

MANY DOORS TO INTERNATIONAL CRIMINAL JUSTICE

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Responsibilities to protect and prevent elite crimes are best energized by enforcement that walks through many doors. Effective deterrence is rarely delivered by the International Criminal Court. Yet deterrence is possible when it patiently cumulates through many doors. Likewise truth, justice, and reconciliation can achieve little through one door and much through many. Opening more doors to the complexly cross-cutting character of survivor guilt with mass atrocities can better open possibilities for future prevention and reconciliation than simply doors to courtrooms that find a criminal on one side of complex sequences of atrocity. The Nuremberg and Tokyo War Crimes Trials opened quickly after World War II. They did not prove to hold keys to truth and reconciliation for Germany until the Eichmann trial finished in Jerusalem in 1962. Why? Still today, non-confession by the U.S. to Hiroshima/Nagasaki as war crimes has meant truncated Japanese reconciliation. Different kinds of doors are needed with crimes like the Dresden and Tokyo fire bombing, the rape of Nanjing and the “comfort women” issue. These have included citizens tribunals, truth commissions, and indigenous justice in cases like Bougainville that rejected the truth commission model. When we reflect upon door diversity, transitional justice turns out not to be very focused on justice or international criminal law, and not to be at all transitional, but rather a maze

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*of doors to justice of diverse kinds that open or close across the longue durée (as developed in the work of Susanne Karstedt).*¹

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INTRODUCTION: TRANSITIONAL JUSTICE PLURALISM

Transitional justice was launched at Nuremburg and re-launched in the 1990s with “great expectations.”² As trials got deeper into their work at the highwater mark of international criminal law in Bosnia (in terms of numbers of multilevel criminal prosecutions)³ and Cambodia (in terms of engaging victims with genocide),⁴ dissatisfaction and anger with what was actually delivered proliferated in survivor societies to the point where managing these great expectations to something more realistic became a widespread imperative for transitional justice practitioners.⁵ The most common manifestation of this expectation management, especially among lawyers at The Hague, was a retreat to a tempered legalism of believing that all we prosecutors can do is try fairly the facts before us, all we judges can do is decide the case justly on those facts, and let the disappointing overall quality and quantity of transitional justice be as it may. Criminal lawyers, on this view, should not be responsabilized to tackle all the massive problems of societies traumatized and devastated by war. Ray Nickson, Alice Neikirk, and Aleksandar Marsavelski⁶ have been among those who have pioneered thinking about pluralizing the doors through which transitional justice unfolds, beyond doors at The Hague, as the remedy to this retreat to

1. Susanne Karstedt, *From Absence to Presence, from Silence to Voice: Victims in Transitional Justice since the Nuremberg Trials*, 17 INT’L REV. VICTIMOLOGY 9 (2010).

2. THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT: GREAT EXPECTATIONS (Brett Bowden, Hilary Charlesworth, & Jeremy Farrall eds., 2009).

3. Aleksandar Marsavelski & John Braithwaite, *Integrating Transitional Justice: Levels-of-Government, Levels-of-Offending*, CORNELL INT’L L.J. (forthcoming 2020).

4. Christoph Sperfeldt, *Rome’s Legacy: Negotiating the Reparations Mandate of the International Criminal Court*, 17 INT’L CRIM. L. REV. 351 (2017).

5. RAY NICKSON & ALICE NEIKIRK, *MANAGING TRANSITIONAL JUSTICE: EXPECTATIONS OF INTERNATIONAL CRIMINAL TRIALS* (2018).

6. Marsavelski & Braithwaite, *supra* note 3.

overly narrowed legalism. Martha Minnow⁷ and Philip Clark⁸ count among many who have introduced important new themes into the complementarity conversation about international criminal law.

This article argues that the high costs and disappointing accomplishments of transitional justice in terms of deterrence, prevention, accountability, justice, truth-telling, and reconciliation can be salvaged by a renewed pluralism of justice that walks through many doors. It is no more than the sketch of a different kind of argument for a justice cascade.⁹ The sketch might hopefully motivate more detailed treatments of how to build a court's pitiful spoonful of deterrence in the face of multitudinous mass atrocity by patiently and creatively moving beyond that courtroom to justice in many rooms¹⁰ that accumulate many spoonfuls of deterrence across the *longue durée*. Then the article outlines even more sketchily the idea that patiently pushing on many doors can also accumulate spoonfuls of crime prevention, accountability, justice, truth-telling, and reconciliation into larger dollops of these ideals. In doing so, it brackets much of the great complexity of the challenge. It does not tackle the many ways that counterproductive things can be done in the way we walk through these doors. A good illustration of that challenge is Susanne Karstedt's literature review, which suggests transitional justice often delivers macro-gains in societal healing and reconciliation, while leaving more survivors with worsened than improved individual emotional wellbeing at the micro-level.¹¹

The first section of the article argues that there is a degree of generality of the application of this idea to all types of crimes of the powerful. Responsibilization and widening the net of duties to prevent risks of crime are conceived as keys to this accomplishment, contrary to much thinking

7. Martha Minnow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law? Truth Commissions, Amnesties, and Complementarity in the International Criminal Court*, 60 HARV. INT'L L.J. 1 (2019).

8. PHILIP CLARK, *DISTANT JUSTICE: THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON AFRICAN JUSTICE* (2018).

9. KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011).

10. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 13 J. LEGAL PLURALISM & UNOFFICIAL L., no. 19, 1981, at 1.

11. Susanne Karstedt, *Between Micro and Macro Justice: Emotions in Transitional Justice*, in RESEARCH HANDBOOK ON LAW AND EMOTIONS (S. Bandes, J.L. Madeira, K. Temple, & E. Kidd White eds., forthcoming 2020).

in critical criminology. The second section of the article narrows the focus to transitional justice and to the character of mass atrocity in World War II as the foundational and largest case study of the dilemmas of responsabilization for mass atrocity. The third section narrows the focus even further to the Tokyo Tribunal and to a humble methodology of one family's narratives of attempting to speak truth to the flawed power of Tokyo, as it dashed the great expectations of families for justice. Next, the article conceptualizes eight variegated types of doors to justice, reconciliation, and high-integrity truth-seeking from these family narratives. Then doors that became more important in conflicts after World War II, such as truth commissions, citizens tribunals, and vernacularizing¹² local indigenous justice into international criminal law, are added to the analysis from restorative peacebuilding cases such as the Bougainville civil war of the 1980s and 1990s. The Pinochet case in Chile is conceived as a model where spoonfuls of deterrence do accumulate in the long term, where high-integrity truth-telling spreads from small chinks of light to a bright light shone on genuine innovation and patience in the pursuit of reconciliation. The upshot is the half-full Chilean glass of transitional justice, a society rich with peace and genuine democracy that is a light on the hill, just as Germany and Japan are today. The revealing data for the analysis is two personal narratives, one of the Pinochet family because it is so decisive in revealing the possibility of a half-full glass of international criminal law, the other of the Braithwaite family, chosen because this author has decades of detailed personal experience of things one family can do to take responsibility for making the personal political.

