arose initially from reflection on how to remedy the defects of Northern criminal law jurisprudence (Braithwaite and Pettit 1990). The concern was that Northern legal thought was conducive to an insatiable criminal justice system. If retributivism or just deserts justifies criminal punishment, this creates a criminal justice system that fills prisons with marginalized populations (Braithwaite and Pettit 1990). Utilitarian doctrines like the deterrence theory, most influentially instantiated in the Nobel Prize winning models of Gary Becker (1992), likewise leave the powerless vulnerable to an empirical criminology that might conclude that locking up more people might reduce a certain kind of crime; that building a Guantanamo Bay, invading an Afghanistan, extrajudicial assassination by drones in Pakistan, legalizing torture, might deter terrorism.

The republican remedy to the pathologies of extant Northern theories of crime control is to reject crime reduction as the normatively valued outcome in favor of domination reduction. This means, for example, that if building Guantanamo Bay or torturing prisoners succeeds in reducing terrorism while increasing the amount of domination in the world, then these policies are unequivocally wrong. Citizens simply cannot be free if they live in fear of the arbitrary power of torture or indefinite detention without trial. This is one

meaning of the suggestion that Southern criminology should not be overly criminological if it is to advance global justice. Better to reject crime reduction in favor of an ideal like *azadi* reduction. Better to embed such a criminal policy in a constitutional architecture of Sun Yat-Sen's Republic of China with a relational approach to crime control (Liu 2017).

Robert Peel's idea of the London Metropolitan Police (formed 1829) and the globalization of a hybrid of London and Irish colonial policing was of doubtful benefit to predominantly village societies of the global South.[1] Peel's police was a good reform for London and other large cities. It was a precursor to a preventive form of problem-oriented policing that helped bring crime under control in cities that were quite dangerous in the early nineteenth century. But it was a bad reform to globalize, quite unsuited to predominantly rural village societies of the South. The globalizing Peelian revolution created a paramilitary organization specialized in crime control. European and North American 'police' or constables in previous centuries were decidedly not specialized on crime control. They were generalized regulatory inspectorates who policed everything from observance of the Sabbath to liquor licensing, weights and measures and other forms of consumer protection, environmental regulation of pollution into streams, regulation of the destruction of forests and compliance with labor laws (master and servant laws). The Peelian revolution peeled away these regulatory state functions from the specialist criminal law police.

This created an imperative for a plethora of new specialized regulatory inspectorates of the nineteenth century regulatory state: weights and measures inspectorates, factories inspectorates, mine inspectorates, food inspection, health inspection, the Alkali Inspectorate and later diverse forms of environmental regulatory agencies, liquor licensing boards and many more diverse kinds of regulatory specializations. Not all of it was state regulation. Ship safety was predominantly regulated by Lloyd's of London; the Plimsoll Line allowed insurers to observe if ships leaving ports were overloaded, for example. A then private Bank of England was responsible for prudential regulation of the City of London in collaboration with magnates like Lord Rothschild who would roll up his sleeves to regulate any semblance of a run on a financial institution by walking to the front of lines of panicked depositors waiting to make withdrawals, visibly piling a Rothschild cash deposit.

The emergence of this kind of regulatory capitalism that cascaded from the Peelian institutionalization of paramilitary police worked quite well in sustaining Britain as the most powerful state on the planet until World War I. The factories inspectorates began to take some of the evil edge off industrial capitalism; the terrible smog that afflicted London was experiencing the

beginnings of amelioration; British coal mines began a century of stupendous decline in fatality rates; rail travel that was very dangerous in its early decades became the safest form of transport possible; British crime fell sharply in the nineteenth century and into the early decades of the twentieth, resuming the long-run decline in violence that started in the fifteenth century (Eisner 2003; Pinker 2011).

This reads as a stirring success story of Northern regulatory and criminological theory. The trouble was that these institutions were designed for problem cities like London, Manchester, Glasgow, Dublin and Belfast. This new world of specialist regulators was one where agency budgets only funded offices in the cities. Environmental inspectors were on hand to police water pollution from urban factories into rivers. But who was now to police waste pouring from large rural piggeries into streams? No one once Peel had transformed police into a paramilitary organization focused on crime. Such rural police were unlikely to soil their new uniforms wading into the slush of piggeries. More fundamentally, they were clear that piggery regulation was not their function and had nothing to do with the new focus of their corporate plan on crime.

While the Peelian revolution was good news for London and bad for rural England, it was very bad news for rural spaces of British and other colonies in the global South. The Peelian model of a paramilitary force specialized on crime control globalized remarkably fast. Early in the nineteenth century none of the cities of the global South had paramilitary police; by century's end every single Southern city had them. Yet the capitals of these societies did not dominate them in the way the Londons and Manchesters did in industrialized societies. Most of the economy was rural; overwhelmingly the population lived rural lives; most of the big regulatory challenges were rural. Yet the empire transplanted to the colonies its new regulatory state model with a metropolitan police myopically focused on crime prevention the largest regulatory agency by far. This was worse than dysfunctional for Southern societies. The misallocated concentration of a large clump of regulatory clout in a metropolitan police was a honeypot of concentrated power (with guns) available to be seized by excluded political factions awaiting their moment to seize the state.

I will now illustrate the problems Peel's Northern theory created for Southern populations with the recent history of one of the poorest, most Southern states, the Solomon Islands. The purpose is not just to illustrate a negative lesson about a Northern model crippling a Southern state. It is also to communicate a positive lesson about Southern thinkers the North might attend to in order to improve Northern policing. Of course, many police

forces in Western democracies also became tyrannical in ways that would have shocked Peel, with his ideals of preventive policing, but none quite as tyrannical as in the Southern story told in the next section.

Relearning Policing from Melanesian Experience

Policing was at the center of the 1998–2003 armed conflict in the Solomon Islands. It had two major stages. The first was an indigenous uprising initially among young men from the impoverished Weather Coast of Guadalcanal. This was the insurgency of the Isatabu Freedom Movement (IFM). Its leaders had the objective of driving settlers from Malaita off Guadalcanal. In 1999, the second phase began with the creation of the Malaita Eagle Force (MEF), initially to defend Malaitan interests against the Guale rebels. The MEF took over all the police armories and patrol boats to effectively control almost all the high-powered weapons in the country. This was done with the active cooperation of the police themselves. The Malaitan-dominated paramilitary wing of the Royal Solomon Islands Police were actually leaders of this armed uprising. With the MEF, the police effectively staged a coup that resulted in the coerced resignation of the incumbent Prime Minister in 2000.

A South Pacific regional peace operation led by Australia successfully helped end this conflict. Given the centrality of policing in the onset of the insurgency, police reform was at the center of the peace operation. It was unusual in being police-led. Braithwaite et al. (2010b) documented positives and negatives of this police-keeping. The negative, narrowed as a focus here, is that the policing assistance was overwhelmingly metropolitan and Peelian. Eighty-five percent of the largely Australian-funded police cars supplied to the Solomon Islands Police Force were located in the capital city Honiara. An overwhelming majority of both police-keepers and Solomon Islands police were located in Honiara; the majority of the remaining police were located in two other urban centers, Auki and Gizo.

Former Prime Minister, Sir Peter Kenilorea (Kenilorea 2008: 155–157), advocated a rethink of the transplanted Peelian policing model reinforced by the peace operation as one insufficiently focused on the villages of a village society. In British colonial times, Kenilorea served as a district officer. Among his responsibilities in that role was supervising the local police (village constables, ples men) (Kabutaulaka 2008: 98; Wolfers 1983) and serving as a traveling lay magistrate under the Solomon Islands version of governance by patrol.

Mahmood Mamdani (1996, 1999) conceives many African states as 'bifurcated'. On the one hand there is a 'civilized' urban society spawned by a history of direct rule and now practicing a form of constitutional democracy. But most of the society is in fact a patchwork of societies beyond the reach of the constitution and profoundly ethicized by a history of indirect rule and resentment of the predations of the capital. It could be that the Solomon Islands today is an even more bifurcated society than it was pre-conflict, making a bifurcated policing model even more relevant.

Many share Kenilorea's view that if policing had been effective, the violence would have been calmed early in 1998 and there would have been no crisis. On his analysis, the problems started in rural Guadalcanal, not in the city. What failed was rural policing. He believes that in the rural colonial plantation economy intolerance and anger between different ethnic groups from different islands were rife. Village constables, headmen and district officers above them became sophisticated at reconciling these tensions, nipping in the bud stirrings of crowds toward violence. That was their job and they had failed at it if conflict spun out of control on their patch. They became skilled at homilies of 'when in Rome, do as the Romans do' and at admonishing one group to practice more tolerance toward another. Kenilorea's view was also that colonial village courts were adept at assisting the police with give and take on intercultural clashes, especially over land. The village constable system collapsed soon after the demise of colonialism because part of the deal to placate separatists in Western Province was to hand over some important responsibilities to the provincial level of government. Rural policing was one of these. But because no revenue was transferred to go with the responsibility, village constables withered away for the want of allowances or any other support from their provincial capital. Ironically, one Western Province parliamentarian said during my interview with him that after the police presence in Western Province collapsed during the insurgency (when there were threats from the Bougainville Revolutionary Army staging armed sorties in and out of the province), 'a citizen community watch was set up … which while it was running was more effective than the police had been before or since'.

My Solomon Islands fieldwork with Sinclair Dinnen and Matthew Allen revealed that there were sad consequences for village people of Peelian policing modernity. Villagers said to us that they complained to the police about regulatory abuses by logging companies. The reply of the police was that this was not their responsibility; that was a matter for an inspector from the Forestry Department. But the Forestry Department inspectors were in an office in faraway Honiara. And they had no budget for travel to a distant island to respond to a complaint such as our villager made. As with pre-

Peelian English village policing, in the days of colonial policing, the Solomon Islands villager could take a complaint about misuse of her/his land, forests or rivers to chiefs, then to the village constable, and if no satisfaction was obtained, then to the headman, and if none was obtained there, to a district officer like young Sir Peter Kenilorea sitting as a magistrate. That was a world of more practical, on-the-ground checks and balances against natural resource rip-offs.

Hence, one of the reasons the current Solomon Islands Police Force experiment with a dispersed, part-time community officer scheme as a promising development against the background of this history is that it holds out some hope of a law enforcement system that might return to doing something to respond to villagers' grievances about abuses by loggers. Village constables can receive some basic training on something as important to the nation as forestry law; they can provide the evidence to withdraw licenses from lawless loggers and arrest unlicensed loggers. Corruption associated with rural logging deals was one of the deepest root causes of the Solomon Islands conflict and a major threat to the livelihoods of village peoples. Saving the tropical forest is not the only desperate need for which this Solomon Islands Police Force policy shift might be an apt response. Foreign loggers so economically dominate locales where they log that they become a law unto themselves. Police intelligence suggests they use being above the law to traffic weapons and other illicit goods, such as pornography on logging ships. Not only do they traffic pornography, they produce it by exploiting indigenous children, according to the systematic research of the Church of Melanesia on the large island of Makira, which is believed to reflect a more widespread problem (Herbert 2007). It was found that village children were raped, sold into marriage and used for pornography on a remarkably wide scale by Malaysian loggers.

> Child prostitution was found in every village visited on Makira. Last year I worked at the camp. There were seven Malaysian men there, and every one was married to a young girl—13 or 14. They are not interested in the older girls—once they are 18. (Solomon Islander former logger quoted in Herbert 2007: 25)

This was happening at a place where the nearest police officer was three hours away by boat. For Mamdani, indirect rule through village constables and headmen was part of a fabric of oppressive colonial clientelism. It was 'decentralized despotism' (Berman 1998: 316). But that of course does not preclude a postcolonial leader such as Sir Peter Kenilorea harnessing colonial

technologies of policing to projects of contemporary emancipation from violence and rural commercial exploitation of priceless forests.

The policing scene has become more promising during this decade as the peace operation wound down (Dinnen and Allen 2013). A trial started in 2010 in three communities of a part-time community officer scheme using as a consultant a Bougainvillean police officer with experience of this kind of scheme in the aftermath of its civil war of the 1980s and 1990s. War helped Solomon Islands, Bougainville (Braithwaite et al. 2010a) and Timor-Leste (Braithwaite et al. 2012) to take local control of returning policing to the villages. This has proved quite helpful in Bougainville particularly in responding to the epidemic of domestic violence that was a consequence of war. Part-time police living in the village heard the screams as soon as they started and were in a better position than officers in metropolitan police stations or urban courts to respond preventively to stop violence before it escalated to murder or severe injury. Societies can weave new hybridities from the fabric of old cloth to create policing that is responsive to contemporary modalities of domination of citizens. The hybrids thereby created in the global South offer learnings from which developed economies could benefit.

Even though Australia is one of the most urbanized societies on the planet, the Peelian revolution has been a clumsy fit. While Australia's rural populations are small, they are economically central and decimated by the collapse of effective rural regulation. Unlike the United States where the biggest crime problems are to be found in large cities, many of the highest crime areas in Australia are little outback towns many hundreds of kilometers from any major city (Hogg and Carrington 2006). A new dimension of this problem is the FIFO (Fly-In-Fly-Out) model for creating anomic mining towns with no sense of community, relational social control capabilities enfeebled, as hubs of male violence (Carrington et al. 2010). In addition, stripping rural constables of noncrime regulatory functions has failed rural Australia badly. I spent ten years as a part-time commissioner on Australia's competition and consumer protection authority (the ACCC). Daily we would receive complaints from rural communities of consumer rip-offs. A common one was the country town that had only two petrol stations that charged much higher prices than remoteness could justify (and higher than other towns) because they were dominated by a little local cartel. The two proprietors would always put their price up together to the same high price. The Commission would always decide that we did not have offices nearby to investigate that kind of allegation and there were always bigger competition cases to pursue that affected larger numbers of consumers and were more structurally important for the economy.

In a Sir Peter Kenilorea world of rural policing, the local constable could have a conversation with those two proprietors about why the law forbids price fixing conspiracies, why local citizens are upset about their exploitation, and give them a shot across the bows reminding them that if their market behavior does not change, he could consider sending a brief of the evidence he has been given to the ACCC. Contemporary Australian police would never do this. They would view this as trespassing onto the turf of the ACCC in the functionally specialized Australian regulatory state. They would view themselves as having more important 'real crime' to deal with. A flaw in their analysis is that rural rip-offs by exploitative businesses often escalate to 'real crime' as frustrated citizens resort to violent self-help. Any modern state that does not provide all citizens with practical means of resolving illegal forms of exploitation risks a return to the endemic violence that we saw in Europe before the rise of an accessible rule of law. While modernity did effectively pacify ever wider spaces (Elias 1982; Pinker 2011), rural towns based on FIFO are examples of de-pacifying shifts back to a feudal order (ruled by corporate mining barons) where workers are given the options of 'Fit-in-Or-Fuck-Off' when they get off the plane for the first time (Carrington et al. 2010) and denied effective access to justice to resolve complaints of domination. This is quite the opposite de-civilizing shift (Elias 1982) to the reforms of Cyrus the Great in cultivating a sense of justice and conquering anomie in communities of migrant workers who worked the Empire's mines and built its monumental capitals.

Australia would, therefore, be well served by learning from Melanesian neighbors like the Solomon Islands and Bougainville and adapting English modes of regulation more prevalent in the eighteenth century. In practical terms, twenty-first-century Australian rural police are spread thin and too busy to dabble in regulatory state enforcement of challenges like consumer protection and environmental law. Executive governments would do well in the face of this to negotiate a new budgetary settlement where rural police numbers were markedly expanded in return for them taking responsibility for issuing warnings for noncompliance with regulatory laws and writing briefs of evidence for metropolitan regulators when noncompliance is extremely serious or repeated. This would be win-win-win for the police, regulatory agencies and the state as a whole. For the police, it would allow them to be more effectively responsive to their communities, to do something about the want of rural access to regulatory justice that can escalate to violent self-help or retaliatory attacks on business property. For regulators, it would increase their legitimacy to cease being seen as organizations that systematically turn a blind eye to rural victimization. For the state as a whole, it would undercut the rural

appeal of far-right populist parties like One Nation that play to the deep sense of grievance of rural people over the neglectful deal they get from the state and the rural injustice the state repeatedly asks them to lump.

