

FOREWORD

*Rachel Lopez**

On August 30, 2016, I attended the funeral of Jacobo Lopez. Jacobo was an indigenous activist who disappeared in Guatemala in 1983, after two military commissioners accompanied by a group of masked men came to his home and dragged him away. Since that day, his family has been fighting to hold those responsible for his disappearance to account. They experienced a major setback in 2014 when a Guatemalan court dismissed the case against the officers who ordered his disappearance, because there was not enough evidence to proceed with the case. However, after the Forensic Anthropology Foundation of Guatemala found 558 human remains in numerous graves—some of the largest mass graves found to date in Guatemala—at a military base known as CREOMPAZ, justice again seemed within reach.¹ Within one of those graves was Jacobo Lopez. Now, in light of the evidence recovered from the exhumation of those graves, the high-level military officials who ordered Jacobo’s disappearance are poised to stand trial in what some are calling the largest case of enforced disappearance in Latin

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1. Maggie Jones, *The Secrets in Guatemala’s Bones*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-secrets-in-guatemalas-bones.html>.

America.² So it would happen that over thirty-three years after his disappearance, on the International Day of the Victims of Enforced Disappearances, I would find myself with Jacobo's family at his funeral in Guatemala, where I was conducting research as a Fulbright Scholar.

When I began organizing the 2018 Drexel Law Review Symposium with Editor Justin Hollinger, I did not realize the profound connections between the story of Jacobo Lopez and the selection of topics for the Symposium, *Times of Reckoning: Confronting the Legacies of Mass Abuse Through Transitional Justice*.³ The aim of the Symposium was to gather leading transitional justice scholars and practitioners from around the world together to discuss the most pressing issues in the field, with a focus on more intentionally connecting theory and practice. The keynote speakers were two trailblazing jurists, Justice Richard Goldstone of South Africa and former Attorney General Thelma Aldana of Guatemala. The Symposium was organized around three panels that explored the diverse contexts in which transitional justice occurs, how transitioning societies memorialize past injustices, and the role that foreign courts can play in adjudicating human rights abuses.

Only after reflecting on the Symposium did I realize how Jacobo Lopez's story animated each of these topics for me. At his funeral, I witnessed firsthand the importance of ritual and other non-judicial acts of remembrance, which were discussed during the panel entitled "The Memorialization of Transitional Justice." Surrounded by the relatives of others who disappeared during the armed conflict, Jacobo's family spoke about the feeling of closure that came with finally knowing what happened to him. Having devoted much of my time that year to sifting through the case file of CREOMPAZ, this experience gave new meaning and broader context to endless pages of appeals and court decisions in the case that hopes to bring those

2. CREOMPAZ: *The Largest Case of Forced Disappearance in Latin America*, NISGUA, <https://nigua.org/portfolio-items/creompaz-report/> (last visited Mar. 19, 2019).

3. Transitional justice refers to the judicial and non-judicial processes, which aim to redress mass human rights abuses that occur during periods of armed conflict, civil strife, or repression.

responsible for Jacobo's death to account. It highlighted how much context informs what transitional justice measures should be taken after periods of mass abuse and dictates their prospects for success, a theme that was explored in the panel entitled "Transitional Justice in Context." The day after Jacobo's funeral, I flew to Spain to research another case. That case was the first to bring charges of genocide against the same military officials who are thought responsible for Jacobo's disappearance and are now pending trial in CREOMPAZ. This case was brought under a Spanish statute that provided universal jurisdiction for international grave crimes regardless of where they occurred and was discussed during the panel on "The Role of Foreign Courts in Transitional Justice."⁴ So it was quite fitting that the program for the Symposium bore a picture from Jacobo's funeral.

Despite the variability of transitional justice across different jurisdictions discussed during the panels, the Symposium and the articles in this volume highlight three critical observations on transitional justice, which I will discuss in detail below: 1) that to facilitate reconciliation and confidence in the rule of law, some kind of reckoning must take place; 2) not all victims heal or define justice in the same way and thus pluralistic approaches to transitional justice are needed; and 3) because of the need for pluralistic approaches, transitional forces might be at odds, so in order for transitional measures to be effective they must be complementary.