I. ONE-DOOR METHODS BREAK DOWN WITH CRIMES OF THE POWERFUL

Notwithstanding the profound impact of Edwin Sutherland's invention of the concept of white-collar crime in the 1940s,¹³ criminological theory and criminal law jurisprudence remain myopically mired in debates about how

12. SALLY ENGLE MERRY, *HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2009).

13. EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME: THE UNCUT VERSION* (1983).

to punish street criminals. This is true for conservative theory, critical theory, and progressive theory that seeks to liberate the powerless from the manacles of oppressive criminalization. In this special issue we might read John Pratt and Michelle Miao's as always inspiring contribution with this concern, for example.¹⁴ Pratt and Miao articulate well the worry that rewriting criminal law to deliver security against future risk, rather than merely punishing past wrongs, endangers individual rights by the prioritization of public protection.

Yet with crimes of the powerful (as opposed to crimes of the powerless), we should actually want to prioritize duties to prevent crime more than we do, and we should prioritize this above corporate rights. The systematic patterning of child sexual abuse in the Catholic Church, century after century, for example, should energize criminal law reform that overrides Canon Law doctrines that protect the holy mission of the church and its rights to privacy and sovereignty over church affairs by enforcing a criminalization of cover-up and criminalization of failures to take reasonable steps to prevent the preventable by Cardinals and corporate entities of the church alike.¹⁵ In airline safety regulation, and increasingly with the regulation of recklessness and negligence in health care, the evidence is persuasive that effective regulation can be forgiving of reckless near misses, while being quite punitive toward cover-ups of near misses that hobble prevention of future safety catastrophes.¹⁶ In environmental regulation, there is a case for criminalizing corporate failures to prevent preventable environmental harms, learning from the challenges preventable general duties have thrown up in occupational health and safety enforcement.¹⁷ Directors' duties in the corporate law of many countries also criminalize

14. John Pratt and Michelle Miao, *Risk, Populism, and Criminal Law*, 22 *NEW CRIM. L. REV.* 391 (2019).

15. Meredith Edelman's research program explores this theme through multiple alternative lenses of responsive law. For early fruits of this work, see Meredith Edelman, *An Unexpected Path: Bankruptcy, Justice and Intersecting Identities in the Catholic Sexual Abuse Scandals*, 41 *AUSTRALIAN FEMINIST L.J.* 271 (2015).

16. Rachel Wilf-Miron et al., *From Aviation to Medicine: Applying Concepts of Aviation Safety to Risk Management in Ambulatory Care*, *BMJ QUALITY & SAFETY*, Feb. 2003, at 35; John Braithwaite, *Between Proportionality and Impunity: Confrontation → Truth → Prevention*, 43 *CRIMINOLOGY* 283 (2005).

17. *General Environmental Duty*, EPA VICTORIA (Mar. 12, 2019), <https://ref.epa.vic.gov.au/about-us/response-to-epa-inquiry/general-environmental-duty>.

failures to prevent corporate crime in ways that are useful for preventing capitalism from becoming more predatory.¹⁸

Criminal enforcement of the laws of war does and should criminalize failures of commanders to prevent war crimes, even if the commander did not pull the trigger, did not issue the order, was not even present, and was not even aware at the time that an order was given to shoot Prisoners of War (POWs).¹⁹ If the commander takes steps to ensure her wilful blindness to the war crime, and then an ethical officer makes a point of tainting her with knowledge of it, and if she then fails to discipline troops responsible for the crime, the commander is bound to be culpable under international criminal law.²⁰ Rightly so, is one implication of my analysis.

The core argument is that responsibilities to prevent and responsibilities to protect many kinds of crimes of the powerful are best energized by enforcement that walks through variegated doors. This implies that with elite crimes we need more of the responsabilization in civil society so often denounced by critical criminologies.²¹ Enhanced responsabilization for all crimes of the powerful should be mixed in with enhanced state punishment of crime, and many other very different arrows in the quiver of multiparty regulation of military domination. The evidence, now including data from an impressive meta-analysis,²² is that heightened levels of corporate deterrence do not work very well in preventing corporate crime. What is shown empirically to work with corporate crime, however, is having a mix of regulatory enforcement tools—an enforcement quiver containing diverse arrows.²³ We can interpret this as evidence of the greater effectiveness of multi-door criminal justice with crimes of the powerful, compared to single-door criminal justice, because regulatory mix is more likely to be found behind disparate kinds of doors to justice than behind singular doors.

18. For example, Robert T. Miller, *The Board's Duty to Monitor Risk After Citigroup*, 12 U. PA. J. BUS. L. 1153 (2009).

19. Marsavelski & Braithwaite, *supra* note 3.

20. CHANTAL MELONI, *COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW* (2010).

21. See, e.g., Bernard E. Harcourt, *Neoliberal Penalty: A Brief Genealogy*, 14 THEORETICAL CRIMINOLOGY 74 (2010); Michelle Brown & Judah Schept, *New Abolition, Criminology and a Critical Carceral Studies*, 19 PUNISHMENT & SOC'Y 440 (2017).

22. Natalie Schell-Busey et al., *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIMINOLOGY & PUB. POL'Y 387 (2016).

23. *Id.*

Like Schell-Busey and her colleagues,²⁴ Choi and his team²⁵ found that enforcement mix is what delivers better deterrence. They set out to test the deterrent effectiveness of the historical construction between 1992 and 2006 of the Australian Securities and Investment Commission's (ASIC) responsive regulatory pyramid. Their analysis showed that as successive regulatory crises, commissions of enquiry, and law reforms progressively equipped ASIC with new layers of more varied arrows in its law enforcement quiver, the effectiveness of ASIC enforcement progressively increased. A difference-in-difference analysis with the impact of New Zealand securities and financial market regulation reinforced this result.²⁶

For war crimes, one important door can be energizing self-regulation of the laws of war by vernacularizing them into the religious discourses of different religious traditions. The International Committee of the Red Cross (ICRC) has mobilized Islamic scholars respected by the Afghan Taliban to identify Sharia texts that justify compliance with the international humanitarian laws of war in a dialogue process that helped to energize the pre-existing Taliban Code of Conduct for fighters as a document that vernacularizes international humanitarian law and Islamic law on armed conflict.²⁷ The Taliban has taken more convincing self-regulatory actions by rather punitive Taliban courts to enforce the agreement than its adversaries in the Afghanistan conflict have managed to deliver. This ICRC work

24. *Id.*

25. Ka Wai Stanley Choi et al., *Responsive Enforcement Strategy and Corporate Compliance with Disclosure Regulations* (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722923.