This is the kind of possibility than can come from Southern experience, from reflective wisdom about indigenous institutions that is translated into English by the likes of Sir Peter Kenilorea to radically reframe Northern regulatory and criminological theory.

Making Transitional Justice Less Transitional

Earlier I discussed the hypocrisy of US leaders demanding war crimes prosecutions against the likes of Muammar Gaddafi while demanding impunity for themselves from the Rome statute of the International Criminal Court. As Barack Obama leaves office at the time of writing, it seems implausible that he ever could be prosecuted for cases like the following from my 2013 Pakistan fieldwork with a human rights nongovernment organization (NGO) who supported village victims of US drone attacks with a rather restorative *Jirga* (circle) approach. One of their initiatives was a camera project for witnesses of drone attacks. Part of the philosophy of this NGO was to provide young people who were angry about their innocent relatives being killed by drone strikes with a better form of resistance to US attacks on their country without declaring war on it than taking up arms to join the Taliban or Al Qaeda or ISIS-linked groups. The project gave youth witnesses of repeated drone attacks in remote areas cameras to record drone strikes. In 2013, NGO leaders described to me a 2011 *Jirga* in which they gave a camera to a 16-year-old who had lost family members to a drone strike. The NGO was convinced his family had nothing to do with the Taliban. The gift of the camera to document future drone strikes was their approach to the boy's journey of healing. A couple of days later the boy was killed in a drone strike on a car in which he was traveling with other family members. What made this particular incident investigable as an alleged murder of a child sanctioned at the highest levels of the US state was that Western journalists were present in this particular *Jirga* and the Central Intelligence Agency (CIA) was likely snooping and recording the restorative process. Investigability was also increased in 2016 by the fact that the most sensitive of the Hillary Clinton emails released by the Russians related to State Department contestation of CIA drone targeting (Entous and Barrett 2016). One US Ambassador to Pakistan resigned in protest over the ethics of the drone killings. An NGO leader told me that a senior American journalist who sat in this boy's *Jirga* was upset at his state allegedly murdering

the child. He reached out to the CIA with the message that this was not the way to win hearts and minds in Pakistan. The only comment he got back from the CIA was their opinion that the boy was not 16.

This alleged child murder was eminently investigable, but not investigated, by either a US or a Pakistan prosecutor. It would be politically and legally unthinkable for such a prosecution to occur in either country today. In the longue durée of US law, Pakistan law and international criminal law, however, even if only in the hands of citizens' judicial tribunals, it can be; President Obama can be made subject to the rule of the law prohibiting the intentional murder of a politically active child. In defense of Obama's response to the errors of the drone program, he totally abandoned drone strikes inside Pakistan for his final year in office, a policy reversed by the new Trump administration.

Productive thinking about the unrealized potential of transitional justice is a matter of the longue durée as we saw in germinal cases, such as that against former President Pinochet of Chile so many decades after his crimes. The Pinochet case contributed to a 'Justice Cascade' for Latin American crimes against humanity (Sikkink 2011). Reconciliation is particularly a project of the longue durée as we have seen in the example of Bougainville with so many waves of traditional indigenous and Christian restorative reconciliation by successive generations (Braithwaite et al. 2010a) and with so much reconciliation remaining to be done, especially with Port Moresby before the independence referendum scheduled for 2019 (Breen 2016).

The work of Susanne Karstedt (2007) shows that the Nuremberg trials did not produce an acceptance of the full truth of the Nazi regime's atrocities in the 1940s and 1950s. Yet this was accomplished by later trials after 1960. Early truth omissions like the one in El Salvador that ran for only six months and the one in Timor-Leste that lasted three years were extremely valuable, but barely scratched the surface of impunities that in some cases are finally being prized open decades later in spite of obstacles like amnesty laws that seemed hard to breach in earlier times, yet vulnerable today. The so-called comfort women issue in World War II, which is better described as a sexual slavery issue, has continued to peel back new layers of understanding this century as a result of citizens' tribunals that have stepped into the vacuum of impunity left by the silence of state and international justice.

My late brother's book (R Braithwaite 2016) on the World War II Sandakan prison camp and Death Marches that took the lives of our mother's two husbands and 2430 other Australian and British troops revealed a counter death march to avenge this war crime in which hundreds of Japanese were killed by Australian troops. His book was not the first to reveal that decades after the

war crimes trials, an Australian survivor confessed that survivors had fabricated evidence against Japanese officers who were innocent of the charges on which they were convicted to ensure they were executed (Silver 1998: 310). Our father recoiled from the way he was threatened with prosecution under the Crimes Act if he told the story of Sandakan as he saw it; intelligence officers had a preconceived view of which Japanese officers should and should not be executed and they wanted him to give their testimony rather than his own. Their views may have been influenced by a more senior survivor who may have been a collaborator with the Japanese during his incarceration.

A story my brother did not tell in his book is one that I know makes people uncomfortable because on one occasion when I wrote about it, an editor asked me to take it out. Before they perished, the Australian POWs in Sandakan were required by their captors to march under the verandah of the building that housed the enslaved Asian women called 'comfort women' for Japanese soldiers. As the bedraggled starving men marched as best they could, the women poured the contents of their chamber pots down upon their suffering bodies. This signified the humiliation of white colonialism, I conjecture, in the eyes of someone who urged them to inflict this upon our beloved, suffering fathers. I suspect this is an ugly but instructive story that we should not self-censor. We can view it through a feminist lens of the suffering of those raped women; we can see it through the war crime lens that shines light on the suffering of the fathers, and we can understand it through the lens of the degradation and humiliation induced by colonialism and imperialism, Western and Japanese. The stories that cannot be seen through the uni-focal lens, that blur our seeing of who was good or bad—Australian soldiers giving false testimony at war crimes trials, orchestrating a death march of Japanese prisoners, the chamber pots, false US allegations of rape that contributed to a rape, America's 'Great Generation' raping German women, allegations that a loved politician like Barack Obama should be investigated for murder—these are all easily suppressed.

So the truth of transition is always shallow, never multiplex. Transitional justice is at its best when it is not very transitional, when it sticks at the projects of truth, justice and reconciliation in the longue durée.

Conclusion

For criminology to learn from the global South, it might become less criminological, more interested in learning lessons from peacebuilding mistakes in the South, more interested in putting into the balance the domination caused

by criminals with the domination caused by those who punish them, more interested in domination prevention than crime prevention. Normatively, justice may be less a solution to crime and war, more a hostage of crime and war, hostage to our uni-focal lenses that sharpen focus on the bad of the other and blur focus on the good of our own.

Southern theory from the pens of the likes of former Solomon Islands Prime Minister Sir Peter Kenilorea may be one corrective to our myopic Western lenses on policing and peacekeeping. If Australians listened to his wisdom, Australia could become a safer society with less domination, and so probably could many other societies that this author understands less well. The themes of making criminology less criminological and less Northern have been complemented by the theme of making transitional justice less transitional. This follows the lead of Susanne Karstedt toward making restorative justice a winding journey of the longue durée.

Notes

1. It is often argued with some justification that it was the Irish colonial model of policing more than the London model that was exported across the British Empire. This was an even more militarized model than that of the London Police and more oriented to terrorizing dangers to the state and suppressing political agitation (Ellison and O'Reilly 2008: 398). But it was also a Peelian model in that it was forged during the time of three chief secretaries of Ireland: the Duke of Wellington, Sir Robert Peel and Sir Henry Goulburn, the lifelong friend and deputy of Peel. These three all became parliamentarians who played prominent roles in the formation of the London Metropolitan Police (Ellison and O'Reilly 2008: 399).

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Building Social Democracy Through Transitional Justice: Lessons from Argentina (1983–2015)

Diego Zysman Quirós

Introduction

Leading scholars of the sociology of punishment have, frequently, studied the penality of 'ordinary crimes' through causally deep and global narratives largely from the perspective of the global North. State crimes and regional paths of transitional justice have been neglected in their accounts. Hence, studies on the punishment of common crimes and crimes of the state are still rarely, if ever, combined in a comprehensive approach (recent exceptions include Godoy 2005; Beckett and Godoy 2008; Iturralde 2010; Sozzo 2011; Cheliotis and Sozzo 2016; Hathazy and Muller 2016). Instead, they are frequently treated as separate and unrelated, assuming different—almost parallel—lines of inquiry, even in places like Latin America where common crime and the experience of dictatorships and bloody repression make it very difficult not to cross these lines of inquiry. In those places, policies, debates and control practices regarding common or ordinary crimes coexist with those related to truth, memory and justice surrounding serious human rights violations.

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Latin America has neither suffered the most serious human rights violations or mass atrocities in the contemporary world nor the worst of them (cf. Nazi Germany and Rwanda), but it helped build a model of individual criminal responsibility for state crimes, whose main precedent had been the trials of Nuremberg and Tokyo after World War II. Argentina is a global leader in human rights prosecutions (Nino 1997; Sikkink 1996, 2011; see also Savelsberg 2010; Transitional Justice Database Project 2015). Therefore, Argentina has had a leading role in the global trend known as 'the justice cascade' (Sikkink 1996, 2011; Sikkink and Kim 2013). In the early 1980s, after a non-negotiated transition following the defeat of the Malvinas/Falklands war, Argentina contributed to the development of accountability mechanisms, such as truth commissions (to precede trials, not to replace them as South Africa post-apartheid did in the 1990s), and also to establish high-level human rights prosecutions concerning the disappeared ('*desaparecidos*') (Sikkink 1996, 2011; Crenzel 2008a, b).

Therefore, in this chapter, I consider how the Argentine experience of common and state crime may contribute to understanding certain aspects of the dynamics of penality in other Latin American countries and possibly other transitional justice countries, without forgetting that: '… local specificities that underpin the relationship between democratisation and punishment, (are) embedded … in national histories, political traditions, economic trajectories, institutional arrangements, and social and cultural dynamics …' (Cheliotis and Sozzo 2016: 264).

In a recent contribution to the growing body of scholarship around Southern criminology (Carrington et al. 2016; Hogg et al. 2017), I developed a more detailed chronological account of the history, legal changes and available data in transitional and ordinary penal justice in Argentina, since the end of the dictatorship (Zysman Quirós 2017). Following this line of inquiry, this chapter briefly sums up three moments of Argentine transitional justice history and develops the study of the role of the collective memory of human rights violations through court proceedings in common crime and punishment. This chapter also highlights how the collective experience of the victims of state terror could give a singular meaning to the emergence of an organized victims movement in relation to common crime as well as influencing the manner in which previously unprosecuted state crimes were tackled in the day-to-day operation of the criminal justice system. This brings attention to the need to rethink the impact of state crime trials on general punitiveness and informal societal reactions to crime.

State Crimes and Transitional Justice in Argentina

Dictatorships and Transitions to Democracy

In recent decades, many Latin American countries underwent complex transitions to democracy (the 'third wave' according to Huntington 1993) from the repressive military dictatorships that existed in the 1960s, 1970s and 1980s (e.g., in 1973 of the ten Latin American countries of Hispanic origin, only Colombia and Venezuela had democratic governments). State crimes perpetrated by these regimes involved serious violations of human rights, qualifying as mass crimes, state terrorism or genocide. State violence involving national armies and paramilitary groups was also a feature of internal armed conflicts in some South American and Central American countries.[1]

Notably, between 1930 and 1983, Argentina experienced six coups d'état led by military interventionism (1930, 1943, 1955, 1962, 1966 and 1976–1983) in between short periods of weak democratic rule. Not all the coups used the same degree of violence and not all of them received the same rejection and resistance from political parties and large sectors of the population. In addition, in the last coup, Catholic fundamentalism against the 'leftist subversion of Western values' in the context of the Cold War and local arm insurgence emerges as a main feature of it. In this framework, the broad use of violence to solve political conflicts became naturalized; this included media censorship, illegal detention, breaking and entering, political imprisonment, military controls in the streets, torture and summary executions (Vezzetti 2002; Calveiro 2006; Feld and Franco 2015).

With the return to democratic rule in Argentina in 1973, state and parastate violence increased alongside civil violence. Nevertheless after the coup of 24 March 1976, together with a new dramatic and systematic increase in the scope and degree of violence, the adoption of practices that were quite unlike those of other Latin American dictatorships dramatically modified the style of historical repression: thousands of disappearances demonstrated both the state's systematic plan to exterminate opponents and the clandestinity of political murders (Crenzel 2008b: 174–175; Vezzetti 2002: 175–180; Feld and Franco 2015; Crenzel and Allier-Montaño 2015; Calveiro 2006). It also led to the kidnapping of almost 500 children and babies who disappeared with their parents or were born in detention centers and were given to other families to assume false identities; the majority of them still remain subject to discovery.

While supporters of the dictatorship identified the use of force as a 'war against subversion', 'communism' or 'terrorism', some of its critics considered

it a 'dirty war' (a very controversial concept even today),[2] with tens of thousands of victims. Human rights groups symbolically claim 30,000 disappeared by 'state terror' in the context of what was a 'genocide' (Osiel 2000: 121; Crenzel 2008a; Feierstein 2015).[3]

Argentina is exemplary in relation to the experience of transitional justice in Latin America and the world and the developments and debates arising from it (Osiel 1986, 2000; Sikkink 1996, 2011; Teitel 2000; ICTJ 2005; CELS 2013: 128). Due to Argentina's early development, its impact, and of the scope of its juridical debates, human rights trials, convictions and sentences, Argentina has had a leading role in the global trend known as 'the justice cascade' (Sikkink 1996, 2011; Crenzel 2015: 81). Although other military trials were held before in Greece (1975) and Portugal (1979), this unprecedented decision in Latin America was internationally compared with the impact of the Tokyo and Nuremberg trials. Argentina is now also the country with the longest record of prosecuting human rights abuses that occurred before the transition (Sikkink 2011).

Three distinct moments may be identified in the history of trials in Argentina. They developed in particular political, economic and social contexts but are also closely linked with broader political ideas about democracy and social justice. Naturally, they also reflect different approaches in relation to common and state crimes (see Zysman Quirós 2017). Briefly:

1. *The origin of the state crime prosecutions*

In late 1983, Argentina was the sole country in the region not governed by military dictatorships that continued to rule in Bolivia, Brazil, Chile, Paraguay and Uruguay. With democracy restored, Raúl Alfonsín (a social-democratic leader from the *Unión Cívica Radical* party and member of Socialist International), was sworn in as president (1983–1989). Within days he established a truth commission, the CONADEP (National Commission of Disappeared People) to investigate disappearances of people and other human rights abuses by the military dictatorship (Crenzel 2008a, b: 180, 2015).

The work of the CONADEP helped prove that the military-run centers had been part of an entire system of state terrorism (Crenzel 2008a: 63, b: 179–181, 2015; Carrington 2014: 87–88). The final report with the complete record of abuses, titled *Nunca Más*, was presented one year later to the president on paper and microfilm in a public ceremony.[4] It was the first published report of a truth commission anywhere in the world.

As a result of that investigation, in 1985 nine former members of the military juntas were successfully prosecuted in a civilian Federal Criminal Appeal Court in Buenos Aires. The Trials of the Juntas and five others (ex-generals

Videla, Massera, Agosti, Viola and Lambruschini) were convicted according to criminal law (rather than the military code) and sentenced to prison for crimes of aggravated murder, kidnapping and multiple cases of torture (Speck 1987). This led to the investigation of many people by other federal courts.