As a starting point, the Symposium underscored how despite efforts to bury the past, the past reemerges and continues to influence the future. As Radhika Hettiarachchi, Curator of Herstories in Sri Lanka and one of the contributing authors to

4. Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79, 79 n.3 (2008) ("The Audiencia Nacional hears cases involving drug smuggling, terrorism, state corruption, and international crimes that cannot adequately be dealt with at the level of provinces and autonomous communities. Although divided into chambers, it is roughly equivalent to a US district court."); Naomi Roht-Arriaza & Almudena Bernabeu, *Many Roads to Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Conflict Guatemala*, in *THE ROLE OF COURTS IN TRANSITIONAL JUSTICE: VOICES FROM LATIN AMERICA AND SPAIN* 184, 188 (Jessica Almqvist & Carlos Esposito eds., 2012).

this volume, put it, “We often look at the present through the lens of the past.” Similarly, Thelma Aldana, the former Attorney General of Guatemala, poignantly remarked that “any country that forgets the past is destined to repeat it.”

Still, in the aftermath of mass violence, there are often orchestrated efforts of forgetting. In Spain, after the death of Franco, politicians negotiated a pact of forgetting (*Pacto de Olvido*), where leftist activists forewent accountability in exchange for the tacit support for democracy from Spanish conservatives and the military.⁵ In Guatemala, a genocide denial movement, supported by business elites and former military officials including former President Otto Pérez Molina and united in the refrain “no hubo genocidio” (“there was no genocide”), has sprouted.⁶

Yet, the failure to reckon with the past can be the Achille’s heel of transitioning societies. Indeed, the two aforementioned countries bring into focus the perils of “forgetting,” or as Dr. Noha Aboueldahab, a Fellow at the Brookings Doha Center, described it, “collective amnesia.” In Spain, the failure to address the atrocities of the past has meant that old wounds have festered and have been easily ignited to foment divisions that threaten the unity of that nation. Despite the supposed forgetting after the Spanish Civil War, Catalan separatist leaders frequently evoke the atrocities under Franco’s dictatorship, and for some, the government’s crackdown on the separatist movement has been a replay of Franco-era brutality.⁷ Additionally, as legal scholars Naomi Roht-Arriaza and Máximo Langer described in their Symposium remarks, Spanish nationals are now seeking justice abroad and an

5. James J. Friedberg, *The Wane in Spain (of Universal Jurisdiction): Spain’s Forgetful Democratic Transition and the Prosecution of Tyrants*, 114 W. VA. L. REV. 825, 827 (2012).

6. Lisa J. Laplante, *Memory Battles: Guatemala’s Public Debates and the Genocide Trial of José Efraín Ríos Montt*, 32 QUINNIPIAC L. REV. 621, 651 (2014).

7. Michael Birnbaum, *For Some, Catalonia Crackdown Evokes Memories of the Dark Days of Spain’s Dictatorship*, WASH. POST (Nov. 9, 2017), https://www.washingtonpost.com/world/europe/spanish-crackdown-on-catalonia-independence-effort-prompts-bitter-memories-of-franco-dictatorship/2017/11/08/b0ae6eac-bf14-11e7-9294-705f80164f6e_story.html?utm_term=.3617ffd7f489.

Argentinian judge has opened two investigations into the human rights abuses of General Franco's dictatorship.⁸

The failure to reckon with the past can also mean that bad actors retain power and thus are able to continue their harm to the nation. For instance, during her keynote address, Aldana explained how the human rights abusers of the internal armed conflict in Guatemala have morphed into the illicit criminal networks of today, including Otto Pérez Molina, who is now in prison for receiving millions of dollars in bribes.⁹ In this volume, Radhika Hettiarachchi further warns that “[w]hen individuals and collectives make painful concessions and compromises about what can be accepted as ‘good enough’ in order to move on with life under the present circumstances, cracks may appear much later in the veneer of sustainable peace and development.”¹⁰

The United States is no stranger to this phenomenon either. In this country, our failure to reckon fully with the torture employed during the so-called War on Terror has resulted in a disturbing normalization of torture, manifested in President Trump's support of torture and the current Director of the CIA Gina Haspel's refusal to condemn it as immoral.¹¹ Furthermore, the United States' failure to address the legacy of slavery, as evidenced by this country's undignified treatment of slave burial grounds described by legal scholar Ursula Tracy Doyle during the Symposium, has meant that racial discrimination and injustice persist.