26. Choi and his colleagues were interested in the effectiveness of securities regulation in making markets more transparent to investors and therefore more efficient and less prone to artificial bubbles that burst. They measured the impact of the Australian and New Zealand financial disclosure regimes by variables such as reduction in analysts' forecast errors, forecast dispersion, bid-ask spread, and increase in the turnover rate from the market liquidity test. The leverage in the data was formidable, with an Australian sample of 148,498 firm-month observations (with each observation based on the median for a number of analysts) and a New Zealand sample of 116,585. This study has the strength of a multi-construct, multi-method move to a pooled time-series cross-sectional analysis of all major corporations in two entire economies on an outcome that securities enforcement is designed to deliver. The accounting methodology delivers a larger *n* of observations than research in the criminological paradigm can ever aspire to. *See id.*

27. For an ICRC video in Persian on how this work is communicated, *see Law of Armed Conflict: Key Elements*, ICRC (Aug. 20, 2015), <https://www.icrc.org/ar/document/law-armed-conflict-essentials>.

started with persuading non-state armed groups in Bosnia to sign such agreements.²⁸ With Islamic armed groups in other places such as Mindanao, and armed Buddhist factions in countries like Sri Lanka and Myanmar, mobilization of their revered Buddhist religious scholars to that same end is also well underway. A long march of vernacularizing international human rights into the normative traditions of all the world's great religions is imperative when its origins in the 1940s were so Christian.²⁹

Another door of course opens to the International Criminal Court (ICC), even if the count of convictions will continue to be a single digit number for some years while thousands of unconvicted war criminals remain at large, even if many countries have now slammed this door shut after 124 states initially opened it during the first two decades of this century. Other states, including three of the five permanent members of the Security Council, never ratified the U.N. Rome Statute of the International Criminal Court in the first place. An alternative door is to hybrid criminal courts that include international judges appointed by tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) sitting with nationally appointed judges.³⁰ Another is to national criminal courts, another to sub-national criminal courts such as Bosnian provincial or municipal courts. Another is to military courts that court-martial culpable commanders. Even though "military justice may be to justice as military music is to music,"³¹ we come to see more value in military justice when it is just one of many thin reeds reformers seek to lash together.

When all these doors are closed, there are truth commissions and truth and reconciliation commissions. The best of these combine televised national town hall meetings with locally informalized or indigenized restorative justice.³² This has happened in remarkable local ways in cases

28. Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992, available at ICRC, <https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts#toc-b-bosnia-and-herzegovina-agreement-no-1-of-may-22-1992> (last visited Dec. 2019).

29. John Braithwaite, *Redeeming the 'F' Word in Restorative Justice*, 5 OXFORD J. L. & RELIGION 79 (2016).

30. Marsavelski & Braithwaite, *supra* note 3.

31. ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970).

32. A good example is the Community Reconciliation Program associated with the Timor-Leste truth and reconciliation commission (CAVR); see JOHN BRAITHWAITE,

like the Bougainville civil war without a national truth and reconciliation commission.³³ Bougainville Revolutionary Army companies in hundreds of locales apologized collectively to villages they had burnt, raped, or pillaged; they returned the bones of murdered loved ones, showed remorse with gifts of pigs (an extremely valuable Bougainville currency) and rebuilding work, sealed with ceremonies of song, dance, and soaring speeches of remorse. Often years after literally thousands³⁴ of kindred collective acts of contrition and accountability did not lead to payback killings, individual soldiers would come with their pigs, their victim bones in a beautiful coffin they had built, their contrition and tears, to the family of a woman they raped and killed in the war. Churches played important roles in these traditional restorative processes in ensuring that they would not trigger new waves of revenge killing, and often oversaw paradoxically animist spiritual ceremonies of burying a stone to symbolize the burying of conflict, enforced by a meaning-making whereby whoever renews the conflict buried with the stone will bring the wrath of dead ancestors down upon the health of the perpetrators, their families, their crops. When all these doors are closed by international vetoes at the U.N. and vetoes at all multilevels of governance down to the church parish or the local village, there is the opening of citizens tribunals, as we saw, for example, with the so-called Korean “comfort women” Tribunal, which was actually about sex slavery by the Japanese army during World War II,³⁵ and with the 2013 Biak Massacre Citizens Tribunal for large numbers of rapes, murders, and sexual mutilations by the Indonesian military in West Papua.³⁶

HILARY CHARLESWORTH, & ADÉRITO SOARES, *NETWORKED GOVERNANCE OF FREEDOM AND TYRANY: PEACE IN TIMOR-LESTE* (2012).

33. JOHN BRAITHWAITE, HILARY CHARLESWORTH, PETER REDDY, & LEAN DUNN, *RECONCILIATION AND ARCHITECTURES OF COMMITMENT: SEQUENCING PEACE IN BOUGAINVILLE* (2010).

34. *Id.* at 68.

35. Christine M. Chinkin, *Women’s International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT’L L. 335 (2001).

36. PEOPLES’ TRIBUNALS AND INTERNATIONAL LAW (Andrew Byrnes & Gabrielle Simm eds., 2018); Jason MacLeod, *Citizen Media and Civil Resistance in West Papua*, PAC. JOURNALISM REV., July 2016, at 38; Camellia Webb-Gannon, *Effecting Change through Peace Research in a Methodological ‘No-Man’s Land’: A Case Study of West Papua*, 18 ASIA PAC. J. ANTHROPOLOGY 18 (2017).

II. RETHINKING CRIMES OF WORLD WAR II

Nuremburg was a turning point in how the international community began to come to terms with international criminal law. Sadly though, the lesson the German people drew in the 1940s and '50s from the conviction of many of those most responsible for the genocide and the wars of aggression was that it was only Hitler's inner circle who were responsible, and perhaps senior leaders of the SS. The German army were not seen as responsible, nor the German people and the institutions they supported in elections. The truth was that not only the army and German political institutions, but also the judiciary, the business elite, and much of civil society were culpable props to a genocidal regime. The next generation of Germans came to accept this, and even its World War II generation, after the Eichmann trial was completed in Jerusalem in 1962. So what was different about the Eichmann trial compared to Nuremburg? The German-Australian criminologist Susanne Karstedt summarizes the previous work of many German public opinion researchers and her own work as supporting a conclusion that what was different was that the Nuremburg trials, valuable as they were, focused only on documentary evidence of who was responsible for what orders and atrocities, whereas the Eichmann trial went beyond that to give evidentiary voice to survivors of death camps.³⁷ Victim testimony and the "banality" of Eichmann's unmoved evil,³⁸ in the face of harrowing victim narratives, shifted German public opinion to the point where, by 1970, it had become good German politics for Chancellor Willy Brandt to kneel in front of a memorial for the Warsaw Jewish Uprising of 1943.

It is a big insight that Karstedt promotes in her work. The door to a Nuremburg style of trial was not enough. A second door to a Jerusalem trial that gave voice to Jewish survivors opened rather wider vistas of justice, accountability, and speaking truth to power. At one level, the ICC continues to make the Nuremburg mistake by holding trials over Congo crimes in The Hague instead of Congo.³⁹ Only in Congo can communities of survivors be connected to trials through the survivor listening and survivor responses in survivor voice that can only work well when justice is

37. Karstedt, *supra* note 1.

38. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (Viking Press rev. and enl. ed. 1964).