2. *Limits and pardons*

The threat of multiple prosecutions by the social democratic Alfonsín government and judicial decisions resulted in armed uprisings against the government and a deep public and state fear of a new coup d'état. In that context, in 1986 and 1987, two laws were passed: one which set a deadline in the presentation of new charges (*Punto Final*, Law 23.492) and another one which limited the legal responsibility of soldiers who acted under superior orders (*Obediencia Debida*, Law 23.521) except in cases of kidnapping of minors. This highly controversial decision maintained the military Juntas' convictions but led to the closure of most of the pending criminal proceedings. It was followed by another decision by the next president—from the opposing *Peronist party*—that seemed to imply the complete end of trials and punishments.

In the 1990s—a decade that was the quintessence of neo-liberalism in Argentina (characterized by privatizations, de-industrialization and unemployment)—President Menem (leading from 1989 to 1999) adopted a rhetoric of social reconciliation and, as chief of the executive branch, pardoned the convicted Junta members and hundreds of military and state officials, and some high-ranking members of leftist groups that were still facing prosecution. The Argentine human rights movement and the families of victims, nevertheless, continued to press for accountability in local and international forums. During the 1990s, there were no criminal prosecutions, but 'Truth trials' were held in some federal courts across the country to gather information about the facts and responsibilities despite the fact there was no prospect of criminal conviction. Relatives and victims also filed complaints with courts in other countries. They obtained arrest warrants and extraditions.

3. *Restarting the prosecution of state crimes*

Néstor Kirchner's administration (2003–2007) was influenced by the legacy of *leftist Peronism* and promoted distance from the USA and close ties to radical countries like Venezuela, and later Bolivia and Ecuador, developing a Latin-Americanist 'post-neo-liberal' approach built on a socialist discourse of inclusion, equality, social justice and confrontation with traditional social and economic elites. The policy was continued by his wife, who succeeded him as president (Cristina Fernández de Kirchner, 2007–2015).

In 2001, the Inter-American Commission on Human Rights—whose decisions must be followed by its members—ruled against the impunity of amnesty laws and pardons in crimes 'against humanity' (ruling *Barrios Altos v Perú*). In 2003, under a new government Congress, Argentina enacted Law 25.779, which declared the invalidity of *Punto Final*, Law 23.492 and *Obediencia Debida*, Law 23.521. In 2005, the National Supreme Court upheld Law 25.779 (*Simon* ruling), and in 2007, it declared the pardons in relation to the military unconstitutional (*Riveros* ruling). Thus, state crimes of the past were considered 'crimes against humanity', and laws protecting or limiting the prosecution of military personnel and accomplices were deemed unconstitutional. This did not extend to political crimes committed by armed leftist organizations. This decision revived intense public debates about the dictatorial past and their civilian accomplices. It also triggered a polarization around the recent history and the silence and crimes of those who had participated in armed leftist organizations prior to the dictatorship.

In sum, in the period 2003–2015,[5] a total of 2821 people (military, police and civilians), many of them having been initially investigated in the 1980s, were indicted in hundreds of federal investigations involving multiple participants, and undertaken in courts throughout the country that continue into the present (2017).

Many the accused are still under investigation; some died of natural causes and a few absconded. Strictly speaking, between 2006 and 2015, 662 of those defendants were convicted on trial and 60 were acquitted.[6] Thirty-eight percent were sentenced to life imprisonment ('*prisión*' or '*reclusión*') with potential for parole; 31.5% were sentenced to 3–15 years in prison (ordinary prisons for serious crimes, not military prisons); 27 percent were sentenced to between 16 and 25 years; 3 percent to no more than 3 years and other sentences in the remaining cases (0.5 percent). Nearly a third of the convictions were for offenses of illegal deprivation of liberty; another slightly smaller percentage for torture or murder and the remainder for kidnapping of children, sexual violence or other crimes (CELS 2015; see MPF 2015).

Transitional Justice, Social Democracy and Penal Moderation

Paradoxically, in some ways the political decision to prosecute and punish more intensely state crimes of the dictatorship seemed to act—at least for a time—as a buffer against the regional tendency toward punitiveness for common offenses. The affinity between the increase or decrease in punitivity of common crimes and the prosecution of state crimes in Argentina is suggestive

of the need for further specific research that identifies the mechanisms involved. However, as Sozzo points out, although all governments between 1983 and the present were formally democratic, it was only during the social and citizen democracy of the 1980s and post-2003 (the period of 'deep democracy') that incarceration rates generally decreased, remained stable or grew only moderately, even though they never returned to the low levels of 1984. On the contrary, during the 1990s—the emblematic decade of neo-liberalism in Argentina—the pardons and end of the trials was accompanied by a growth of the incarceration rates for common crimes (see Sozzo 2016b: 317–318).

In fact, between 1983 and 1984, there was a sharp decline of 51 percent in the number of inmates in the federal national prison service and of 42 percent in the prison service of the province of Santa Fe and of 27 percent in the Province of Buenos Aires (in absence of national data at that time, these being the two largest states in the country). As a result, in 1984 the number in federal prisons was the lowest since 1965. After 1984, however, annual growth remained stable. Indicators of punitiveness sharply grew as the 1990s and the second transitional justice moment approached. The federal prison population increased by 52 percent between 1989 and 1995 until it reached a level 28 percent higher than at the end of the dictatorship. In Buenos Aires Province, the rate grew 14 percent, and in Santa Fe Province, it increased 7 percent reaching the same level as in 1983. This way, the Argentinian rate went from 71 per 100,000 population in 1996 to 123 per 100,000 in 2002. During the third transitional justice moment (2005–2007), there was—against the foregoing tendency—a temperate decrease in the prison population, both nationally and in the Province of Buenos Aires. Then it began to increase until 2015 (168.5 per 100,000 at the end of 2015; DNPC 2016; Sozzo 2016b: 307–314).

There was no such trend in, for example, Uruguay or Brazil (see Sozzo 2016a) where state crime prosecutions against the dictatorships did not develop as in Argentina, and it was not present in Chile (see Hathazy and Muller 2016), where the democratic transition and criminal prosecutions started much later and resulted in numerous judicial sentences, although involving a very different collective response, with proportionately few sentences of imprisonment (CELS 2013: 91, 100).

Images of Crimes, Punishment, Victims and Trials

Based on the three moments of transitional justice, in this section I will explore in a more conceptual way some of the relevant features of penality over the 30 years of post-dictatorship. These are key points to appreciate the

impact of serious human rights violations and transitional justice on the organization and practice of the criminal justice system and in official and public representations of the penality of both state and common crimes.

Are State Crimes Worse than or Different in Nature to Common Crimes?

The moral outrage of the community against common crimes (Durkheim 1964) also had an important role: to question the tolerance and indifference of society against state repression. At the beginning of the transition, before the *Nunca Más* report (1984), limited information about the past existed, and there was a strong debate regarding the existence of 'state crimes' on one side and 'errors' and 'excesses' in a justified military repression of left insurrection on the other. While human rights groups demanded 'trial and punishment' for all perpetrators, and later 'common' and 'non-military' prison (as for ordinary criminals), the military supported the legitimacy of repression in general and considered their detainees 'political prisoners'.

However, even part of the military and conservative civil society initially acknowledged some 'excesses' in the 'subversive activities' of certain groups which were 'out of control', and that exceeded the legitimate orders of repression. In this view, the 'common crime' of some low-ranking officers was allowed to explain the enormity of violence and misappropriation of the dictatorship as well as to deny the existence of systematic practices by the state (Vezzetti 2002: 26; Feld and Franco 2015: 363, 374–376).

After internal reconsiderations, the original criminal justice policies of Alfonsín's government were aimed at criminalizing the repressive practices of the dictatorship as serious human rights violations and legal crimes according to the (civil, not military) penal code and courts prosecuting federal crimes. This had the symbolic and substantive purpose of denying state violence as a legitimate weapon of political struggle (Vezzetti 2002: 26).

This political and legal strategy then established a quantitative distinction between common crimes of violence and state crimes. It was understood that both crimes were rejected by the social majority and they have to be tried by criminal (not military) courts with the same guarantees. However, state crimes were seen as the worst crimes on the scale fixed by the penal code. For example, at the request of the president, the Law 23.097 (1984) equated the penalties of the crime of torture with homicide, which was until then the most serious crime (Anitua and Zysman Quirós 2013).

However, after the resumption of trials during the Kirchner administration in 2003, the relatively new status of past state crimes as 'crimes against human-

ity' under international law implied relevant differences with ordinary crime: such as no amnesties nor presidential pardons, no temporal limitations on criminal proceedings, differences in the use of preventive detention and considerations for house arrest. The local criminal trials, in which the figure of 'political genocide' was part of a legal and symbolic discussion (Feierstein 2015; Anitua et al. 2014), contributed to this change. The distinction between ordinary serious crimes of the present and past state crimes led to a qualitative split between them.

Nonetheless, in terms of social struggle, this split had an instrumental purpose. It allowed for 'updating' the past and superimposing on it the present in order to highlight the role of state violence of the powerful over the criminal violence of the powerless and also denied its nature as 'political offense' by associating it with the same penalities, places and criminal images that the public outcry demanded for the worst common offenders. Thus, there has been a constant evocation and revisiting of the recent systematic violent past, and a kind of on-going debate over what Argentina's 'worst of the worst' crimes and fears of crime are, compared with the serious ordinary crimes that attract public and media attention today, such as drug trafficking, sex and murder crimes, kidnappings or certain crimes related to international terrorism.

Representations and Justifications of Punishment in a Democracy

In the original political transition to democracy, the discourses of the rationality of punishment united common crimes and state crimes under the same penal aim and justification. On the one hand, retribution (or just deserts) was inappropriate for a general policy of punishment, because it seemed to be linked to Kant's absolutist prosecution of all crimes (politically unthinkable) and to popular revenge (as in post-war Italy or post-fascist France; see Nino 1997: 28–30; Karstedt 2010: 12). On the other hand, the idea of limited deterrence has natural anchors in classical contractualist theory, utilitarian and liberal political theory of the Enlightenment (Beccaria, Bentham, Feuerbach) and also in the thought of legal philosophers and advisers of the government (Nino, Malamud, Rabossi) (Nino 1997: 104–107, 222–231; Gargarella 2010; Crenzel 2008a, b, 2015: 90). This focus on consequentialism as moral justification of state punishment does not remove the purpose of prison rehabilitation and was also inherent in a break with the violence of the past and consistent with the governmental rationality of consolidation of a *future* liberal democracy. In this regard, government policies held that state punishment had to be morally grounded for state crime and common crimes

equally; in this way, the democratizing government was communicating a message of legal respect to the whole society, while simultaneously seeking to prevent another coup d'état and human rights violations by militarized groups.

Nevertheless, after 2003, as time went by, and no serious threat of a new military coup appeared (one test being the 2001 economic, political and social crisis), the objective of deterrence for such crimes in the future declined in significance. Latent, rather than manifest, retribution and expressiveness appear—as a common feature in all international processes for crimes against human rights—as a stronger aim of punishment for past state crimes. Meanwhile, the official rhetoric of rehabilitation in prison or the long-standing disciplinary project (Sozzo 2007) highlighted in the Federal Constitution of 1994 and the national penitentiary Law 24.660 (1996) was only seen as fit, as they usually do, for authors of ordinary crimes.

Victims of the Crimes of the Powerful and Victims of Common Crimes

Attention to victims of state crimes is a historically recent phenomenon, alien to the processes of post-WWII (Karstedt 2010). In Argentina, the victims of the dictatorship (crimes of the powerful) (Jelin 2015) were the first to be recognized in judicial and social areas as legitimate victims (before victims of domestic violence and common crime). The public outcry demanding the trial and punishment of state crimes (and power crimes) also expressed an early way of thinking and feeling and an 'anti-expert' bias regarding these selected serious crimes. In regard to the Argentinian case, Carrington also highlights that this history of struggle against an authoritarian regime left a distinctive legacy on the development of feminism and women's movements in Latin America and their role in seeking justice for the victims of violence (Carrington 2014: 87–88).

In over 30 years, except for isolated cases, there were no informal reactions of a physically violent nature on the part of victims of the dictatorship against their oppressors (although there certainly were symbolic repudiations or *escraches* in the 1990s). Neither were there demands for legal changes that would increase penalties, although there was a constant request for life imprisonment, with the potential for parole. The human rights organizations and relatives of detainees or those disappeared focused their energy on the demands for trial and punishment, such punishment to symbolically reflect the highest level of severity applying to the worst of common crimes.

In this frame, as Sozzo (2007, 2011) highlights, the place of the victim as a source of social and political mobilization was occupied in the public and political debate since the beginning of the transition to democracy by the 'victims of power'. From the 1970s, those who had experienced state crimes during the last military dictatorship formed organizations and social movements (Madres de Plaza de Mayo, the Abuelas de Plaza de Mayo, Familiares de Detenidos y Desaparecidos por Razones Políticas, HIJOS). Then, there were the victims of state violence under democratic rule, and, I would add, the victims of the terrorist attacks on the Israeli embassy and the AMIA (a Jewish community center) bombing in the 1990s, allegedly carried out with the complicity of local police members.

Yet in 2004, for the first time, the so-called Axel Blumberg crusade put the emphasis on the universal potential victims of common crimes—victims whose moral authority is constructed from the suffering they had experienced but not from having experienced state repression (Sozzo 2016b, 2007; Schillagi 2006, 2015). This crusade was born in the anger from the murder of an upper-middle class boy, a victim of a kidnapping organized by an 'ordinary' criminal gang. It led to several demonstrations, initially very large, in pursuit of security and justice and in favor of punitive moral and legislative reform.

The new recognition in the 2000s of the human rights issues after years of marginalization it was no stranger to this crusade. It is notable that the Blumberg crusade against street crime was not built back-to-back with the organizations of victims of state crimes but on their bases and in political tension and affinity with them. With the recurrent evocation of a kidnap followed by death (the common fear of political violence during 1970s), it assumed the central role in the penal scene. Without the precedent of the movement of victims of state crimes, the crusade probably would not have emerged to be as organized and as strong as it did. Supporters of these claims used many similar strategies: the monitoring of the media, the rituals in the demonstrations, the occupation of emblematic public spaces of the city, speeches by representatives of different religions, direct demands to the highest authorities, the aesthetics of posters and images of remembered victims, candles and songs. The Blumberg crusade demanded justice and severe punishment, such as life imprisonment, always within the framework of legal institutions and procedures in democracy, as it was frequently pointed out. Unlike populism from above in the 1990s, it neither asked for the death penalty nor approved vigilantism, presenting itself rather as a realistic response to crime in a modern democracy.

It was quite predictable that political dispute over its penal centrality, the heterogeneity of its adherents (who were broadly from the middle class) the

cooptation of space by prominent members of the political right that found in the demonstrations a political scenario to criticize both the government for its inaction and human rights organizations for their apathy on common crimes, would end in the movement's decisive turn to the right—despite its alleged political neutrality. Indeed, in the third mobilization of the end of August 2004, Axel Blumberg's father, the leader of the crusade, sealed this confrontation by saying: 'It seems that human rights are for criminals and not for citizens like you [or me]' (Schillagi 2006: 132).

State Crimes, Collective Memory and Public Criminal Trials

Does the experience of the authoritarian past lead to the subsequent punitivity of the democratic penal system or does it prevent its recurrence? Perhaps the question should not be posed in stark, either/or terms (on the first position, see Beckett and Godoy 2008; on the second one, see Downes 1988 and Savelsberg 2004; and on both Cheliotis and Sozzo 2016). Dictatorial authoritarianism does not magically disappear after the transition to democracy, yet in countries like Argentina, quite significant institutional and social changes empowered critical scrutiny of the state penal power, although not necessarily of all kinds of crimes of power.