8. Sam Jones, *Judge to Investigate Franco-Era Crimes Against Spanish Women*, GUARDIAN (Oct. 26, 2018, 8:45 PM), <https://www.theguardian.com/world/2018/oct/26/judge-investigate-franco-era-crimes-against-spanish-women-sexual-assault-forced-abortion-child-theft>; see also Giles Tremlett, *Argentinian Judge Petitions Spain to Try Civil War Crimes of Franco*, GUARDIAN (Oct. 26, 2010, 1:37 PM), <https://www.theguardian.com/world/2010/oct/26/argentina-spain-general-franco-judge>; Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, EUR. J. INT'L L. (forthcoming 2019) (manuscript on file with the Drexel Law Review).

9. *Guatemala Ex-President Otto Perez Indicted for Corruption*, BBC (Sept. 8, 2015), <https://www.bbc.com/news/world-latin-america-34194227>.

10. Radhika Hettiarachchi, *Embracing Liminality: Grappling with the Challenges and Opportunities of Practicing Memorialization in Sri Lanka*, 11 DREXEL L. REV. 859, 897 (2019).

11. Amy Davidson Sorkin, *Gina Haspel and the Enduring Questions About Torture*, NEW YORKER (May 10, 2018), <https://www.newyorker.com/news/our-columnists/gina-haspel-and-the-enduring-questions-about-torture>.

Similarly, Nikhil Narayan's contribution to this volume traces how the failure to account for the atrocities committed during Nepal's internal armed conflict has undermined long term peace and the rule of law in that country.¹² He questions whether transitional justice can restore the rule of law in Nepal in the absence of criminal justice. To answer this question, Narayan draws comparisons to South Africa and Cambodia. While he acknowledges that South Africa's Truth and Reconciliation Commission was a tremendous achievement, he argues that it would have done more to build confidence in the rule of law had it been accompanied by credible criminal prosecutions. At the same time, he points to the Cambodian experience as an example of why criminal prosecutions alone cannot restore the rule of law unless they are accompanied by the broader institutional reforms that address the root causes of a conflict. He concludes that criminal justice is a necessary component of transitional justice, but not a sufficient one. To leave a positive mark on the rule of law, it must be undertaken in combination with a holistic set of transitional justice measures.

On a more encouraging note, in his contribution, David Mandel-Anthony, a Senior Policy Advisor on Transitional Justice in the Office of Global Criminal Justice at the U.S. Department of State, outlines all of the ways that the international community is supporting reckoning at the local or national level.¹³ Specifically, he describes the fact-finding and investigation being undertaken by international bodies with an eye toward future prosecutions in national judicial systems, the proliferation of national units tasked with investigating and prosecuting grave crimes, and the growing number and sophistication of transnational non-governmental actors, who employ a wide range of tactics to increase accountability for grave crimes.

12. See Nikhil Narayan, *Restoring the Rule of Law in Nepal: Can Transitional Justice Deliver Without Criminal Justice?*, 11 DREXEL L. REV. 969 (2019).

13. See David Mandel-Anthony, *Hardwiring Accountability for Mass Atrocities*, 11 DREXEL L. REV. 903 (2019).

Another theme from the Symposium and this resultant volume of works is an appreciation that not all survivors find their sense of justice and healing in the same way. When mass abuse occurs, it leaves a multitude of victims in its wake, each of whom may have a different method of healing and reintegrating back into society. This point was illustrated in the remarks of Dr. Julia Viebach, who aptly described the diversity of justice and memory-making in Rwanda. She described how some survivors want their day in court, while others find comfort in ritual, burial, oral traditions, or music. It is thus unsurprising that no one transitional justice mechanism is enough to satisfy all victims' desires for justice and peace. For that reason, I, among others including several authors in this volume, have written about the need for a pluralistic approach to post-conflict justice.¹⁴

In *Transitional Justice in Practice: The Importance of Context in Confronting Legacies of Mass Abuse*, Justice Richard Goldstone further argues that in navigating these complexities, two principles must drive transitional justice efforts.¹⁵ First, he posits that every situation of transitional justice is unique and therefore transitional justice processes must be context-specific. Goldstone offers a number of examples where context has come to bear, but most notably he reflects on the contextual elements that influenced the truth and reconciliation commission that he shepherded in South Africa. Second, he argues that transitional justice must be inherently victim-centered, as the victims are the primary beneficiaries of transitional justice. Without this emphasis, reconciliation will remain elusive.