39. CLARK, *supra* note 8.

embedded in communities where crimes occur.⁴⁰ In my interviews with Aleksandar Marsavelski in Bosnia, Bosnian prosecutors and victim advocates complained that judges in The Hague had a fourth-grade, primary-school-level understanding of Bosnian history that caused them to make ridiculous interpretive errors in specific cases. In contrast, international judges who came to live and breathe the life of Bosnian society by serving in Sarajevo on hybrid courts where international judges sat with national judges, acquired a high-school level of understanding of Bosnian history. And they were able to lean on the university-level and experiential understanding of Bosnia held by their fellow Bosnian judges when their interpretive speculations ran haywire.

III. CLOSING ONE DOOR TO TOKYO: A FAMILY STORY

Like Nuremburg, the Tokyo War Crimes Trials shifted paradigms in a positive way. Yet there was no Eichmann trial that built them into something better. I disclose that my family feels personally deeply connected to the Pacific theater trials. My father was told by prosecutors (the family passed written evidence of this to the Australian War Memorial only in 2017), that he was to be the “star witness” for the “death marches” hearings at the Tokyo War Crimes Trials. He was one of six survivors of 2,345 POWs and an unknown number of Asian slave laborers (also probably thousands) who perished in Sandakan, on the Death March or in the prison camp. His close mate during the war was my mother’s first husband, Wal Blatch. Wal died on the Death March.⁴¹ My father refused to testify as

40. It is also about caring for the trauma of survivors, which is better done in local ways by local staff who are not rushed to get the job done and return quickly to the safety of The Hague. One story from my Congo fieldwork for *Peacebuilding Compared* is seared in my memory. It is of a 12-year-old girl who had been raped by soldiers. It was a mass rape after which all the rape victims were buried alive. This girl was the only survivor; she lived by digging her way out of the grave. She told the ICC investigator that she did not want to give testimony; she had reasons not to trust foreigners. Because she was the only survivor able to tell the story, the ICC pressed on with asking her “just a few” questions, and she began to weep and shake all over until a local social worker dragged her away from the clutches of the court.

41. Wal Blatch and my mother Joyce married just before he sailed off to the war. My father Dick escaped from the march. He was supported to survive in the jungle by local indigenous people at great risk to their lives. When Dick returned home, one of his letters of

the prosecutor's "star witness." There was no issue for him about the proposed trial of the commandant (Hoshijima) of the camp, a man who my father regarded as a monster. Eye witnesses and the judge in his trial (Justice Athol Moffit) reported that he bit the hand of the hangman and drew blood when the noose was put around his neck. But when Australian military intelligence and legal officers interviewed my father, Dick Braithwaite, after his amazing escape to allied territory, he was disturbed about other choices they were making about who to set up to prosecute. Decisions about who to prosecute were less evidence-based and more politically based than my father could respect. He was also shaken that as a barely alive survivor who was not expected to live long and had a terror of being locked up again, he was threatened with prosecution under the Australian Crimes Act if he spoke publicly at any time about what had happened in Sandakan.⁴² The lawyers and government PR people would manage that through the staged disclosures from the war crimes trials.

What my father did in response, and as part of his journey of healing, was to write hundreds of letters to families of men who he knew had perished to speak of the courage of their loved one in facing death, and to reassure and comfort them about the facts of their passing as best he could. He thought, and our family thinks, that in circumstances where he believed he would not live long, justice and healing was better served by opening many little doors of truth through those letters than by his modest contribution to the big door of truth that was supposedly opened in Tokyo.

Dick Braithwaite suffered terribly from survivor guilt; I remember childhood visits to the "nerve ward" at the Veteran's Hospital, veterans' hands shaking with cigarettes in them. The Australian military leadership also suffered a kind of survivor guilt. The Australian high command wanted to cover up the fact that they had rejected a plan to save the Sandakan POWs.

comfort to families was to Joyce. She was one of many who asked to meet Dick in person. They met, then went to the "pictures" together at King's Cross, Sydney. Dick was a skeleton and struggling with reliving so much for the benefit of the families. He collapsed in the movie theater. Joyce took him home and nursed him back to health. Taking a soldier home scandalized Joyce's Baptist Church. Some gossiping congregation members were advised by my strong grandmother, Ethel, to back off her daughter. As with most survivors of trauma, the major work of healing and enablement of sharing historical memory is the care of loved ones, in this case Joyce and Ethel.

42. RICHARD WALLACE BRAITHWAITE, *FIGHTING MONSTERS: AN INTIMATE HISTORY OF THE SANDAKAN TRAGEDY* 282 (2016).

They put out the story that American Pacific War Commander General MacArthur had made this decision. In fact, the decision to let thousands die had been more in the hands of the Australian high command. In 1945, Dick was overwhelmed with anxiety over his failure to persuade them to rescue those who were still alive. There were also political imperatives about who the United States wanted to prosecute. Dick Braithwaite and the Australian Prime Minister of the time believed, and my family still believes, that Japanese Emperor Hirohito was a war criminal. MacArthur had the view that if victor's justice caused the Emperor to hang, it would be impossible to achieve commitment of the Japanese people to long-term peace and reconciliation. It is hard to argue that MacArthur was wrong. The Emperor stood beside MacArthur in forging that reconciliation in 1945 and 1946, and Japan became as peaceful a number two world economic power as one can find in the history books during that long period before China took over as number two. So far Germany, like Japan, has been historically exceptional as a number three world power in its peacefulness as well.

The Tokyo trials were shabby as justice. Wartime Prime Minister Tojo agreed that it would be bad for Japan if the Emperor were executed. He agreed with American prosecutors that he would assume all blame that might otherwise fall upon the Emperor. One day in Tojo's trial he inadvertently spoke the truth in this regard. The American chief prosecutor got the message to him that night that he had inculpated the Emperor, particularly by saying that no Japanese official would ever go against the will of the Emperor. In court the next day, Tojo begged to correct the record, stating that he was in error the previous day with respect to the role and presence of the Emperor.⁴³ We also know from the historical record that the judges, especially the Australian President of the court, disbelieved this reversal, but were legally powerless to act on this disbelief in the face of the record of evidence accomplished by this conspiracy between the prosecution and defendant Tojo.

Survivor X,⁴⁴ one of three Sandakan survivors who did testify in the Pacific war crimes trials, confessed at the end of his life that he and another

43. HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN 604–05* (2001). Bix also reveals that Hirohito, far from being a passive pawn of the Tojo militarists, played a decisive role in decisions to commit war crimes in the conduct of the war.

44. Although this allegation, and the allegations against survivors Y and Z that follow (see note 45), are all on the public record in various places that name these dead men,

survivor had given false testimony against a Japanese officer that resulted in his execution for a crime he did not commit.⁴⁵ The third survivor who testified was believed by most of the other survivors to have survived because he was a collaborator with the Japanese, and some believed he had murdered another POW with whom he had escaped because the other POW knew incriminating details of this collaboration. My father distrusted this survivor, even had him appear in PTSD flashbacks, but thought the evidence for his Japanese collaboration was not definitive and that he deserved the benefit of the doubt on such a traumatic allegation for family members of the alleged collaborator.⁴⁶ Extremely heavy reliance on testimony from this witness also raises a question about whether some of those executed were guilty beyond reasonable doubt. If this man was a collaborator who murdered a prisoner,⁴⁷ is it possible that such collaboration motivated him to protect some and to want to see others out of the way for the wrong reasons? We will never know. This survivor lived a strange life back in Australia, fearing that someone would kill him.