The experience of totalitarianism, or war and occupation, is much more constitutive than that of an authoritarian dictatorship. However, there is a resemblance between these experiences. Savelsberg (2002: 698, 2004: 391–392) argues the experience of Nazism in the history of Germany—historical contingency—resulted in a significant change in the penal system, promoting the abolition of the death penalty and, decades later, the rejection of retribution in favor of rehabilitation (a similar view is put by Downes 1988 in relation to the Netherlands). In regard to this, Sozzo argues (2011, 2014, 2016b) that the cultivation and maintenance of the collective memory of state crimes of the dictatorship in Argentina make it very difficult to promote public and political debate in favor of punitiveness toward ordinary criminality. The armed forces, for example, have not had full participation in the fight against crime (including drug trafficking), as is common in other parts of Latin America (Kessler 2009, 2010) and this because of the historical memory of the army's involvement in violent repression throughout the dictatorship. In addition, it is not popular for the military to be involved in any way in policing domestic matters that could result in human rights abuses of the population. This still plays a significant role in the criminal field, even in conservative political discourse and harsh public attitudes to crime. Human rights demands

from social organizations and legal culture are not always met, but they have enough power to block certain harsh measures: such as increasing police interrogation powers or investigation in defiance of fundamental constitutional guarantees, the maintenance of moderate sentences to prison for minor crimes, and even limits for serious ones such as (real) life imprisonment (without parole), or the unusual and very extreme demand for the reintroduction of the death penalty (legally forbidden by human rights covenants), *inter alia*.

Even so, this frame allows people and experts to demand harsher sentences to prison and tough reforms. It does not deny the punitivity of the strong growth of the prison population between the 1990s and today (see DNPC 2016; Sozzo 2016a, b) or the importance of a high number of deaths in police enforcement (although much lower than in other Latin American countries. See, e.g., Chap. 26 on extrajudicial killings in Brazil).[7] Nevertheless, rehabilitation and the notion of restoring citizenship through punishment—which form part of a rhetoric distant from degrading prison practices—still could be considered a hegemonic discourse (shared by left and right) for common crimes.

The collective memory of human rights violations (Halbwachs 1992; Bergalli 1987) is also reinforced through court proceedings in mass atrocities. Therefore, Savelsberg (2010: 22–25, 96–97) believes that the judgment of mass atrocities has an important role in deterrence and the construction of a collective memory, which can prevent the repetition of similar atrocities and affect attitudes and practices relating to the everyday administration of criminal justice. This argument is also endorsed by Sikkink (1996, 2011) and Sikkink and Kim (2013) in relation to Latin American processes.

Savelsberg also maintains that trials can also perform functions of a 'degradation ceremony' (Garfinkel 1956), consolidation of social ties against crime (Durkheim 1964), reconstruction of the value of the law (Nino 1997) or as a 'theater of ideas' (Osiel 2000) where social cohesion is built, not only emotionally but from dissent and communication. However, he also criticizes the binary logic of the trial and the difficulty posed by total reconstruction of what happened (e.g., truth) and the allocation and release of guilt (Savelsberg 2010: 93–94).

In this regard, the report of the truth commission (CONADEP) of 1984 and the Trial of the Juntas in 1985 are considered founding moments for the prosecution of state crimes in Argentina and Latin America (Vezzetti 2002; Crenzel 2008a, 2015; Feld and Franco 2015: 366). After two decades, the reopening of trials and punishments (spread over a large number of federal courts throughout the country) rebuilt, reinforced and consolidated a powerful cultural censorship against state crimes of the past.

It is also possible to notice another relation between trials of power crimes and politics. The previously unthinkable (before 1983) trials of the military leadership of the dictatorship seem to have opened a new path to the judicial prosecution of the main government authorities for state crimes, but also for other kinds of crime related, or not, to official performance. From 1826 to the present, there were a total of 56 presidents in Argentina. Between 1983 and 2015, only six democratically elected presidents ruled for more than a year: four of them were prosecuted for criminal offenses during their tenure. After his term, in 2008, former President Menem was the first president in Argentina's history to be brought to trial and convicted (not yet finalized) for a secret decision to smuggle arms to support possible armed conflicts in Croatia and Ecuador. Former President De la Rua (1999–2001) was brought to trial and then acquitted of bribery and investigated for excessive use of police force during the political crisis of 2001. Former Presidents Néstor Kirchner (deceased in 2010) and Cristina Fernández de Kirchner were reported for official corruption in their real estate activities. Cristina is also currently being investigated for corruption and money laundering offenses. Current president Macri, after less than six months in office, is currently under investigation in relation to the Panama Papers tax fraud. All of which happened in the general context of the increased strength of the federal judiciary and the criminalization of politics that (luckily) to some extent replaced the field of past political struggle that concluded in political violence or coups. The reasons and substance of these allegations are very diverse (and I will not focus on them here) but, in any case, it is hard not to identify this criminalization of a significant number of acts of government and of presidential conduct as a 'bastard' and paradoxical legacy from the original democratic judicialization of violent state crimes of the authoritarian past in the 1980s.

Conclusions

The sociology of punishment of common crimes and studies on state crimes have usually taken different paths, even in Latin America where it is really very difficult not to cross the lines that divide them. In general, in Argentina and other transitional justice countries of the global South, experience with respect to common or ordinary crimes coexists with those related to the truth, memory and justice surrounding serious human rights violations committed during the authoritarian past. They impact on the structure and practice of the criminal justice system and representations of penality.

The authoritarianism/democracy binary usually adopted in the transitional justice movement is inadequate as a framework of analysis for studies of general punishment extended in time, since it involves vastly different experiences (see Cheliotis and Sozzo 2016: 265). In the history of state crime trials in Argentina (1983–2015), three distinct moments can be identified that link closely with diverse typologies of democracy.

Criminalizing the repressive practices of the Argentine dictatorship as serious human rights violations and legal crimes, according to the (civil) penal code and to courts trying federal crimes, had the symbolic and substantive purpose of denying state violence as a legitimate weapon of political struggle. It continues today to name these crimes as 'crimes against humanity'.

It is uncertain whether the authoritarian experience of the past will lead to punitivity in the criminal democratic system or whether it will prevent recurrence. However, in Argentina it seems that the collective memory of state crimes of the dictatorship and the punishment of state crimes somehow helps to fix a maximum level of punishment for ordinary crimes and seems to make it very difficult to promote claims of overt punitiveness toward them. Besides, rehabilitation and the notion of restoring citizenship still could be considered the rule in the hegemonic discourse on common crimes.

It was highlighted that the increased tolerance of common crimes of the powerless was possible during the governments of Alfonsín and Kirchner (after 2005) and that this was matched by low rates of imprisonment or, at least, more moderate ones. It seems to correlate (if not causally explain) with the policy of prosecuting crimes of the dictatorship. Additionally, punitivity against common crimes could be related to the interruption of the trials in the mid-1990s.

During 30 years of democratic rule, the feared military coup did not materialize but neither did violent retaliation against the repressors or waves of lynching motivated by other common crimes, as experienced in other Latin American regions (Godoy 2004, 2005).

The grand narratives about the spread of punitive populism over expert dominance in recent decades do not capture the multiple diverse national experiences of victims of crimes, representations of punishment and local political struggles acting jointly. The notable example of punitive populism 'from below' in the 2004 crusade against street crime has points of similarity, but also very different characteristics, compared to other recent demands for punitivism in Latin America and global North countries, and it cannot be grasped without recognizing the influence and status since the return to democratic rule of the anti-expert approach of the victims of the Argentine dictatorship.

The original judicialization of the state crimes of the military as a strategy that avoided violent political struggle has also opened a door to the judicial prosecution of state authorities and figures for other, different forms of alleged crime, a phenomenon that had never emerged before in the history of political turmoil in Argentina.

It is expected that this kind of analysis might contribute to a better understanding of how complex transformations of penality (not just a single and universal one) during the last decades could emerge in diverse national cases.

Notes

1. The transition to democracy began in different years: Ecuador (1980), Bolivia (1982), Honduras (1982), Argentina (1983), Uruguay (1984), Brazil (1985), El Salvador (1984), Guatemala (1986), Haiti (1991), Paraguay (1989), Chile (1990), Panama (1990) and Peru (1980, 2000).
2. The concept of 'dirty war', widely used internationally since 1980s, or similar uses of the term 'war' or 'civil war' to characterize the violence during dictatorship, is questioned by political and human rights organizations and scholars who prefer to identify it as state terror, and not to speak of two sides with equal responsibility for violence in a civil war.
3. The CONADEP, in nine months of work, systematically documented at least 8961 disappearances. This number increased later with new reports. Human rights groups have claimed, since the mid-1970s, the number of '30,000 disappeared'. Discussions on this issue are not innocent, and even today, they are the subject of great political and historical tension that divides sides. Recently, human rights leaders expressed indignation regarding comments of current President Macri (2015) on the number of people disappeared during the dictatorship and the use of the concept of 'dirty war'. Macri answered in an interview: 'I don't know. It's a debate that I don't want to enter into. If it was 9000 or 30,000…'.
4. 'Nunca Más' is still the main motto in human rights discourses. See Arquidiócesis de San Paulo: *Brasil Nunca Más* (1985); SERPAJ Uruguay, *Nunca Más* (1989); Comité de Iglesia para Ayudas de Emergencia, *Paraguay Nunca Más* (1990); Proyecto Interdiocesano de Recuperación de la Memoria Histórica, *Guatemala: 'Nunca Más'* (1996); *ProyectoNunca Más*; *Colombia 'Nunca Más': crímenes de lesa humanidad* (2000) and other commission reports (Crenzel 2008a: 193).
5. 12.31.2015.
6. Despite the criminological importance, a significant number of judgments are not finalized as convicted have the right to appeal to the National Supreme Court.

7. It is alleged that between 1983 and 2015, there were 4644 cases of deaths from police abuse by cases of '*gatillo fácil*' (in English, trigger-happy) and deaths in police stations (See Coordinadora Contra la Represión Policial e Institucional [Coordinator against Police and Institutional Repression] 2015).

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Trauma on Trial: Survival and Witnessing at the International Criminal Tribunal for Rwanda

Julia Viebach

Introduction

This chapter contrasts the recollection of a traumatic experience with the production of legal meaning, related to events during the genocide against the Tutsi in Rwanda. Between April and July 1994 approximately one million people, predominantly Tutsi, but also moderate Hutu, were killed in the genocide against the Tutsi.[1] The genocide was ended by military force by the Rwandan Patriotic Front (RPF) that was, at that time, a rebel movement. The International Criminal Tribunal for Rwanda (hereafter the Tribunal or ICTR) was established by the United Nations in 1994 in response to the heinous crimes committed in Rwanda. The Tribunal aimed to prosecute genocide violations of human rights under international humanitarian law. This chapter analyzes and compares a survivor testimony that was conducted at the Rwandan Nyange memorial in 2014 and the *The Prosecutor vs Athanase Seromba* case at the International Criminal Tribunal for Rwanda.[2] Between 10 and 16 April 1994, around 2500 people were murdered or bulldozed to death in the Nyange parish. Jacques is a survivor of these massacres at Nyange church; he lost his wife and his two children during the genocide against the Tutsi.[3] His recollection of this traumatic experience will be contrasted with the legal account of what happened in Nyange parish. Father Seromba was indicted at the ICTR for crimes against humanity and genocide; in 2006 the

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ICTR Trial Chamber III (hereafter the 'Chamber') found Seromba guilty of counts of genocide, conspiracy to commit genocide and crimes against humanity.

The chapter applies a trauma studies lens to a legal phenomenon and uses the insights of narrative studies to illuminate legal obscurities. Applying this approach is important because what must be heard in court cannot be articulated by legal language (Felman 2002). This chapter shows that the experience of trauma not only challenges the language of law but also blurs the legal narrative and functions of tribunals like the ICTR. However, in pursuing such an inquiry, it should be acknowledged from the outset that the dialogue between the discipline of law, (poststructuralist) trauma and narrative studies is characterized by epistemological boundaries. Although a new awareness of trauma in legal practice has recently emerged, this scholarship has been limited to the lawyer-client relationship and the impact greater trauma awareness might have on a victim's mental health (see, for example, Katz and Haldar 2016). What is often forgotten is that law is inherently related to an injury, which was the central insight of Felman's analysis of the OJ Simpson case. She writes 'the trial has attempted to articulate the trauma so as to control its damage', but 'the trial has become itself a vehicle of trauma, a vehicle of aggravation of traumatic consequences rather than a means of their containment and their legal resolution' (Felman 1997: 743). In a similar vein, philosopher Francois Lyotard, reflecting on the Holocaust, warns us that 'the perfect crime does not consist in killing the victim or the witnesses … but rather in obtaining the silence of the witnesses, the deafness of the judges and inconsistency of the testimony' (cited in Hirsh 2001: 536). Such insights connect to central aspects of this chapter: the silences and the traumatic experiences that cannot be heard on the witness stand.

The chapter sets out to introduce narrative study and the particularities of traumatic narratives, arguing that traumatic narratives fail to convey the traumatic occurrence into a comprehensive and linear narrative form, which is needed in order to make meaning of events and particularly to give events a *legal* meaning. In a second step, this chapter will read trauma into the narratives of the ICTR and the survivor testimony and will read the latter against witness testimonies heard in the Seromba trial. I borrow the approach of reading into and against from Shoshana Felman (1997, 2002) who applies this particular methodology to a comparative analysis of the OJ Simpson and the Eichmann trial. Felman reads trauma into the trials themselves and into the analysis thereof. She argues, for instance, that Hannah Arendt's analysis of the Eichmann trial is heavily informed by her

own traumatic experience of loss, grief and displacement (Felman 2002). In addition, she reads the OJ Simpson trial against Tolstoy's novel *The Kreutzer Sonata*, highlighting the many parallels between the real and the fictitious trial. Here, I read the survivor testimony against *The Prosecutor vs Seromba* trial (hereafter the Seromba case) and read trauma into both narrative accounts. This particular methodological approach produces new knowledge on and insights into a legal phenomenon that cannot be explained by mere legal analysis and makes visible the excluded, the marginal and the invisible. To do so, this empirical section draws on excerpts from the survivor testimony, trial witness statements,[4] cross-examination and the Seromba judgment to illustrate the argument. I show that the traumatic *experience* is eradicated from the witness stand and that it is instead replaced by a linear, chronological, factual and precise narrative account in order to support legal meaning-making. The last section, the conclusion, draws together these findings and relates them to broader discussions of trauma and law, of victims' positions in international criminal trials and of how history is written by international criminal trials.

What Cannot Be Heard: Traumatic Testimony

The core of any narrative and storytelling is the plot. It forms the causal link between events in a story, functions as the structure of the story and the means by which otherwise mere occurrences are made into moments of the unfolding of the story (Polletta et al. 2011: 111). At the same time, narratives are a form of discourse and can be identified by their structural and formal features (Polletta et al. 2011: 112). One of these formal features is what is termed the 'Aristotelian configuration' (Ricoeur 1984). Ricoeur argues that when stories are told there is a certain pressure to deliver them within an Aristotelian conventional narrative configuration, one in which concordance looms large, where there is a sense of the connection between events and where the conclusion is 'congruent with the episodes brought together by the story' (Ricoeur 1984: 67). Thus, stories are narratives told according to the conventions of linearity, continuity, closure and omniscience that are often taken as a quasi-natural condition of narrative (Brockmeier 2008: 28 in Andrews 2014: 152). There is, Ricoeur suggests, always a pressure to transform a chain of events into a meaningful whole. Moreover, only when stories are emplotted can our lives, our experiences, become meaningful. He writes, 'we tell our stories because in the last analysis human lives need and merit being narrated. This

remark takes on its full force when we refer to the necessity to save the history of the defeated and the lost. The whole history of suffering cries out for vengeance and a call for narrative' (Ricoeur 1984: 75).