In her compelling article in this volume, Radhika Hettiarachchi describes how the same pluralistic and contextual approach should apply to memory work.¹⁶ Much like the risk of projectizing transitional justice by adopting a one-size-fits-all approach, there is analogous risk of projectizing memoriali-

14. Rachel Lopez, *Post-Conflict Pluralism*, 39 U. PA. J. INT'L L. 749, 750 (2018).

15. See Richard L. Goldstone, *Transitional Justice in Practice: The Importance of Context in Confronting Legacies of Mass Abuse*, 11 DREXEL L. REV. 835 (2019).

16. See Hettiarachchi, *supra* note 11.

zation. She encourages us to move beyond the tropes of memorialization and highlights the complexities and contradictions inherent in this work. She illustrates this point by explaining how in the south of Sri Lanka the common sentiment is that memorials agitate and exacerbate tensions, while in the north, there is a similarly common assumption that memorialization supports healing by promoting empathy for the other.¹⁷ This example harkens back to the reflection of Professor Camilo Sanchez, who reminded us during the Symposium that there is “not one story; there are many stories.”

Another salient theme that emerged at the Symposium and in this volume is that, at times, tensions between various transitional forces may put the values of human rights law at odds. In light of this reality, our panelists shared some cautions for practitioners. Dr. Viebach warned that the law can sometimes objectify atrocity. After Dr. Viebach spoke, Justice Goldstone offered a thoughtful reflection on how the exhumation needed for criminal prosecutions in South Africa might have interfered with much needed memory work there. Professor Roht-Arriaza explained that there is tension between building the rule of law locally and ensuring survivors find justice where they can. In describing the United States’ resort to immigration enforcement to punish alleged war criminals, Dr. Jamie Rowen cautioned that our outrage about the gravity of these crimes can obscure our commitment to due process rights and exacerbate existing inequalities already present in the law.¹⁸ In addition, Dr. Noha Aboueldahab emphasized that in order for transitional justice to be successful, we must be clear about what we are transitioning from and what we are transitioning to.¹⁹

The Symposium and this volume also created space for critical reflection on the future direction of the field. At a pivotal

17. *Id.* at 881.

18. See Jamie Rowen & Rebecca Hamlin, *The Politics of a New Legal Regime: Governing International Crime Through Domestic Immigration Law*, 40 *LAW & POL.* 243 (2018).

19. See generally NOHA ABOUELDAHAB, *TRANSITIONAL JUSTICE AND THE PROSECUTION OF POLITICAL LEADERS IN THE ARAB REGION: A COMPARATIVE STUDY OF EGYPT, LIBYA, TUNISIA AND YEMEN* (2017).

moment during the Symposium, Professor Ruti Teitel, who first brought transitional justice to the fore in the legal academy, reflected on a comment made to her at another conference that transitional justice's moment had come and gone. This Symposium and the reflections in this volume show the promise that transitional justice still holds for the future. It finds its strength in offering a bird's eye view that allows us to reflect, not only on justice choices for transitioning societies, but in our ordinary judicial systems as well. Indeed, the lessons of transitional justice could not be more valuable at this moment in the United States when we are grappling with sweeping reforms to our national criminal legal system. In this country, incarceration has been our main tool for addressing societal failures. Our lack of imagination has limited our nation's ability to bridge profound divides and heal deep wounds. In contrast, transitional justice inspires a more integrated approach that permits us to better understand and correct the root causes of societal failures, rather than individualizing them. It can also help us to accomplish the layered goals of justice, including reconciliation and healing of survivors.

Transitional justice processes are aimed at reminding us of our mutual humanity, as well as the diversity of human experience and emotion. They create space for multiple truths to live together, where both dynamic understandings of the past and more static accounts of "truth" tethered to a specific moment can co-exist. At its best, pluralistic justice can prevent us from reliving the mistakes of the past by addressing abuse at its individual, collective, and systemic levels.