I choose not to name them because these are criminal allegations (of perjury) not proven in court, and I prefer to do it this way for the sake of surviving families.

45. This may have been triggered by the best-known historian of the death marches, Lynette Silver, pointing out “something horribly wrong with the evidence” after reading transcripts of the evidence at this trial. When [X] confessed that he and [Y] had “framed” the defendant, Silver reflected, “How could [X] possibly expect me to believe any of his evidence when he and [Y] had lied under oath?” LYNETTE RAMSAY SILVER, SANDAKAN: A CONSPIRACY OF SILENCE 310 (1998). As family historian Richard Braithwaite also pointed out, regarding the work of another historian: “Michele Cunningham has carefully analysed the testimonies of [Australian survivors X, Y, and Z], and found inconsistencies between different trials. However, to suggest that these men were masters of what they said at the trials is probably unrealistic. Does anybody really think ORs [Other Ranks] would be allowed to testify without being given instructions about what to say?” See BRAITHWAITE, *supra* note 42, at 361. In the end, there was a preference for witnesses still in the army at the time of the trials over discharged survivors for this reason; see *supra* at 361.

46. My mother had a traumatic experience when she was with the wife of survivor Z at a Sandakan commemoration event, when two other survivors approached Z’s wife together and broke her down, shouting at her that she should not be allowed to attend the event because her husband was a traitor.

47. As implied even by the report of the Australian military fact-finder of 1945–46, Major Harry Jackson, on the ground in Sandakan in a letter to X, “. . . I saw [Z] on several occasions but got rather boxed up due to the fact that he never told the same story twice, however, I think I understand that gentleman’s motive. I saw [another survivor] in Sydney last week in connection with the BBC broadcast in which we figure . . . [the implication was that this other survivor explained to him that Z was a collaborator].”

He was killed in unusual circumstances that were never adequately explained: one car ran him down, then a second car ran over him.⁴⁸ The dead can no longer speak to clarify the truth, and so truth is elusive in war crimes trials because so many witnesses are killed with the purpose of suppressing truth, and sometimes those who live distort truth because of particularities of their own survivor guilt. Hence, let us at least modulate international triumphalism about the justice that occurred behind those doors in Tokyo.

Let us also give a tiny bit of space for the truth and justice enabled by Dick Braithwaite's letters that passed through the doors of hundreds of victims' homes across Australia, the United Kingdom, and British North Borneo in 1945. One sits framed in the Australian War Memorial, another to a British family was displayed at the Imperial War Memorial in London. No words uttered in the Sandakan trials were memorialized on those walls. Not every one of the letters was as truthful as it could have been. One letter was traumatizing to my father's survivor guilt. In it, he prioritized healing over truth. He had not volunteered a letter to this family. When they heard he was writing so many letters, they wrote him to ask how their son had died. The truth not told in his letter was that my father had been involved with many prisoners in a "kangaroo court" that convicted this young man to "Coventry": no POW was allowed to speak with him. His alleged crime related to the fact that healthy prisoners were paid money they could use to buy extra food for working on building a Japanese airstrip, dangerous work punctuated by American bombing. POWs could only store money at the foot of their bunk. When it disappeared, circumstances pointed to accusation of this young man. He wept, pleaded his innocence. His health fell like a stone after he was convicted and shunned by his mates; he died, a broken boy. After he perished, the money was found in the rafters of the prison where rats had taken it to build nests.

It took decades before my father was ready even to speak to our family about how the injustice done to this innocent young soldier burnt suffering into his soul. It was enough for such a very young man to suffer the predations of his captors without being psychologically tortured by mates he looked up to. Before he died, he did put this story on the public record so that future generations might learn about the injustice that can occur in conditions of captivity where survivors are so few to speak of injustice

48. Tim Bowden, *Foreword* to BRAITHWAITE, *supra* note 42, at xiv.

perpetrated by the victims themselves. Whenever I write of this story I feel I do a spoonful of justice to honor this boy and the memory of his suffering, putting the waste and the tragedy to some little piece of instructive historical memory. Historians in this story and many others have across the decades painted a better picture of the selective justice that is involved in the narrative complexity around war crimes trials.

IV. TINY DOORS OF JUSTICE AND HEALING FOR WORLD WAR II CRIMES

These micro-injustices drive so much of the survivor guilt from World War II camps, which had many collaborators. They pale beside the macro-injustice involved in dropping atomic bombs on the entire civilian populations of Hiroshima and Nagasaki, targets motivated by a desire to terrorize civilians rather than destroy military capability. Sordid revenge was involved, especially by Churchill,⁴⁹ less so by Roosevelt and Marshall. Likewise with the even greater deaths caused by conventional firebombing of whole cities like Tokyo, Hamburg, and Dresden. Japanese society sees no evidence of accountability of any kind, let alone criminal prosecution, for these mass civilian atrocities. Contrition did come earlier for Dresden; British and Australian churches raised money for decades at least to rebuild the Dresden Frauenkirche that had been destroyed by their airmen as a gesture of remorse, the cross and orb finally completed by the son of an RAF pilot in 2019, honoring his father's wish that the atrocity not be forgotten.⁵⁰ All this is part of the context where doors to truth,

49. U.S. leaders were much less persuaded than Churchill that the German people could be terrorized to surrender by relentless bombing. Although Churchill decided that chemical weapons would have to be used in defense of Britain against a German invasion, Hitler was not of this view and Germany did not deploy its 12,000-ton stockpile of chemical weapons when it was invaded. Churchill even seemed disappointed that Germany did not provide the excuse for war crime by chemical means. Pruitt reports that Churchill wrote to his Chiefs of Staff in February 1943: "In the event of the Germans using gas on the Russians . . . We shall retaliate by drenching the German cities with gas on the largest possible scale." Sarah Pruitt, *The Nazis Developed Sarin Gas During WWII, But Hitler Was Afraid to Use It*, HISTORY.COM (Apr. 12, 2017; updated Apr. 1, 2019), <https://www.history.com/news/the-nazis-developed-sarin-gas-but-hitler-was-afraid-to-use-it>.

50. He said, "My father used to tell me about the horrors and the suffering of Dresden. He did not want it to be forgotten. By working on the cross I've come closer to my father

accountability, and reconciliation became progressively more open with the crushing of Germany, but not the defeat of Japan. What can be done about this? I draw eight options from our family narrative.