Part of this 'wholeness' is time: time lies at the heart of narrative. On this point, Jenny Edkins describes the linear or narrative time:

> … is a notion that exists because we all work, in and through our everyday practices, to bring it into being … the production and reproduction of linear time take place by people assuming that such a form of times does exist, and specifically that it exists as an empty, homogenous medium in which events take place. (Edkins 2003: xiv–xv)

Further, she explains that language, and thus narrative, is inevitably linked to social structure and power: language is part of the social order, so that when this order falls apart during genocide or mass atrocity, so does language (Edkins 2003: 8; see also Scarry 1985). In that sense, the traumatic experience keeps one from forming a meaningful narrative. Narrative time and the 'wholeness' of the story delivered by its conventional configuration is precisely what makes a *traumatic* narrative so difficult to convey. The trauma does not fit into this conventional narrative form.

Now, juxtaposing trauma and narrative, I suggest that it is the traumatic occurrence that the narrator fails to integrate into a plot, into a conventional narrative form. Developing this further, it is helpful to return to trauma and Holocaust studies. Cathy Caruth explains, for instance, that trauma is always a *story* of a wound that cries out rather than a mere pathology. It is a story 'that addresses us in the attempt to tell us of a reality or truth that is not otherwise available' (Caruth 1996: 4). She further argues that the truth in its belated character cannot be linked only to what is known, but also to what remains unknown in our very actions and our language. To compound the point further, Caruth maintains that 'the story of trauma … far from telling of an escape from reality—the escape from a death, or from its referential force—rather attests to its endless impact on a life' (Caruth 1996: 6).

The core of understanding traumatic narratives, therefore, is that neither the narrator nor the listener knows what is yet to be said or cannot be said. Despite a vast amount of documents or other evidence, the listener to a traumatic story faces a situation where he or she comes to look for something that is in fact nonexistent since it is a record that has yet to be made (Laub 1992: 57). Against this backdrop, we can now explore and read the traumatic narratives on the witness stand and in the testimonial process against each other.

Trauma on Trial: Reading Traumatic Testimony Into and Against the Witness Stand

Let us start with some ideas around the form and structure of narrative accounts as they are produced in court. David Hirsh (2001: 530), drawing on the trial of Andrei Sawoniuk,[5] observes that the memoir is acted upon by the rules and norms of the legal process, particularly by the process of cross-examination and by that of the sifting out of evidence which is deemed to be inadmissible. In the courtroom, the narrative takes a specific form: here, a 'law-type' statement invites negotiation of meaning with falsification and verification such as by asking witnesses on the witness stand questions such as 'are you sure' or 'I have heard you saying this differently before', or 'evidence suggest'. This excerpt from a cross-examination of a defense witness by the prosecutor is very illustrative of this 'law-type' form. The witness CBR has participated in the killings at Nyange church (TRA03317/1):

Q. … Do you admit to having made this statement, which was recorded by the stenographers?
A. Yes, I can confirm having made that statement concerning that Friday …
Q. In other words, you confirm that the words you spoke regarding your leader, the words were [pause] they said that, 'Seromba did not even allow us to enter the courtyard of the presbytery before we removed the filth'. I've read it again.
A. Yes, that was what was said …
Q. Do you confirm that you yourself [pause] do you confirm that it was your leaders who went to see the priest and you were outside? Is that what you are saying?
A. Yes.
Q. … The same circumstance, the same incident that you are referring to now, when you were being examined by the Prosecutor, it was your leaders who said that Seromba did not want to let you kill the refugees before you clear the filth.
Now, the same incident, you place in the mouth of the priest the following, he said, 'Listen, look around and clear this filth'. First of all, what is the true situation?
A. Yes, but the two versions are not different. …

It becomes apparent through the cross-examination of witness CBR that the prosecution attempts to transform what Hirsh (2001) labelled the 'memoir' of

the witness into evidence. However, here the prosecution attempts to undermine the credibility of the witness by referring to statements made in the direct examination of CBR by the defense council (DC), the party which had called him as a witness (a stage of the process known as the examination-in-chief). The narrative of the witness is put under scrutiny and the meaning of the content is heavily debated between him and the prosecutor. In that process, the 'evidence' or the account of the witness is rendered inadmissible.

In the testimonial process, however, narratives take an open form encouraged by the intimate relationship between listener and survivor. For instance, as an interviewer, I would never ask closed questions or direct the testimony in a certain direction or press it in a conventional form. Turning back to the court, Hirsh (2001) further states that, in the process of forming memoir into evidence, criminal trials give extraordinary events a routine form: they abstract, shape and civilize them. For Jacques, the genocide is clearly an extraordinary event that has fundamentally changed his life and altered his being in the world. In his testimony to the author, he says,

> it [referring to the memorial, the church] is very touching; I remember what happened here and I imagine how they [his family] were killed … I had so much fear when I came back … Every year at commemoration we bury remains. Every year we found bodies and we dig new graves.

His account indicates that the remembrance of the 'event' does not know an ending and that, even after 20 years [at time of testimony], they still find bodies that need to be buried. In contrast, the Seromba judgment states, 'following his order, an attack was launched against the refugees by the Interahamwe, militiamen, gendarmes and communal police officers, equipped with *traditional weapons* and firearms, *causing the deaths of numerous refugees* [emphasis added]' (Seromba Judgment, 01-66-0276/2: para 19, p. 37). Here, the Chamber talks of 'traditional weapons' and 'causing the deaths of numerous refugees'. This is clearly, in the words of Hirsh, a 'civilized' form of describing the death of thousands of people, some of whom were bulldozed alive while being trapped in the church. The use of 'traditional weapons' refers to clubs and machetes that were predominantly used by the *Interahamwe* to kill people.[6] Generally, this way of dying was described to me in research interviews as 'animalic', a 'death without dignity'.[7] Jacques reaffirms what it means to die from a machete, when he says, 'I chose to be drowned instead of being killed by machetes. After what I saw here, dead bodies everywhere, people hacked into pieces, I really wanted to die'.[8]

In addition, law understands facts restrictively, which means that the collection of legal evidence privileges positive or objective facts. Facts are only considered as such if they are precise, pedantic and quantifiable and structured within a true/false dichotomy (Dembour and Haslam 2004: 163). For example, the cross-examination by the defense of witness SE13 on 7 April 2006 illustrates how narratives of a true/false dichotomy emerge on the witness stand (TRA0037701):

Q. Witness, on that day, 16th April 1994, did you see Father Athanase Seromba, while Nyange church [pause] was being destroyed?
A. On that day, I did see Father Seromba.
Q. Witness SE13, you told us during your testimony this morning, that the *bourgmestre* had requisitioned gendarmes from the *préfecture* to bring them to Nyange; is that correct?
A. Yes, you are right.
Q. They were supposed to provide for the safety of the refugees at the parish; is that right?
A. Yes, that was why they were at the church.

The defense counsel, Mr. Monthé, attempts to establish positive and objective facts by frequently asking witness SE13, 'is that correct?' or 'is that right?' He thereby reduces the events to singularities of objective facts and creates a binary and very simplistic narrative that fits the conventional narrative feature. The witness testimony continues:

Q. Witness SE13, can you explain to the Chamber, the circumstances and the atmosphere in which the church was demolished? …
A. Assailants had come from practically everywhere. The doors to the church were locked, and the refugees inside had barricaded the entrance of the doors with benches, such that they could not be opened. The people outside the church could not go inside to find [pause] or to get at the refugees. That is why they were throwing stones at the window panes above the doors. So, above the doors were window panes. It is true they had difficulty throwing stones. There was total chaos outside. People were trying to get into the church, and they were waiting for people to come out so that they could kill them.
Q. Do you think Anasthase Nkinamubanzi could have avoided the killings at Nyange church, you who are present, do you think he could have avoided destroying Nyange church?[9]

A. … even those of us who are from the same *commune* could not stop people from doing what they had to do as of the 12th of April. …People were bloodthirsty and just being before them posed a problem. Those in charge of security were present and they participated in the activities that were unfolding there. That is why I said that Kinamubanzi could not have disobeyed the orders to destroy the church.
Q. Witness SE13, can you be more precise? When you say people were bloodthirsty, what do you mean? Can you be more specific? …
A. They were present and no one could stop them from executing the orders they had received.

In this extract, witness SE13 is directed to establish precise and objective facts. When he talks about people being 'bloodthirsty', the DC pushes him to define what he means by it. Questions are asked in a linear structure, where the single events and circumstances are 'emplotted' in a chain of events that suggest an allegedly wholeness of the narrative emerging on the witness stand. The DC obviously wants to establish the 'fact' that the massacre on 15 April and the bulldozing of the church the following day could not have been prevented by the defendant, priest Seromba.

In contrast, Jacques' testimony neither refers to facts nor to a precise or quantifiable true/false dichotomy. Consider, for example, this longer excerpt from this testimony that describes the early days of the 'events' at the Kivumu commune:

> … On 10 April they killed the *achronomyst* of the commune. The same day the *préfe*t called the *bourgemestres* of different communes to make plans how to kill the Tutsi and to encourage them. The next day on 11 April the *bourgemestre* of Kivumu assembled authorities to pass instructions from the *préfet*. On the same day after the meeting they sent a letter to me because I was a business man at that time. The letter said that the authorities would need my car … Despite of so many Hutus having cars, I was the only one who was asked. I brought the car to Komini and they asked me to drive them to the border of the commune Kivumu/Kibirira but I asked why they made me do this. So I gave them my driver, because I didn't believe them. I met the driver [later] in October that year who said that they didn't move. I was glad I didn't go because they could have killed me. After giving my car away on the 12 April the killings officially started…

In this account of the events between 10 and 11 April, Jacques refers to information that he cannot possibly know or have witnessed himself ('hearsay'

evidence, in legal terms). He was hiding with neighbors and only came to the Nyange church on 13 April. Reading his testimony from the standpoint of facts, precision and true/false dichotomy, he cannot know what they did with this truck because he gave it to his driver. He was not at the meetings he describes either. We also never learn how he convinced 'them' to let him go after he gave 'them' his truck or if his driver actually delivered the truck.[10] We also do not get to know who 'they' in his account are. He refers to both Hutu more generally and to authorities and 'they' who started killing Tutsi. Yet, he refers to common knowledge and broader social narratives of what happened on those days that feed into his own narrative account and how he *remembers* what happened.

Giving testimony is always more than to simply narrate or to report a *fact* or an *event*, even to relate an experience. We can understand Jacques' testimony more generally as what Felman refers to as a 'responsibility to truth' (Felman 2014: 322): 'to speak from within the legal pledge of the witness oath, whether one is actually on the witness stand or not, whether one is in a trial or one is in the court of history'. In this sense, to testify is always metaphorically to take the witness stand, and the narrative account of the witness is engaged in both an oath and a commitment to one's own narrative that addresses the other. Jacques neither simply reports facts or events, nor is he referring to a factual truth. His testimony is a responsibility to a truth that is defined by how he *remembers* the events.

The courts in contrast may produce a vast number of facts, but the traumatic experience remains silent. In the Seromba case, for instance, it was difficult for the Chamber to establish the exact number of bulldozers that were used on 16 April to destroy the church and to kill Tutsi hiding in the church. On that point the judgment compounds, '13 witnesses testified to having seen a bulldozer at Nyange church, while 7 others mentioned the presence of two bulldozers'. The Chamber finds that the discrepancy between the accounts is due to the difficulty they had in 'identifying the type of vehicles present at Nyange church' (Seromba Judgment, 01-66-0276/2: para. 206, p. 59). At another point in the judgment the Chamber dismisses the testimony of witness BZ4 because 'his testimony lacks precision with respect to the *sequence* of the events [emphasis added]'. The Chamber further notes, 'he was unable to recall the *exact time* of his arrival or the arrival of the bulldozer [emphasis added]' (Seromba Judgment, 01-66-0276/2: para. 259, p. 73). Under the same heading the Chamber dismisses a further witness testimony because it found contradictions, 'as to the *order* to bring in the bulldozers [emphasis added]' (Seromba Judgment, 01-66-0276/2: para. 269, p. 75). In light of the fact that at least 1500 people died in the church, it seems rather unimportant

from which direction and in which order the church was pulled down by a precise number of bulldozers. As Molly Andrews reminds us, traumatic narratives are precisely marked by what is not there: coherence, sequence, structure, meaning and comprehensibility (Andrews 2014: 155; see also Laub 1992: 59–60).

Against this backdrop, how does Jacques describe the events between 13 and 15 April?

> On 13 April I came to the church, leaving my hiding place with neighbours. They said things were getting worse. But in the church I kept myself in the corner of the entrance and my children were gathering near the altar together with other children. They didn't know I had entered the church. I kept in corner all the time … My fellow businessmen bet on my life. If they found me they said to other perpetrators they would give them 100000 RWF. On 14 April many Tutsi were in the church and the Hutus were gathering around the church … I managed to flee the priest compound. They were killing the whole day of 15 April from 10 am through the night … I left the roof at 9pm in the night but killings still went on. In the night I left I was running around the bush until I reached the river Nyaberongo; I knew how to swim but I wanted the river to kill me. I chose to be drowned instead of being killed by machetes. After what I saw here, dead bodies everywhere, people hacked into pieces, I really wanted to die. But when I went in, I managed to reach the other side. On the other side was Gitarama; I was wounded all over, especially on my legs because of glass, but I could walk slowly until I reached my younger brother, who was living in Gitarama. There, it was somehow peaceful because they hadn't started to kill there. But the next day they started killing, so I and my family went to seek refuge in the marchlands (Kabgayi) where so many Tutsi were'.

In his account of the events between 13 and 15 April at Nyange church, Jacques does not testify according to a descriptive account of what he observed, rather he offers the very personal and private account of the effect of survival and of resistance to extermination, the very crime priest Seromba was found guilty of committing. His narrative account shows that the act of testifying, in and of itself, is vital not so much because of the historical or legal information that can be extracted from it but because of the depth of darkness that it begins to make visible to those who were not there.

Such stories testify to a struggle of survival then and now (Hartman 1996: 142). Jacques wanted to die, being drowned in the river after seeing how people were hacked into pieces by machetes. He testifies to the struggle of survival and in that moment also to the cruelty of survival. His account makes visible the despair and betrayal in saying how Tutsi believed the authorities

that they were safe in the church. Further, he recalled how his fellow businessmen who knew Jacques for years bet on his life as if he wasn't a human being, but an object. His ordeal doesn't end at Nyange church or in the river. He has hope when he arrives at his brother's home, a treachery 'peace' as he describes it. But the next day he must learn that his struggle for survival continues. His testimony breaks with the marchlands.

Later in the testimony he explained to me that his father and brother are not buried at the Nyange memorial. Indirectly, he here suggests they both died in the marchlands. The darkness of his testimony also becomes visible by the way he talks about his children. His children were in the church, but he stayed in the corner of the entrance, where they could not see him. And, here, we must ask what does it mean to know that we cannot save our own children? It is precisely this silence that cuts through his testimony, the recollection of losing and witnessing the killing of his children, wife, brother and father ('I remember how they were killed').

His testimony breaks the frames of law and testifies, on the one hand, to its very rupture in the wake of 'crimes against humanity' and, on the other, to the very human nature of survival. The testimonial process, in a relationship between listener, the 'other' and narrator, is the place and the process in which the traumatic experience comes into existence and is therefore knowable (Felman 2014; Laub 1995). We become more familiar with Jacques's trauma of survival, although we will never truly understand the deeper meaning of the silences that cut through his testimony.