1. *Open doors to personal memory* from all sides. Like the son of the Dresden pilot, my father's letters opened his own doors; others benefit from various forms of institutionalized help to do so, such as those provided by truth commissions.
2. *Open doors by personal gifts* from victors to the vanquished, reversing the one-way traffic of victors' justice. My brother Richard became close to Fathers Tony and Paul Glynn, Australian priests who organized the collections of Japanese swords for return to Japanese families starting in the 1950s. Tony collected and returned 80 swords to Japan before he died in 1994, and his younger brother Paul continued this work of returning swords into the current decade.⁵¹ The swords were culturally important, sometimes handed down for centuries across Japanese generations. In recent years there have been more U.S. and British projects for old soldiers to return Japanese swords before they pass on.⁵² Their return enabled powerful micro-ceremonies of reconciliation on which one day macro-reconciliation can be built.
3. *Speak truth of the injustices of victor's justice* as survivor X did as death approached.⁵³ My brother Richard befriended the descendants of Japanese General Baba, who was executed for the Sandakan Death March. General Baba's grandson, Furei Sadaoki, stayed in my brother's home in Australia and my brother stayed with him in Japan. Our family view is that General Baba was a truly decent man who died with dignity, apologizing explicitly to Australian families for the loss of their loved ones on the Death March, accepting responsibility for it in the way expected of a Japanese leader, even though our family is

and it's my way of saying goodbye to him and fulfilling his wishes." Kate Connolly, *Cross of RAF Pilot's Son Crowns Rebuilt Church in Dresden*, TELEGRAPH (June 23, 2004), <https://www.telegraph.co.uk/news/worldnews/europe/germany/1465293/Cross-of-RAF-pilots-son-crowns-rebuilt-church-in-Dresden.html>.

51. There have been two biographies of Tony Glynn—JIM GRIGGINSHAW, *SHIMPU-SAN: HEALER OF HATE* (1996) and PAUL GLYNN, "LIKE A SAMURAI": THE TONY GLYNN STORY (2008)—and a Japanese film documentary, *THE RAILROAD OF LOVE* (1999), directed by Shigeki Chiba.

52. See *Japanese Sword Repatriation*, THE JAPANESE SWORD, <http://www.thejapanesesword.com/profile/repatriation.html> (last visited Mar. 27, 2019).

53. SILVER, *supra* note 45, at 310.

inclined to believe that he personally may have been morally innocent of mass atrocity and innocent as a matter of law because he actually resisted the Death March orders from his high command.⁵⁴ He was a kind of political scapegoat, and I honor him today for his attempts to prevent the war crime that destroyed the lives of both my mother's husbands, and her own life. Richard's book tells the suppressed story of a counter death march to avenge one war crime with another in which many hundreds, perhaps thousands, of Japanese were willfully allowed to perish by Australian troops.⁵⁵ He arranged the translation of a Japanese survivor's story of captivity by Australian forces at war's end.⁵⁶ Richard's participation with General Baba's family and the families of other Japanese who served at Sandakan, among other things, led to a dinner with the Japanese Foreign Minister in which he issued an apology to families who lost loved ones at Sandakan, and will lead on to further reconciliation events.⁵⁷

4. *Reveal the complexity behind survivor guilt* so that overly simple narratives that glorify survivors do not conceal the cross-cutting complexity of the horrors of war. My father's survivor guilt over the soldier effectively sentenced to death by the POW kangaroo court is an example, as was survivor X's guilt over his perjury at the Pacific theater trials. Another concerns the "comfort women," the sexually enslaved Asian women who lived near the Sandakan prison camp. One day the Australian POWs were marched under the verandah of the building where the women were enslaved. Someone incited them to pour human waste from their chamber pots over the emaciated

54. See the historical research on this in BRAITHWAITE, *supra* note 42, at 336: "Captain Yamada, while not generally sympathetic to Baba, states, 'Thus, Commander Baba, fighting back his tears, had to order all his soldiers and residents in the east coast to move to the west.'"

55. *Id.* at 318–21.

56. Richard's book included the survivor's account of Allied troops, announcing: "We will examine you one by one to find any suspects who raped and killed local women during the war.' If the locals stated 'I'm sure that he is the one,' 'the one' would be pulled out from the line and executed with a gun, even if 'the one' had not done anything wrong, except, probably, looking like the real 'one.' Those three people stared at every one of us and passed along slowly in front of our line."

57. I also participated with General Baba's family in a reconciliation gathering of the local Sandakan family of Cynthia Ong, which suffered beheadings of five family members by the Japanese occupation. Another larger one is planned for 2020 in Sandakan. My mother's will allocated some monies for scholarships for children at a school near the camp, descendants of locals who risked their lives to sneak food to starving POWs.

bodies and heads of our fathers. I do not share this story to be unfair to these women who suffered such gendered domination. I conjecture that they were urged to do this to signify a reversal of the humiliation of white colonialism at the hands of women who suffered such shocking patriarchal and militarized domination that compounded this domination by colonialism in Asia. Truth and reconciliation requires revelation of intersectoral dominations of enslavement and murder of men and women, colonialism, and gendered domination, all compounded by the dominations of war and war crimes.

5. *Advocate for belated prosecutions of the truly culpable top criminals in national or international courts.* In retrospect, families like mine perhaps should have made the case for prosecution of the aging Emperor Hirohito in the decades after peace was consolidated, at the same time as making a case for prosecuting the surviving American old men who decided to drop the atomic bomb on Japanese cities. This might have rekindled arguments advanced by Nobel laureates who worked on the bomb and by members of the U.S. Joint Chiefs of Staff of 1945 for attempting to strike the last blow of the war with a demonstration atomic bomb offshore. It might have helped rekindle the imperative to stop suppressing politically and psychologically the likelihood that one day weapons of mutual genocide will destroy our beloved planet. *Conversations* about the justification for trials are more critical to this consciousness raising about the ecological dangers of war in the Anthropocene, than actually opening the door to such trials.
6. *Support citizens' tribunals* with donations of time and money when international justice fails, such as that held for the Korean sex slaves of the Japanese military.⁵⁸
7. *Support local restorative justice* such as the healing the Braithwaite family did with Japanese families such as that of the executed General Baba and the Sandakan family of Cynthia Ong, whose members were beheaded by the Japanese.
8. *Support the transnational restorative justice of permanent truth and reconciliation commissions for the most terrible conflicts. These commissions ultimately become museums of memorialization* once all the victims and all the perpetrators are dead.⁵⁹

⁵⁸ Chinkin, *supra* note 35.

⁵⁹ See Ray Nickson & John Braithwaite, *Deeper, Broader, Longer Transitional Justice*, II EUR. J. CRIMINOLOGY 445 (2014).

V. MORE DOORS

These eight types of doors simply illustrate particular possibilities that arose in one family's experience of one mass atrocity. Various others have been discussed by Marsavelski and Braithwaite, including some like the International Court of Justice, whose practice has not proved to be promising.⁶⁰ The Bougainville peace process had few national prosecutions, no international ones, and no truth commission, yet there were thousands of successive openings of collective village-level church and customary restorative justice for collective accountability, followed years later by uncounted cases of individual-level accountability for war crimes through church and customary restorative justice.⁶¹

None of the dozen types of doors discussed so far deliver more than a spoonful of justice, a chink of light upon the truth through a door that creaks only partially to an opening, and only the beginnings of a germination of reconciliation. Still there is more than a bit of practical reconciliation between Japan and Australia, Japan and Malaysia, Japan with Korea and China across the Pacific theater. The apologies came later and with less flourish and contrition than we saw with Willy Brandt. Berlin has major museums that honor in vivid ways the victims of its World War II aggression and mass murder; Tokyo less so. Japan has major memorials that commemorate mass atrocities against Japanese civilians in World War II; Germany less so to commemorate mass atrocities against its civilians.

One reason we need many doors is that each single door only opens wide enough to expose tiny fragments of truth, justice, accountability, and reconciliation. Yet, as has begun to happen for a Pacific still not fully recovered from World War II, war criminals—even ones like Emperor Hirohito, who enjoyed total impunity from the law of the courts—have been held to account. They have had their reputations repeatedly sullied at other little levels of informal regulation of wrongdoing. Hirohito's successors have been required to reach out with further gestures of reconciliation beyond those advanced by Hirohito; Japan has become an international model of peaceful conduct. There is nothing satisfactory about these spoonfuls of justice, truth and reconciliation, but much that is cumulative

60. Marsavelski & Braithwaite, *supra* note 3.

61. BRAITHWAITE, CHARLESWORTH, REDDY, & DUNN, *supra* note 33.

about them. Moreover, there is a degree of redundancy where one thin reed of justice that snaps has weaknesses that can sometimes be covered by combined strengths of many other thin reeds bound together. That is the best we can do.

VI. THE *LONGUE DURÉE*

The hope and the possibility is that truth, justice, and reconciliation can cumulate in many rooms through a multitude of new doors and innovative ways of entering. Good and evil, domination and non-domination, push at all the doors. If we do not resist the injustice, the lies, the exclusion, the potential for evil feeds on itself to fester further. If we do well, truth, justice, and reconciliation can also cascade domination reduction.

For all this, let us not be too gloomy about our inability to shirk a contest between progress and regress in international justice. Consider Chile as a beacon of progress to peace and flourishing democracy 46 years after a CIA- and U.S.-business-inspired coup ousted a left-leaning social democrat to replace him with General Pinochet. Pinochet savaged his country with authoritarianism, militarism, and terror.⁶² For decades after the coup, Pinochet must have felt that while he had suffered a lot from attempts to punish him, his prolonged period of total domination of the country was worth it. Yet at some point long before his death, he undoubtedly changed that view. This was because of the prolonged cumulation of many only partially successful attempts to hold him to account.

The first door toward justice his opponents opened was to a people power movement against his rule. It ultimately deposed Pinochet from the presidency in 1990. Accepting that no president lasts forever, he cut a deal with his enemies whereby he returned to being head of the military, quite a cosy sinecure for an aging tyrant. Although it was hard for the successor democratic regime to target Pinochet while he remained in that powerful role, prosecutors and courts went after members of his family, especially a son who benefitted from corrupt deals with state funds during Pinochet's presidency. Then came one of the first Truth and Reconciliation Com-

62. PETER KORNBLOH, *THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY* (2013); CARLOS HUNEUS & LAKE SAGARIS, *THE PINOCHET GAME* (2007).

mission processes the world had seen,⁶³ a report personally signed by the new president and posted to every victim of state murder's family, a report that utterly discredited Pinochet's reputation and caused the commanders of the air force and navy to undermine Pinochet's power base in the army. This ultimately pushed him out as defense chief in 1998 to the diminished office of "senator for life." Next a British court in October 1998 triggered his arrest under an international warrant for human rights violations while he was staying in London. A tumultuous legal battle ultimately led to his release on health grounds and return to Chile in March 2000.

By 2004, Pinochet could no longer count on the backing of an army that was now ashamed of him, evidence against him had become overwhelming, and a Chilean judge ruled differently from the British court, finding him fit to stand trial and putting him under house arrest. Almost three years later, 300 criminal charges had accumulated in the Pinochet indictment, including mass murder, tax evasion, corruption, and massive embezzlement of state funds. He died under house arrest before the charges in the indictment were tried. The glass-half-empty is that Pinochet was never convicted for his crimes across five decades of impunity and obscene wealth. None of the efforts to hold him to account were decisive. Yet my argument has been that any politician or general looking at Pinochet's career would be impelled to wonder whether Pinochet was lucky to die rather than languish as the cumulated ratcheting up of truth, accountability, and justice through so many doors arrived at its final destination of utter disgrace for him and his family. Pinochet's long journey of justice evasion was hardly one any ambitious leader would choose to aspire to.⁶⁴ Every reed of criminal deterrence in Pinochet's life was a thin one that snapped, but a formidable long-run accumulation of deterrence was delivered by tireless pushing at the many principled doors to justice in this Pinochet narrative.

Long-term cumulation of feebly partial micro-deterrence to meaningful macro-deterrence is more persuasive for political leaders than for military officers in hot wars. Consider the numerical logic of deterrence in World War II. Tens of millions of soldiers were killed in the war, and many times

63. ANITA FERRARA, *ASSESSING THE LONG-TERM IMPACT OF TRUTH COMMISSIONS: THE CHILEAN TRUTH AND RECONCILIATION COMMISSION IN HISTORICAL PERSPECTIVE* (2014).

64. See Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127 (1999).

more were seriously wounded or had their health destroyed for the rest of their lives. In comparison, only dozens of soldiers were convicted in international war crimes trials. It follows that in a pure deterrence calculus, as opposed to a calculus of conscience, soldiers are likely to calculate about what will keep them safe from bullets and bombs. Fear of statistical probabilities of conviction years later do not change purely rational calculations much when soldiers make decisions to shoot emaciated POWs who slow them down in reaching the safety of their own lines, nor from using POWs or civilians as human shields if they calculate that this will keep them alive now. Hence the imperative is less for deterrence than for an international criminal law that can mobilize the respect among soldiers to render war crimes and crimes against humanity more shameful, more unthinkable, than they currently are. This legitimacy requires that the doorkeepers of international criminal law transcend victor's justice. International criminal law will never have much legitimacy if it is primarily enforced at the behest of great powers on the Security Council who do not allow their own generals and political leaders to be subject to it.

Hence, global legitimacy is a prerequisite for the greatest potential for international criminal law, which is for it to deliver a spoonful of rational deterrence combined with a larger spoonful of shame and remorse for mass murder. Domestic criminal law mostly works this way as well: most of us refrain from murdering other people who we detest because to do so is unthinkable for us, not because we calculate the deterrent risks of doing so.⁶⁵ International criminal law will only prevent mass atrocity in a society like Congo that has had more mass atrocity than any other since World War II, when Congolese see international criminal law as something that equally binds the Global North and the Global South, and as something that is deliberated on the ground in Congo rather than in The Hague.