In contrast, legal knowledge may produce vast numbers of 'facts', but the traumatic experience is silenced because the trauma does not speak from the language of facts. Consider this short excerpt from the examination-in-chief of witness CBN by the prosecutor to further illuminate this point (TRA003309/1):

Q. Without saying any names, did anyone close to you die at Nyange church?
A. Yes, many. My family members died in Nyange. Members of my family died at Nyange.
Q. Can you just say a number, at this time, of the close family members that you lost? You can estimate.
A. My four sisters died at Nyange. My junior brother also; that makes five. If you add my father, that makes six. My father's wife also died; that is seven. My wife, herself; that makes eight. Her daughter and the children of my sister. That makes 11 people. There are others who were not in my direct family; that is, the members of my father's family totalled 11.

The prosecutor is not interested at all in the personal loss of witness CBN, but only in the quantifiable number of family members CBN lost at Nyange church. In another examination-in-chief of witness CBJ, the prosecutor is interested in detailed facts concerning the death of one particular person (TRA003306/1):

Q. Did you see Miriam when you were at Nyange church during your stay from the 10th to the 16th of April?
A. Yes, I saw her.
Q. Did anything happen to her?
A. Yes.
Q. Can you briefly explain?
A. Yes. Miriam was the wife of Jean Kariyanga, who was a businessman. At the beginning, when people started fleeing and taking refuge at the church, she took refuge in the church after the death of Habyarimana … So Miriam and her family joined us in the church. And on the 15th, the doors were opened for us and we came out. And after having gotten outside, during the attacks, Miriam went to the same building in which she was before, and Father Seromba, once again, sent her [pause] sent away the people who were in the rear court to the *presbytery*, and where these people were coming out, they were being shot at. Miriam was captured after she had been sent away by Father Seromba. She was beaten up in front of the secretariat, and I saw people bring her to the front of the church. I didn't quite observe the scene, but subsequently I saw her mortal remains, that is the mortal remains of Miriam. Her clothes had been stripped off. She was treated very shabbily, and that is what I can say that I saw about Miriam.
Q. Did you see her clothes being removed?
A. Yes, I was an eyewitness. Her body was dragged on the ground …
Q. Did you recognise anyone present or perpetrating that against her? …
A. Those I were able to identify, Kayishema [pause] Kayishema Fulgence, of the judicial police. Miriam was dragged by a certain Murindanyi, but I do not know his first name. The judicial police inspector, Kayishema, was holding Miriam's head and was banging it against the floor of the courtyard. I saw them undress her and her legs were spread apart. That was what I was able to see.

The prosecutor does not follow up on the death of Miriam, the fact that she was humiliated or her legs spread apart. Indeed, the prosecutor continues the line of questioning, by simply asking 'You said that Seromba sent some people

out. Can you estimate the number of people sent?' Again, the trial is only interested in establishing meticulous and detailed facts. Only minutes later CBJ must take a break. He says, 'I have a problem. Before I came into the courtroom, I talked to the prosecutor regarding the wound I had which I sustained as a result of the *Interahamwe*. My head is heated up, and I'm feeling confused. This is the situation I am facing now. I don't think I can understand the questions that are put to me now'.

The traumatic experience of witnessing how Miriam died and his physical injury are not allowed to come through in the trial. It also seems arbitrary to establish the fact of the death of one particular person, given that around 2500 people died in the parish between 11 and 16 April 1994. At the end of the trial, the judgment establishes the death of Miriam 'beyond reasonable doubt'.

Conclusion: Law's Past and Trauma's Present

Reading the survivor testimony against the witness testimony on the witness stand has revealed the difficulties of the trial to hear and address the trauma of genocide and crimes against humanity. Felman reminds us that there are limitations in the possibility of seeing and hearing trauma. She argues that there exists a structural exclusion from our factual frame of reference that is determined by a built-in cultural failure to see, and I would add, *hear*, trauma (Felman 1997). Law is a language of abbreviations, of limitation and totalization that rules out what cannot be disclosed in language and words. And this is exactly what Lyotard (cited in Hirsh 2001: 536) prompts us to understand when he asserts that the perfect crime is not the death of the witnesses, but obtaining the silence of the witnesses and the deafness of the judges. To carry this thought further, law's story focuses on ascertaining the totality of facts. The facts of when, where, what and how many is what the trial is concerned with. This is the evidentiary foundation that the Chamber uses to rationalize its judgment and its legal quest for justice in the Seromba case. The court needs to establish the facts in its *totality* as 'beyond reasonable doubt' in its judgment. But as Arendt has argued in respect of the Eichmann trial, 'reality is different from, and more than, the totality of facts and events which anyhow is unascertainable' (Arendt 1993: 261). Law is, by definition, a 'discipline of limits' (Felman 1997) that also applies to the way time is understood and interpreted in the trial process. The analysis has shown how the cross-examination, the law-type questioning, produces legal narratives that not only distance and totalize the singularities of 'events' but also form a legal temporality that fails to include,

admit or acknowledge trauma time, except as a rupture of the legal frame. Temporality is indeed problematic with regard to trauma. The judgment makes past out of the massacres that happened at Nyange church and brought a legal closure, whereas the traumatic experience for Jacques lives in the present. Claude Lanzmann, with regard to the Holocaust, even emphasized that the Holocaust is not a memory but reveals itself only in a hallucinated *timelessness* (Lanzmann cited in Felman 2002: 153), something the trial can neither think of nor include.

Reading trauma into the witness stand might illuminate why the Chamber found so many inconsistencies in witness testimonies in the Seromba case. Indeed, as Nancy Combs has observed, inconsistency in witness testimonies in international criminal tribunals is not only a problem before the ICTR, but a 'serious problem in international criminal law' (Combs 2016: 5). Combs further argues that inconsistencies arise when witness testimony diverges from pretrial witness statements and that those are often related to details of dates, distances, duration and numbers (Combs 2016: 6). Combs argues that around 50 percent of inconsistent testimonies are given at the ICTR. She admits, though, that such can occur due to false testimony, interpretation problems and cultural misunderstandings and claims that these cases of inconsistencies relate to facts that 'can't be forgotten or confused'. This analysis however has revealed, in contrast to Combs' findings, that a more sympathetic understanding of traumatic testimony appreciates that, while there is always an oath to tell the truth, everything in this truth can be forgotten and confused (Felman 2014). Traumatic testimony exactly lacks the consistency and comprehensiveness that is needed in order to establish a totality of facts. A pure legal perspective neglects the fragments of both traumatic memory and experience. I therefore suggest there is a need to consider reading trauma into inconsistencies in witness testimonies before international criminal trials in order to illuminate different perspectives as to why those 'inconsistent' testimonies occur.

Reading trauma into and testimony against the witness stand importantly speaks to humanistic claims that storytelling by victims in juridical proceedings is a desirable and necessary act to build collective peace. Often there have been claims that victims are healed by giving testimonies in court or before Truth and Reconciliation Commissions. Osiel argues, for instance, that the 'victim-witness' appeals not only to the judges but implicitly to the community at large and that, therefore, the legal arena provides the victim with a superior platform to articulate their stories as influencing the collective memory of the events it judges (Osiel 2012: 2, 30). The foregoing analy-

sis of how the traumatic experience is not heard because it is silenced in the legal structure of the trial procedure has clearly shown that the 'real' story remains mute and the legal audience deaf to it. This dominant view that testifying in court leads to a catharsis for 'victims' and an acknowledgment of their suffering seems much more debatable in trials such as at the ICTR. Rather, the findings of this chapter seem to complement the work of those who argue that today's international trials leave little room for witnesses to tell their stories (Dembour and Haslam 2004: 153). In the case of Rwanda, local victim organizations such as Avega (the organization of genocide widows) or Ibuka (the umbrella survivor organization) even refused to work with the Tribunal because of repeated mistreatment and the lack of protection of witnesses in the court room.[11]

As the analysis of the court transcripts revealed, the only way to tell the story is in the form of giving legal evidence that at the same time clears the human experience out of the legal forum in order to establish a legally authoritative account of the crime and of 'what happened'. There is an inherent tension between the survivor who speaks on the witness stand and whose story cannot be heard. The survivor is only positioned as evidence with probative value that fundamentally neglects the fact that he or she has made an inhumane experience (Viebach 2017). In order for the trauma to be heard, the listener must hear and acknowledge the traumatic occurrence (Laub 2005). The court, therefore, cannot provide this testimonial holding space that would be needed in order to form and convey a traumatic narrative. The assumption of so many scholars that victims' pain and suffering is acknowledged in legal proceedings should be reconsidered and challenged by more empirical research. The results presented here, however, build a fruitful starting point to initiate a more nuanced debate about the position of victims in juridical proceedings, nationally and internationally.

The analysis in this chapter also engages with the critical work on the extent to which international criminal trials really can, and do, write history (see Wilson 2011: 1; also Gaynor 2012; Simpson 2007). It was shown how the trial marks what history remembers and what history forgets, or in the words of Felman, 'what is pragmatically included in and what is programmatically excluded from collective memory' (Felman 1997: 766). The collective memory created in court programmatically excludes the traumatic testimony, but pragmatically includes the evidentiary linear narrative that supports legal meaning-making. This leads to the human experience of the mass crime being cleared from the legal records. Therefore, we need further outlets for a traumatic past to emerge, to be heard and understood

if we are to generate a fuller and more sensitive picture of mass atrocities and genocide. Importantly, though, we must be aware that law relates to history through trauma, through the social function of the trial as a structural, procedural and institutional remedy to trauma (Felman 1997: 766). Yet, as trauma studies teach us, a trauma cannot simply be remembered when, in the first place, it cannot be grasped, transgressed into language (and legal idiom) or heard by its (legal) audience.

In conclusion, it is important to note that trauma is unique, both individually and historically, although some aspects of it share some characteristics (Andrews 2014: 148). That also means that the representation of trauma faces epistemological and ethical challenges (Feldman 1991; Robben and Nordstrom 1995; Young 1988). As researchers, we should be cautious when arguing to 'speak for the subaltern' or 'give voice' to victims, particularly when the research is characterized by hierarchical encounters between global North and global South. Robben and Nordstrom importantly note that 'one can count the dead and measure the destruction of property, but victims can never convey their pain and suffering to us, other than through the distortion of word, image and sound. And rendition of the contradictory realities of violence imposes order and reason on what has been experienced as chaotic' (Robben and Nordstrom 1995: 12). We have come across this in the witness testimonies and in Jacques' story. Yet this chapter has rendered this contradictory reality meaningful by providing it the linear (beginning, middle, end) narrative structure that is needed to understand and contextualize what is said, written and heard and what is ultimately needed to write an academic piece of work. When writing about narratives of violence, we must, therefore, reflect on our own subject position in the broader epistemological community and how this impacts on the way we present and make use of traumatic experiences in our work. Nevertheless, this chapter has hopefully contributed to a more nuanced and complex understanding of the relationship between trauma, witnessing and memory-making in international criminal trials.

Notes

1. It is beyond the scope of this chapter to detail the genocide. See for a very detailed discussion Alison Des Forges (1999). Her book was used at the International Criminal Tribunal for Rwanda (ICTR) to establish the count of genocide. She served as expert witness on many occasions during the ICTR trials. Further on expert witnesses, see Wilson (2011).

2. This research is funded by a Leverhulme Trust Fund Early Career Fellowship. The Faculty of Law of University of Oxford generously funded my research trip from August to October 2014 during which the survivor testimonies were conducted. The survivor testimony was part of a broader project on memory and transitional justice in Rwanda between 2011 and 2014. I am grateful to Rachel Condry and Richard Martin for fruitful comments on earlier drafts of this chapter.
3. Names used here are anonymized in order to protect the identity and privacy of research participants.
4. I use witness testimonies of both defense and prosecution, but only those of survivors. Furthermore, material includes cross-examination and examination-in-chief. The documents used are accessible online via the Juridical Records and Archives Database of the United Nations Mechanism for International Criminal Trials. The records used here are referenced under their record number only. The case number for all documents of the Seromba trial is ICTR-01-66.
5. This case was tried in London under the *War Crimes Act 1991*. Andrei Sawoniuk was a member of a Nazi-organized police force that operated in and around a small town in Belarus and that was tasked with killing Jews. He was found guilty of murder.
6. *Interahamwe* literally means 'those who work together'. The *Interahamwe* was a militia founded by the Republican Democratic Movement (MDR) political party in 1994. The *Interahamwe* operated countrywide and was responsible for organizing, planning and carrying out massacres. Leaders of the *Interahamwe* have been tried before the ICTR, including Georges Rutaganda, head of the *Interahamwe*.
7. For a recollection of the killings from a survivor perspective, see also Jean Hatzfeld (2007, 2010).
8. Witness BZ1 states in his witness testimony that he witnessed how Anicet Gatare asked a *gendarme* (a police officer), in exchange of some money, to be killed in order avoid an atrocious death [by a machete or club]. Gatare was killed as a matter of fact. However, the Chamber could not establish whether this happened through a machete or through shooting (Seromba Judgment, 01-66-0276/2: para 200, p. 56).
9. Anasthase Nkinamubanzi appeared before court as well and was a defense witness. On the stand, he claimed that he was coerced to drive the bulldozer. Witness FE31 testified that another driver who was asked to bulldoze down Nyange church refused to follow the order and was killed. The Chamber regarded this statement as not credible.
10. Indeed, in the examination-in-chief of prosecution witness CDL, he refers to Jacques' vehicle and states, 'he was a Tutsi and his vehicle was taken away from him. He had gone into hiding. During that period [name redacted] was the driver of that car' (TRA003315/2).

11. A report by the International Federation for Human Rights into the treatment of witnesses before the Tribunal concluded that the complaints raised by those survivor organizations were justified (2002).

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Critical Reflections on the Operation of Aboriginal Night Patrols

John Scott, Elaine Barclay, Margaret Sims, Trudi Cooper, and Terence Love

Introduction

Indigenous night patrols grew from community development initiatives during the 1990s in central Australia and have evolved and multiplied into a diverse range of patrol types dispersed throughout the nation (Blagg and Valuri 2004; Lawrence 2007). During this time, they have been subject to many pressures—from communities and government—but for advocates their primary role is to improve quality of life in the community development sense for all members of the community, rather than modifying social, environmental, health, economic and crime indicator metrics. As part of this,

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Indigenous night patrols play a role in the prevention of conflict and violence and reduction of associated harms, especially in remote places (AIHW and AIFS 2013). Contemporary rural and remote Indigenous communities are typified by high levels of cultural and social disintegration. The development of Indigenous night patrols to function in this difficult context and address the specific issues to improve community quality of life can be considered as a distinct 'Southern' contribution to criminology (McCall 1980; Connell 2007), especially because unlike many international examples of 'community policing', they were developed and are largely operational in rural and regional settings (see Nalla and Newman 2013). Moreover, they were a form of community development and justice that developed bottom-up, drawing on Indigenous methods of community support and forms of dispute resolution (see Carrington et al. 2016; Walker and Forrester 2002).

In their earliest form, Indigenous night patrols acted primarily to resolve issues and build community (Mosey 1994). They intervened at critical junctures in events, not as police or an emergency service, but as local people who knew the individuals involved and the context, and could respond by persuasion and mediation, operating via consent as opposed to coercion. Later, as patrols became better funded within a community policing paradigm, the patrols transported people from 'risk' areas to safer places, typically at night. They were auspiced by local Aboriginal organizations, staffed by volunteers and had considerable flexibility in how and when they worked. The philosophy of successful night patrols was primarily derived from community development and justice principles and early intervention approaches to problem-solving and crime prevention. Night patrols were distinguished from private security and formal policing operations in that they are typically community development focused, 'community-based' operations and were in some cases 'community owned' or 'community-controlled'. Over time this changed in practice, as they spread to varied locations, secured an increasing share of government funding and developed a range of models that emphasized a focus on crime prevention, being a professionalized service, guidelines for practice, formalized governance arrangements, and reporting requirements. Nevertheless, notions of community development with an increasing focus on community policing remain central to the philosophy of patrols.