This fits with the argument that the entire articulation of the idea of “transitional justice” is at odds with accountability, deterrence, constitution of the shameful of mass atrocity, truth, and reconciliation. As in the Bougainville experience, most victims of rape in war are not ready, during a brief post-war window when a truth and reconciliation commission sits, to speak truth to power about their rape, to the patriarchy enabled by militarism. Few of the hundreds of thousands of the German and Austrian women raped by Allied troops during the invasion of Europe ever spoke of it beyond

65. ELIZA AHMED, NATHAN HARRIS, JOHN BRAITHWAITE, & VALERIE BRAITHWAITE, *SHAME MANAGEMENT THROUGH REINTEGRATION* (2001).

their family and closest friends.⁶⁶ So Nickson argued for a permanent truth and reconciliation commission⁶⁷ that would have doors open to collect testimony, to conduct hearings about holding commanders to account for an accumulation of evidence for systematic rape, to sustain collective memory by educating school children,⁶⁸ until all survivors had died.⁶⁹ After that, it would continue as a repository of testimony, artifacts and photographs of atrocity that would be a museum of collective memory for future generations. Enabling the accumulation of little spoonfuls of accountability through truth across the *longue durée*—even if it only means that war criminals can be delivered a tiny spoonful of deterrence by comprehending that their grandchildren will eventually come to understand the full horror of what they have done—is not the main rationale for a permanent truth and reconciliation commission. But it is a subsidiary rationale.

CONCLUSION

Exaggerated claims are still sometimes made about how the ICC can deliver deterrence, justice, truth, and even reconciliation. There is no novelty in the argument that its capabilities on all these fronts will continue to be thin,

66. See the discussion by J. ROBERT LILLY, *TAKEN BY FORCE: RAPE AND AMERICAN GIs IN EUROPE DURING WORLD WAR II* (2007).

67. Nickson & Braithwaite, *supra* note 59.

68. One creative program of South African civil society's Institute for Justice and Reconciliation has been to engage schools by encouraging their students to create videos of the testimony of their loved ones. A granddaughter might approach a victim who did not want to testify before the Truth and Reconciliation Commission (TRC) to enable the collective memory of the family concerning her suffering under Apartheid. The granddaughter's appeal might be to encourage the grandmother simply to do for her granddaughter what she would not do for the TRC if she now felt ready and strong enough to do that much. One possibility from such family reconciliation initiatives (children-up rather than judiciary-down or Commission-down) is that a person who did not wish to disclose the atrocity she suffered as a younger person discovers in her later years with her granddaughter that she benefits from telling the story—so much so in some cases that perhaps she might change her mind about a permanent truth and reconciliation commission and then lodge her video on their archive for the collective memory and history of the nation, as well as for the collective memory of future generations of her family. One possibility is that this kind of initiative could be catalyzed in civil society by a commission that was in the business of reconciliation for the *longue durée*.

69. Nickson & Braithwaite, *supra* note 59.

at least until it can finalize hundreds of cases each decade, and perhaps even then. Yet Pinochet illustrates that if deterrence is pressed through many doors across different spaces, different levels of governance and civil society, and is patiently encouraged to cumulate across the *longue durée*, credible deterrence of crimes against humanity is at least possible. There is some novelty in conceiving a strategy of patiently seeking to cumulate deterrence across space and time until it works. Criminal trials are likewise not good at exposing the truth of complex events like wars. This is because judges cannot possibly acquire a well-rounded knowledge of any phenomenon by a forensic focus on whether one specific actor is guilty of a specific crime. In spite of this myopic focus, criminal trials can add tiny spoonfuls of truth that begin to counter some of the bucketloads of lies about atrocities in war. Truth commissions and the work of professional historians can in combination with criminal trials deliver much larger dollops of truth, or at least truth-seeking of greater integrity. This is because historiography and truth commissions are designed to be more synoptic, plural, and open-textured in their pursuit of truth in comparison to criminal trials. Historiography is a cumulative discipline. Other spoonfuls of truth about a specific atrocity might be added by more contextually attuned contributions like Dick Braithwaite's hundreds of letters to victim families, when put alongside the various other exotic methods discussed above.

In another paper, Marsavelski and I have also argued that justice, reconciliation, and even prevention can also be cumulative across pluralized, diverse doors to international justice and across time.⁷⁰ Prevention is the most neglected of these because prosecutors are so focused on their tiny contributions to justice that they neglect the possibility that they might also add some not-so-tiny preventive contributions. An ICC prosecutor can do this by issuing a warning letter to a general who is massing troops with the intent of ethnic cleansing of a locale. The letter warns that if the general proceeds, it will probably be a crime against humanity that the ICC could prosecute. ICTY prosecutor Louise Arbour developed the beginnings of this preventive strategy in the Bosnian war.⁷¹

70. Marsavelski & Braithwaite, *supra* note 3.

71. Justice Arbour, who subsequently joined the Canadian Supreme Court, called them "Are you aware of your obligations" letters (senior ICTY counsel interview). When some Serbian officials refused to receive the letters, Justice Arbour made them public and named the persons to whom they were sent, which included President Milosovic. This was a preventive innovation and one that put a Sword of Damocles over the heads of potential war

Hence the advocacy of this article has been for multiparty regulation of international crime across space and time to cumulate deterrence, accountability, high-integrity truth-seeking, justice, and reconciliation. It renounces targeted or single-minded pursuit of any of these things, preferring a slow-food approach to cumulating all of them.⁷² For this we need a formalism of criminal law that enables informalism, and an informalism that enables formalism. This is so if there can be strength in the convergence of weaknesses of formalism and informalism in the *longue durée* of international justice.

Kathryn Sikkink's *Justice Cascade* tradition of research shows that implementation of just one transitional justice strategy is less effective than multiple strategies; this signals the needed direction for empirical research.⁷³ Sikkink's study across all states that experienced transition between 1974 and 2004 and the Olsen et al. dataset on human rights prosecutions, amnesties, and truth commissions are more or less consistent in finding weak effects of each of these transitional justice interventions on their own.⁷⁴ But, when human rights prosecutions, truth commissions, and amnesties are all in harness during transitional justice, or when at least two of the three are in harness, there is a solid impact in reducing subsequent repression and reducing human rights abuses. The testable empirical question then becomes whether even more multiplex variegation in transitional justice doors that are pushed open produce even more repression reduction. A different methodological approach to this empirical challenge is provided by the University of Maryland meta-analysis of many organizational crime deterrence studies showing that regulatory mix can reduce organizational crime, but not narrow prosecutorial deterrence alone.⁷⁵

criminals. The ICTY prosecutor's "Are you aware of your obligations" letters were complemented by NGO work closer to the ground by the organization that became Geneva Call and the ICRC. Since the wars in former Yugoslavia, Geneva Call and the ICRC have both refined their strategies for dialogue with commanders to ensure they understand risks they are taking with the laws of war and what they can do to prevent the risks. They also issue advice in writing that increases the legal jeopardy of commanders after they are put on notice.

72. VOLKER BOEGE, *BOUGAINVILLE AND THE DISCOVERY OF SLOWNESS: AN UNHURRIED APPROACH TO STATE-BUILDING IN THE PACIFIC* (2006).

73. SIKKINK, *supra* note 9.

74. TRICIA D. OLSEN, LEIGH A. PAYNE, & ANDREW D. REITER, *TRANSITIONAL JUSTICE IN THE BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* (2010).

75. Schell-Busey et al., *supra* note 22.