Although still referred to as emblematic of Indigenous community justice, Indigenous night patrols have become contested and hybrid entities through what was has been termed a 'clash of paradigms', which has contrasted community development activities, with state policing and/or Indigenous dispute resolution or crime prevention with non-Indigenous (Turner-Walker 2010). The research on night patrols has included critical reviews (e.g. AIHW and

AIFS 2013; Auditor-General 2011), in-depth ethnographic-style accounts of patrols such as Turner-Walker (2010) and Walker and Forrester (2002) to accounts emphasizing actuarial performance measurement, underpinning government reviews (Auditor-General 2011; Beacroft et al. 2011). All approaches share an interest in how the patrols work and what makes them effective and pay at least some kind of tribute to the patrols as community 'owned', 'led' or 'based' (Willis 2010; Blagg and Valuri 2004; Blagg 2007). For many, however, the explicit primary raison d'être of Indigenous night patrols in community development and improving quality of life in communities has been overlooked and instead reduced to criminological explanation and metrics. As Richards (2014) has observed with regard to restorative justice, community policing has often been presented as monolithic, despite having highly divergent antecedents. This has resulted in an emphasis on documenting and appraising justice practices at the expense of critical scholarship.

Numerous scholars have sought to define the concept of *community*, to identify the unique, often esoteric characteristics that unite residents to become stronger and work towards achieving common goals and maintaining social order (e.g. Tönnies's (1957) concept of *gemeinschaft*, Granovetter's (1973) 'strong and weak ties' and Putnam's (1993) 'social capital'). Sampson et al. (1997) described the social cohesion among community residents combined with their willingness to intervene for the common good to prevent crime and disorder as 'collective efficacy'. This ability depends upon conditions of mutual trust and shared values among residents.

The celebration of night patrols has rarely accounted for how community conflict or fragmentation may impact on their operation and effectiveness, despite such issues having been highlighted in one of the earliest reviews of night patrols. For example, although there may be a passing reference or note to family and community politics and dissension, most notably as a factor in a patrol's demise or decline, there has been no exploration of the challenge such divisions pose for a 'community' initiative and 'communal' resource. It is as though patrols exist in political and cultural vacuum. Where criticism has been made it has been largely 'administrative' to the extent that it has been concerned with functionality of night patrols and best practice in terms of reducing crime metrics, as opposed to examining the philosophical mooring of night patrols and situating them within a broader theoretical framework of community development and criminal justice.

This chapter develops a critical account of night patrols, which situates their development within the broader field of communitarian models of justice. In doing so, we examine the impact on night patrols on how 'the crime

problem' is understood and managed in the context of rural and isolated places. We also examine the capacity of communities to manage social problems and deal effectively with socio-structural precedents and coincidents of crime. The chapter draws on fieldwork undertaken for an evaluation of youth night patrols in New South Wales to provide a critical context to night patrols, examining the challenges of localism and its relation to neoliberal forms of governance (see Cooper et al. 2013).

The Sociopolitical Context of Night Patrols

On 21 June 2007, the Australian Government announced a 'national emergency' response to protect Aboriginal children in the Northern Territory (NT) from sexual abuse and family violence. On 23 June, approximately 600 members of the armed services were deployed to occupy 23 Indigenous communities and town camps in the far North of Australia. At the same time, 'the intervention', as it became known, introduced a range of draconian measures, including abolishing government-funded employment projects, quarantining 50 percent of welfare payments, suspending the *Racial Discrimination Act* (1975), subjecting children to mandatory health checks and compulsorily acquiring Aboriginal land (Aboriginal & Torres Strait Islander Social Justice Commissioner 2007). The intervention was, on the surface of it, a response to the *Little Children are Sacred* (2007) report, released on 15 June by the Northern Territory Government.

The government response was criticized in terms of being a top-down intervention, which micromanaged the lives of Indigenous people. Critics claimed the intervention disregarded human rights and was essentially racist (Altman and Russell 2012; Fieldes 2010). In terms of its mission to assist and 'liberate' Indigenous peoples, comparisons were drawn between the Northern Territory and Afghanistan and Iraq. The North of Australia presented as something akin to a failed state. In July 2015 Australian Human Rights Commission president, Gillian Triggs, described the NT intervention as a 'sad chapter, in Australia's history' and a gross 'breach of basic principles of public international law' (Kerin 2015).

The question here is how should the intervention be read in terms of the troubled history of policing Indigenous communities in Australia? Was it some kind of reversal of the welfarist interventions that had become familiar during the 1990s following the *Royal Commission into Aboriginal Deaths in Custody* (Johnston 1991)? Indeed, was it an indication that the zero-tolerance-type policies and procedures of the new right, which had been tested in urban

ghettos of the global North, were being introduced into some of the most remote communities in the world? It is interesting to note that the intervention had occurred at a moment when criminological theorists had begun to denounce criminal justice policies and activities of the right as 'neoliberal'. There was nothing overtly 'neoliberal' about the intervention, with its emphasis on overt state intervention.

Looking back, the intervention was none of these things. At the very moment of the intervention, a major review was being undertaken of a very different approach to Aboriginal policing in Australia. In 2001–2002, Blagg and Valuri (2004) reviewed over 100 self-policing initiatives being undertaken by Indigenous peoples throughout Australia. Similarly, Cunneen (2001) concluded that night patrols represent 'the major and longest running crime prevention programs in Indigenous communities, with evaluation of night patrols indicating reduced levels of fear of crime, offending and associated social problems' (Cunneen 2001: 50). It seems difficult to reconcile the extremes of militaristic intervention with the subtler rhetoric and practices of community policing. And yet, both were being played out, sometimes in the same communities in the far North of Australia. Cunneen (2001), writing prior to the intervention, had noted a lack of effort to implement restorative or community-based policing in Australian jurisdictions, there instead being signs of an increased paramilitary or tactical approach. And yet, by 2008 Blagg cited 130 patrols operating in Australia, which Porter (2016) suggests to be a conservative figure. What's more, most patrols were situated around the far North of the continent.

In the seminal *The Culture of Control* (2001) David Garland documented a seemingly schizophrenic or contradictory response to crime control in Western nations, such as Britain and the USA, that had emerged following the failure of penal policy during the late twentieth century and access to justice critiques which had emerged simultaneously on the left and the right of the political spectrum during the 1970s. The failure of penal welfarism in an Australian context is stark when considering Indigenous Australians. It is widely acknowledged that Indigenous Australians experience significant levels of disadvantage across a range of social, economic and health indicators (Anderson and Wild 2007; Higgins 2010; Macklin 2011; Ministry of Justice 2010; Cunneen 2007). In 2016, Amnesty International called on Australian state and territory governments to introduce justice targets to reduce the chronic rates of Indigenous incarceration (Amnesty International 2016).

In the context of such failures, two criminologies have emerged in Western societies. The 'criminology of the other' is a hysterical denial of the failure of sovereign state to control crime within its borders. It seeks to reassert the

state's power to govern by force of command; in this context, power plays a largely symbolic role. Punishment is an act of sovereign might, an act of punitive force, which exemplifies what absolute power is all about. This response to the penal crisis relies on exclusionary and punitive strategies of crime control. The intervention makes sense in the context of this criminology. In contrast, the criminology of the self views criminal and risk populations as rational actors and utilizes what have been referred to as the 'new criminologies of everyday life', such as crime prevention (Garland 1996). It involves increasing rationalization and commercialization of criminal justice functions, utilizing the agencies and actors of civil society to manage crime. In terms of power, it operates according to what Foucault termed disciplinary power (1991).

A key shift for Garland (2001) in the contemporary management of crime involves the movement from a monopolistic sovereign state towards dispersed and pluralistic strategies of crime control. Community policing, an important aspect of night patrols, is one such strategy. The shift from conventional models of policing can be traced back to the 1987 *Royal Commission into Indigenous Deaths in Custody*. Following this, the past two decades have seen strenuous efforts by Indigenous groups, the courts, law reform bodies and the police to address the overrepresentation of Indigenous people in Australia's criminal justice system through the adoption of pluralistic strategies which draw on restorative models of justice (AIHW 2012; Allard et al. 2012; Ministry of Justice 2010; Richards 2011; Smith and Weatherburn 2012; Willis 2010; Cunneen 2007).

Many of these programs may be characterized as new criminologies of everyday life to the extent that they are decentered from the state and have a preventative focus. They require a shift from an adversarial offender-centric approach to acknowledging offending as a community issue requiring a collective response. Community justice intervention programs have three elements: restorative justice; prevention, early intervention and community strengthening; and self-determination and engagement (Ryan et al. 2006). New programs include the adoption of community policing, diversionary programs, cross-cultural training and education for police officers, a commitment to improve custodial health and safety and greater Indigenous autonomy concerning justice issues. More Indigenous staff have been employed in courts and prisons, and alternative forms of community-based sentencing have been introduced to address Indigenous disadvantage (Cunneen 2007; Mazerolle et al. 2003). Night patrols might be situated as one strategy in this shift towards communitarian forms of justice, with community placed at the forefront of justice initiatives, alongside offenders and victims.

Night Patrols as a Criminology of Everyday Life

The reform challenge of community justice might be characterized as achieving 'governance at a distance' (Rose 1996), that is, to incorporate traditional patterns of behavior of local Indigenous people into the conventional concepts and procedures of criminal law. The process is confounded by communication and language barriers, the role of kinship, Indigenous customary law, multi-tribal and interclan conflicts, substance abuse and the historical legacy of social discrimination and dispossession (Hogg and Carrington 2006). Addressing Aboriginal injustice must involve rethinking how crime is interpreted and understood, especially in rural and isolated places. Rethinking 'the crime problem' might address aspects of over-policing and allow Aboriginal people to be positioned not only as perpetrators of crime, but also as victims of crime, and might also broaden the way in which crime is defined and policed. On another level, the causes of offending and victimization, deeply structural and highly contextual, need careful consideration.

Mainstream police studies have largely ignored night patrols, as has critical work on private policing in Australia. Night patrols have sometimes been considered as a form of community policing. This can be mostly considered as a neoliberal strategy which engages a community in broader responsibility for social development and social sanctions, as well as supporting the adoption of harm minimization strategies and mechanisms (Nalla and Newman 2014). With this model, the role of the community is to provide expert knowledge and to mobilize previously untapped cultural and community resources to develop situational and culturally appropriate responses that will engender change in the community and individuals. There is also adjustment in the role of government from that of expert to that of facilitator and enabler. The objective here is to increase capacity of local communities to self-manage program elements (Ryan et al. 2006). However such policies are based upon the assumption that programs will succeed because a functioning cohesive community exists in all places (Barclay and Donnermeyer 2007).

The 1986 New South Wales (NSW) Law Reform Commission of Australia's review of customary law noted that Aboriginal people want a police presence and a voice on how policing is carried out. This review argued that self-policing provided flexibility to Indigenous communities in how 'troublemakers' are dealt with while taking pressure off limited police resources (Law Reform Commission 1986). Community policing has been found to be sensitive to the social and welfare needs of specific groups in the community. It is also a strategy, which has allowed for the state to extricate itself from the

troubled area of Indigenous justice, reverting some responsibilities back to communities. In Australia, it uses 'local Aboriginal knowledge' to create new regulatory networks (Ryan et al. 2006; Turner-Walker 2010). With the support of local police, Indigenous people and their codes of conduct are utilized in problem-solving work (Blagg and Valuri 2004; Office of Crime Prevention 2006; Blagg 2007; Attorney-General 2008; Aboriginal Programs Unit 2010; Auditor-General 2011; Beacroft et al. 2011; Richards et al. 2011).

Night patrols have been criticized on a broader level for problems such as 'net-widening', a process by which the client reach of the criminal justice system is extended by increasing the overall proportion of the population subject to some form of social control (Ryan et al. 2006). This is said to arise from the programs becoming too closely linked with formal systems of intervention and the problems encountered as a result of endemic funding shortages. There is danger of Indigenous community initiatives being co-opted in new security networks, into meeting needs of non-Indigenous interests or being colonized by powerful agencies of business and government. Here 'local Aboriginal knowledge' is used to create new regulatory networks, as has been seen with some Indigenous dispute resolution programs that have been appropriated by powerful state agencies such as the police (Nolan 1995). The same criticisms have been made with regard to restorative justice interventions among young people in Australia (see Richards 2014).

Their position at the bottom of the service provision chain makes patrols vulnerable to co-option. Partnerships have been questioned where community organizations are seen as junior partners, and information tends to flow one-way (upward) rather than being shared. Some key decisions on the management of night patrols have even been made away from community forums. An enforcement model sees the role of patrols as removing the 'Aboriginal crime problem' from public spaces. Here Indigenous agency is used to achieve traditional policing objectives of cleansing public space of Indigenous people.

What is surprising here is that the community, which is prominent in the philosophical grounding of night patrols, is largely invisible in evaluations of the service. Typically night patrols have been offered as an example of the 'decolonization' of Indigenous justice (Porter 2016). The proximity of night patrols to what Garland (1996) refers to as the 'new criminologies of everyday life' is largely ignored, as is the less positive interpretation of such criminologies as a 'neoliberal' strategy of crime control. Night patrols are considered in terms of empowering community as opposed the net-widening, surveillance, privatization of disputes or responsibilization of communities. In contrast to the type of strategy we see in the NT intervention, night patrols could also be

considered as a withdrawal of state responsibility for the management of Aboriginal disadvantage coupled with the maintenance of state control through standardization and quality assurance mechanisms.

The following section draws on fieldwork undertaken for an evaluation of youth night patrols in operating as part of the Safe Aboriginal Youth (SAY) programs and referral to support services (Aboriginal Programs Unit 2010; NSW Government 2012). These programs, which commenced in 2009, have been funded to operate for eight hours per week, usually over two nights, with some additional funds provided for supplementary nights during school holidays or to coincide with key community events. Patrols and activity programs operate at priority times identified by local police. Aboriginal community justice groups or other local Aboriginal youth interagencies provide an advisory role for SAY patrols and activity programs (Aboriginal Programs Unit 2010). SAY program funding has been provided to nongovernment organizations for up to four years, subject to compliance with Performance Agreements.

In total, fieldwork was conducted in 11 sites in New South Wales; however, this paper draws on data collected in nine rural sites. Size of communities in the study ranged from 600 to 38,000 and included agricultural, coastal and remote areas. In addition to night patrol management and staff, interviews included members of Aboriginal community justice groups, youth workers, local council staff, Indigenous leaders, police and various government and nongovernment service providers. In total, there were 117 participants interviewed across the nine communities. Of these, 46 were female, 71 male and 57 Indigenous people. Ages ranged from 18 to 75, with most participants aged in their 20s and 30s.

Discussion

The Service

The SAY program targets communities with relatively high proportions of Aboriginal people and high levels of social disadvantage. According to the Australian Bureau of Statistics (ABS) Socio-Economic Index for Areas for regional towns, these communities have some of the highest levels of disadvantage in NSW, with higher levels of unemployment and disability, single-parent families and criminal victimization as compared to state averages accompanied by low levels of household income (ABS 2011). Furthermore, these levels were much higher for Aboriginal residents in comparison to

non-Aboriginal residents of these communities. The Indigenous population was also much younger with a higher proportion of children under the age of 14 years. The large- to medium-sized communities could be said to have a high population turnover, but overall a low population growth compared other rural and/or isolated towns of similar size. In some communities, young people aged less than 14 are overrepresented. Some places had high levels of Indigenous in-migration. In one larger town, 57 different Aboriginal groups were represented.

In many cases night patrols in NSW were started by the community, often as foot patrols. In all cases the patrols went through diverse structures with different sponsoring organizations. Initial sponsoring organizations were invariably Indigenous, although few current organizations are. In terms of operation, patrols were variously managed by Police Citizens Youth Club, local government youth services, Indigenous-specific services or bodies and local government. Only one service was managed by an Aboriginal organization, most staff were non-Indigenous though local stakeholders did stress how important it was to have a number of local Aboriginal staff, and the users of the service were a mix of Aboriginal and non-Aboriginal youth.

A mix of female and male children and young people use the night patrol services. In larger communities, 40–50 clients could access the patrol on a busy night. Different programs targeted different age ranges: some from 10 to 16 years, others 12–18 and another 14–17, but services were flexible and occasionally children as young as 7 would be transported. Hours of operation varied significantly across the different communities, with some using fixed schedules and routes, while others providing a more flexible service. Some of the young people were picked up from their homes and transported to an activity center, while others are picked up from the streets and returned to a safe place, which may be the activity center. In addition to transport, programs provided a range of recreation (e.g. midnight basketball), social and learning programs. The provision of food was a key component to the success of the activity program.

Night Patrols and the 'Crime Problem'

That youth, and in particular Aboriginal youth, were a problem and/or in trouble in the towns we visited almost went without saying. Small populations and high levels of mutual recognition in these places meant the activities of young people were more visible than other groups in the town and more likely to be policed (Cunneen 2007). Being visible, hanging out, late at night,

under the influence, loud and disruptive—these were concerns for adults, both Indigenous and non-Indigenous. Night patrol staff concurred with such concerns.

In particular, local residents were concerned with the presence of young people in civic centers 'hanging around'. The marginalized status of young people was underlined by references to 'boredom', 'nothing to do', 'no transport' and for those most at risk or most disengaged 'not being safe at home'. Boredom was blamed for many young people gathering in the streets on evenings and during weekends (Blagg and Valuri 2004). Environmental factors such as heat and crowded dwellings brought young people into public spaces at night. Once on the streets, young people were likely to hang out with other young people. Lack of youth recreational activities or exclusion from 'communal' facilities resulted in what young people describe as 'boredom'. Recreation options that occupy young people in urban areas such as cinemas, major shopping centers and other sport and recreation facilities were limited in the places we visited or were inappropriate to the needs of young people. In some cases, young people were excluded from participating in recreational activities because of age, monetary or social restrictions. Even where young people did have access to these, it involved considerable travel and money. The *exclusion* has necessitated alternative recreation spaces, which in small towns may not exist. This is not normally the arrangement in more traditional cultures, nor in all Western cultures, where it is normal for adults, young people and children to socialize together in public space.

The use of public spaces, often highly supervised and physically restricted in smaller communities, conflicted with the commercial and service functions of the places we visited. Other research has noted that the use of public space within town centers by young people has been accompanied by efforts to make them invisible through the coercive actions of police and private security companies to move them on (see Smith and Reside 2011; Putt 2011; White 1990). This results in high levels of policing, noncomparable with non-Indigenous populations, and high arrest rates for minor offenses (Hogg and Carrington 2006). Following from this, research has also found that night patrols have produced enhanced public perceptions of safety (Ryan et al. 2006). Our research also suggested that night patrols were broadly considered by those directly responsible for their operation to be an effective form of situational crime prevention and there was a general consensus that they were an effective instrument in controlling the 'crime problem' or social problems identified by communities, this being, namely, juvenile delinquency associated with isolation and lack of mobility by offering a spatial form of crime prevention. For example, they seek to move 'people at risk', in terms of both

criminal offending and criminal victimization, from public places to 'safe' places. However, night patrols that focus narrowly on immediate crime prevention and community safety are open to criticism that they do not address the underlying social causes of crime. This noted, they do provide a mechanism to address community safety and may address criminalization by diverting young people from antisocial or criminal activity.

While, on the one hand, those involved with night patrols lauded their effectiveness, there was also a perception among some residents that night patrols only operate as 'booze buses' or free transport that facilitate and normalize antisocial conduct. In the absence of programs that build community capacity, it could be patrols focusing narrowly on immediate crime prevention do nothing to build community efficacy. A broader criticism here was that patrols are providing a 'street sweeping job' and fail to challenge the perception of 'youth as trouble' or address the causes of youth offending. Instead the aim of patrols is to remove the Aboriginal problem from public space. In this way the Indigenous agency, if co-opted, functions to perform traditional policing goals associated with cleansing public space of Indigenous people. The youth night patrols clearly sought to address these concerns, but it is notable that youth have minimal input into their operation or management. Patrols are not led or managed by young people. 'Harm' is defined by self-defined members of the community, not those on its fringes. On whose behalf do they speak?

Addressing the Causes of Crime

Communitarian justice often relies on the ability of people within a community to intervene for the common good to maintain social order and depends upon conditions of mutual trust and solidarity among residents or 'collective efficacy' (Sampson et al. 1997). Collective efficacy is embedded in structural contexts, and therefore it can be eroded by social change, such as residential instability, ethnic diversity and social and economic disadvantage. Sampson et al. (1997) maintain that the differential ability of communities to maintain effective informal social controls is a major source of variation in crime. Rural criminologists in North America long argued that collective efficacy produced lower crime rates in rural communities. While this has recently been questioned in research drawn from the experience of the global South, especially the notion that crime rates are necessarily lower in rural areas, the broader point that collective efficacy also produces a criminogenic order which facilitates and represses certain varieties of criminal or deviant activity has also been

made (Scott and Hogg 2015). On another level, the type of communitarianism idealized in studies of rural crime is not evident in many isolated and rural Aboriginal communities. In such places, communities have been fractured, social disintegration often contributing to actual and perceived crime problems. This ignores the state as a positive force in struggles for justice and much communitarianism avoids analysis of power relations.

Geographic isolation and geographic distances made transportation a huge issue for residents of the towns that we visited. Given the lack or cost of public transport in these places, the addition of a communal vehicle—the bus—can be a considerable asset, especially for some groups within a community. While transport affects all young people living in rural areas, especially the economically disadvantaged, Indigenous people are especially affected as spatial management has formed an important element in their social control. The disruption of Aboriginal cultures and communities had significant spatial dimensions and continues to be so, as Indigenous people have traditionally been segregated from rural towns, despite often being an important element of rural labor forces. During the colonial period and for most of the twentieth century, Aboriginal people were forcibly separated on reserves and missions outside of town boundaries. These were places of isolation, which cultivated dependency. The legacy of this separation has persisted in some of the case study communities in the form of social housing, which is restricted to defined spaces on community margins. Children were particularly vulnerable to victimization in the smaller remote towns that are located on major highways where strangers traverse, where street lighting is minimal.

The above noted lack of transport resources and options are closely linked to youth crime in rural areas. Constraints on access to education, training, work and social life were exacerbated by the lack of public transport in the case study communities, and many young people (including non-Indigenous youth) lacked private transport to access basic services, such as schooling or leisure activities such as sport. Access to transport for young people and limited youth services are key problems and highlighted the utility of a night patrol service. In some towns, the out-migration of families reduced demand on education, health, transport, retail and other services. As a consequence, there was a shortfall in specialist services in relation to drug and alcohol use, psychiatric and psychological assessment and counseling and life skills. There had also been problems in attracting and keeping sufficient numbers of appropriately skilled staff for night patrols. Justice services were largely concentrated in certain regional centers leading to problems in youth access.

A major challenge for patrol workers in most communities is the lack of services available for young people, particularly after hours. In many communities, the night patrol is the only dedicated service for youth that operates at night. Some programs did not tend to refer young people to other services on a regular basis, but in other communities referral of young people to drug and alcohol services and outreach services is common practice. As Richards (2014) has noted, while justice initiatives may hand back some of the responsibility for crime control to communities, this is not worked in conjunction with an increase in social support services. Given that many community initiatives operate in lower socioeconomic regions and involve Indigenous peoples, the likelihood programs will address the structural precedents of crime are limited.

There were also problems of an overlap of service delivery and a lack of clearly defined functions in the roles of service providers. Our informants felt that some services in their communities can have quite territorial views about 'competing' services and there are issues around confidentiality and the sharing of information. This is because of the practice of tendering for services, which means services 'silo' clients and services to retain their viability and ongoing funding. As a result, there was limited interaction, cohesion or collaboration between services and limited scope for night patrol staff to link clients to other community supports.

A recent evaluation concluded that night patrols could best support increased community safety if there was a 'more coordinated approach to services delivery at the community level' and if each night patrol established 'effective partnerships with other related community support services (such as police, safe houses, sobering up shelters and health clinics) at a local level' (Auditor-General 2011). This conclusion subtly changes the focus of night patrols, away to short-term immediate problem-solving (persuading people to accept transport home to avoid conflict or victimization) towards a more prominent role in an integrated approach to service provision that addresses underlying causes of social problems that reduce community safety (Beacroft et al. 2011).

In small rural towns, the lack of transport made a bus a prized possession. In some communities, the patrol bus is used during the day as an outreach service for a range of Aboriginal services, such as taking people to classes and medical appointments. In these instances, people who were elderly and people with disabilities were cited as using the bus. In other instances, for people who were elderly, the bus would be used to transport adults to recreational activities. This has created confusion as to the function of the buses, and some patrols have experienced problems when refusing access to adults or

inebriated people seeking transport home. There was a strong sense that such 'misuse' of the resource should be limited and managed, especially when it had resulted in the discontinuation of funding for the patrol in some instances. Opening up this possibility, however, ran the risk of exacerbating local friction in smaller communities with accusations of 'nepotism', 'gate-keeping' and 'hijacking' and/or in all contexts of 'inappropriate use' by groups and individuals. Concern was expressed about allowing widespread community access to the bus. It was acknowledged that if access is managed well, it can work in a large 'fragmented' regional center, but caution was urged in smaller communities where everyone knows everyone else. A further concern about 'wider access' was that such arrangements can take the ownership and management of the bus out of the hands of the Aboriginal community.

Such misuse is to be considered in the context of Aboriginal kinship relationships. There are shared responsibility agreements between kin groups based on the concept of mutual obligation or 'reciprocity'. Behrendt (2011) defines Aboriginal reciprocity as a social norm that requires those who have resources to share them with those who do not and that those who receive this generosity must provide for and share with others. Therefore, the needs of the community would take precedence over the use of the bus in these towns where there is a lack of transport. This noted, fault lines and fractious relationships also emerged within and between communities. This is not surprising as any close-up knowledge of social life reveals, be it in rural towns or remote places. However, most pertinent were the references to family conflict and local politics within the Aboriginal community, as these impeded program management in some communities. Kinship and 'closeness' are seen as a potentially divisive force that is glossed as local politics, influenced by kinship, Indigenous customary law and multi-tribal and interclan conflicts (Memmott et al. 2006). These explanations of local politics, however, primarily relate to remote Indigenous communities, where the traditional is more apparent to the non-local eye.

Social debts and credits need to build up over time, which occurred in some locations, primarily among Indigenous residents, but not solely so. Arguably, where there is little in the way of assets held in joint ownership and where individuals have not accumulated much capital or goods, then the power conveyed to enable access to and use of a vehicle takes on a special significance. To key individuals and groups, it has the potential to generate significant service 'debt' and cause disequilibrium in the ongoing balancing of social and political power between individuals and family groupings within a community.

Conclusion

All rural communities differ in size, geographical location including their proximity to urban centers, their social structure and economic base, which can range from agriculture, forestry and fishing, mining to tourism. Even places closely matched in these characteristics differ according to the collective characteristics of the people who live there (Barclay and Donnermeyer 2007). Indigenous communities in rural Australia are usually located on former reserves and missions that were constructed through the colonial process which often resulted in different and sometimes traditionally antagonistic groups being forced to live together. The construction of 'community' took people away from their traditional lands and prevented the use of customary ways of dealing with conflict (such as temporary exile) (Cunneen 2015). Therefore, the term 'community' may not really apply to the complex interrelationships and diverse groups of Indigenous people that exist in rural Australia. Furthermore, Indigenous communities are usually part of a wider non-Indigenous community; and the community as a whole may not be socially cohesive (Cunneen 2015; Barclay and Scott 2013).

Collective efficacy is facilitated by social cohesiveness within a community where there are high levels of mutual trust and cooperation between residents. However these characteristics require time to develop. Communities are not natural set of relations but are constructed on broad terrain of history and politics (Barclay and Scott 2013). In fragmented communities, such as those which were the focus of our evaluation, social bonds between residents are weaker, and this reduces the probability that they will be willing to monitor the behavior of young people or intervene to prevent crime.

The increasing shift in focus to small 'remote' communities in federal public policy has contributed to distorted and asymmetrical depictions of community life that privileges the traditional regions with dense kinship ties and clan affiliations. Too often the rhetoric of community disguises the variegated and fragmented postcolonial situations of Indigenous people and romanticizes pan-Aboriginal identity in a manner that conceals differences. Turner-Walker (2010), for example, uses the term 'settlement' as opposed to community to highlight how colonization mixed peoples together who would not otherwise have resided in geographic proximity and would likely have avoided social contact. Morgan notes that very few Aboriginal people now live in circumstances where they are completely immersed in Indigenous kinship ties to the exclusion of all others. Thus it seems fair to conclude that understanding localized power relations and contestation cannot be anchored

to essentialist views of what it is to be Aboriginal or symbolic representations of Aboriginal communal life, even if they have currency as rhetoric at a local and national level. Communities are not natural set of relations or processes, but are constructed on broad terrain of history and politics, including practices of colonizers, such as the forced relocation of tribal groups.

Power and hierarchical formations pervade all communities, so that there is no such thing as a singular or universal community—no community includes everybody. It is meaningless if it does. Always communities have members and outsiders. This position is rarely acknowledged in the literature on community policing, which struggles to account for community diversity and conflict. In terms of night patrols, the diversity of rural and remote Indigenous communities means they are unlike other Australian communities, particularly in terms of the mixes of families, relationships, responsibilities and territories; therefore night patrol memberships and activities must be designed for the specific circumstances of each community (Turner-Walker 2010). Traditional and cultural value systems must be considered when planning programs. Community participation requires genuine participation and leadership from community members. Often the most disadvantaged and socially disorganized communities struggle to create and sustain the participation and leadership required to pressure government agencies and services to take effective action (Achterstraat 2011). The challenge for the new criminologies of everyday life is to define the role, capacities and limits of communities in theory and practice. Our research would indicate that the capacity of night patrols to achieve their objectives varies according to the sociopolitical context of communities.

There is a romanticization of community self-regulation, with community seen as an antidote to antisocial behavior, as a moral and philosophical source of justice and preferable to privatization and individualism. While rural places have been idyllized by criminologists as places of collective efficacy, replete with social capital at a geographic level (Bell 1997, 2006), Indigenous peoples have also been mythologized as representing a more basic form of social organization (Richards 2014). The assumption that a collective and egalitarian ethos exists in many in contemporary Aboriginal communities dangerously oversimplifies and conceals complex social disorganization and structural inequalities that pervades these communities. When considered in terms of geography, unstable communities are sites composed of different identities and interests can be riven with tensions regarding the seemingly authentic and essentialized experiences and roles of leaders in embodying such qualities.

In terms of the structural causes of crime, there is a need to acknowledge the different capacity of regions or groups to regulate conflicts, support

victims and offenders and resource reintegration. A neoliberal response to governing crime in rural Australia requires communities to take generic responsibility for certain crime problems, such as youth offending. Meanwhile, it seems only Indigenous people are constructed as belonging to communities which are outside of communities of care (Richards 2014). The notion that youth or Indigenous people constitute a significant part of the crime problem in rural places goes unchallenged. Geographic inequality and spatial concentration of wealth and poverty means some communities are better able to provide community policing initiatives. What might work reasonably successfully in well-integrated communities will be limited in socially fragmented places characterized by deep-set structural inequalities. Local harms weaken a broader response to political domination and oppression. If community justice remains tied merely to crime prevention, no attention will be given to the need for transforming communities and building progressive social alliances that might change the conditions under which offending takes place. Community policing remains at best a medium-term, band-aid solution to a problem that would be better addressed from a long-term, whole-of-society perspective, offering a therapeutic response for structural problems.

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