

Introduction: The Rational and the Emotional

Issues of Transparency and Legitimacy in Transitional Justice

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TRANSPARENCY IS A fundamental principle of justice. A cornerstone of the rule of law, it encourages public engagement with the ‘social project of justice’, allows democratic control of the decisions and actions of justice authorities and judiciary, promotes the acceptance of those decisions by society as a ‘shared truth’ and in essence determines their legitimacy. In this sense, the existence of a public sphere is not merely conducive to but is also constituent of legitimate justice. Normally, however, the only requirement to ensure transparency is that proceedings are public, which is said to make secret trials impossible, and to promote democratic control by communities and participation in justice by involving the public in decision-making, simply through allowing public attendance or more usually through ensuring that the mass media have the means and the freedom to report on trials and hearings. For it is through the mass media that most people obtain knowledge of and form opinions on what goes on in the law courts.

These widely held notions are neatly embodied in the aphorism ‘Not only must Justice be done; it must also be seen to be done’. But seeing is not necessarily believing or understanding, and the fact that trials are public is no guarantee that they are also transparent in the sense that the public can fully comprehend, let alone endorse, the end to which such trials are held or the conclusion to which they come with regard to the ‘truth’ of past events, the apportioning of blame and the imposition of punishment. Nevertheless, if ‘Justice done and seen to be done’ begs the question of who justice is for, who has to see it and, indeed, what justice *is*, it still applies to domestic systems of justice in democratic states (and in particular to criminal justice);

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their legitimacy, although increasingly challenged in the wake of diminishing faith in the rational discourse of democracy and law and the rise of political populism, is nevertheless sufficiently entrenched to allow those systems to adapt to the demands that such questions imply.

This book transcends the domestic sphere and everyday delivery of 'ordinary' criminal justice. It is concerned with transitional justice, the process by which societies and individuals traumatised by mass (political) violence and human rights violations seek a reckoning with the past in order to create a viable future. In the context of such transition, the development of a global legal order is often seen as both a necessity and a given, which will lead to a peace driven by a shared morality and commitment to human rights. Indeed, the substantive and procedural rules of humanitarian and international criminal law have culminated in a system of international criminal justice, epitomised by the establishment of the International Criminal Court (ICC). The most important aims of the ICC as well as its predecessor international criminal tribunals include not only ending impunity with regard to genocide, crimes against humanity and war crimes, but also establishing or reinforcing the rule of law and democracy through reconciliation, conflict solution, deterrence and retribution, and providing a platform for the recognition of, and redress for, victims. Intriguingly, while most national jurisdictions recognise that the legitimacy of criminal justice can be challenged and therefore requires continual reinforcement among the public and its audiences, international criminal law finds itself in an ambiguous situation. On the one hand, its claim to such cosmopolitan legitimacy, even if not uncontested, is more or less taken for granted; on the other hand, an array of outreach activities by courts and tribunals testify to the tacit or open acknowledgement of a rather precarious basis of legitimacy in the societies where international justice is to apply, and the necessity of remedies to a situation upon which public opinion might be deeply divided.

However, international criminal law is only one of the mechanisms of transitional justice, with not only the international criminal court but also ad hoc international tribunals and domestic criminal courts as its instruments. What this branch of transitional justice can and cannot achieve is the subject of fierce academic debate and, moreover, there are vast differences between what is perceived as paramount in international political, legal and academic circles and what is regarded as most important by the societies and individuals concerned, victims, perpetrators and bystanders alike. Like all criminal justice, the international variation is reactive; it looks back towards past events and can merely hope for some effect in the future. And it is finite; it ends with conviction (or acquittal) and sentencing by professional judges. While it brings some (hopefully, the most important) perpetrators of violence to justice and may contribute to redress and reconciliation in future, the inevitable reduction of the human experience to the 'facts' of

a criminal trial is rarely able to do justice to the reality on the ground and the suffering of victims.

Although the very term ‘transition’ also implies finality, a ‘before’ and an ‘after’, it may not necessarily be felt or lived as such. Transitional justice is an ongoing process of many years, decades even, that does not depend on law alone, but can engage many different social and political actors in many different ways. Not only are there other legal institutions such as truth commissions or traditional methods of settling disputes (for example, mediation), the search for justice (and therefore also for truth) is conducted and continued by historians, activists, artists and writers. It is not surprising that a verdict in a court of law or other official determination of ‘the truth’ does not bring closure in this context, or even always contribute to the legitimacy of the overall process, though it might be an important part of it. While the above could be said (*mutatis mutandis*) of domestic criminal justice too, criminal procedures as part of a transitional justice process face particular challenges as they address mass atrocities. These differ from ‘ordinary’ violent crimes not only in their perceived greater heinousness, but also in that they involve by definition collectivities of perpetrators and victims, categories that are sometimes interchangeable and blurred, so that accounts of what actually took place continually shift and differ. Transitional justice must therefore always operate in divided public spaces where ‘truths’ are contested, hidden and suppressed. Given the nature of the situations and societies in which such justice must function, in some ways the role of public trials and transparency differs profoundly from its contours and functions in national systems of justice that are designed to deal with ‘normal’ situations in stable societies.

Far from being stable, the societies that transitional justice is meant to benefit are usually torn and divided as a result of past or ongoing conflict and atrocity. Transitional justice institutions are set up ad hoc and operate within a limited timeframe; this applies to international and hybrid criminal tribunals as well as to domestic justice institutions which are specifically established for the task (eg, the *gacaca* courts in Rwanda) or operate under domestic statutes of limitation (eg, the prosecution of Nazi war criminals in post-war Germany). The ICC, despite being a permanent court, is not only young but also has limited temporal and territorial jurisdiction. Such institutions lack the legitimacy that derives from legal-cultural tradition and acceptance, and in many instances—particularly true of international criminal tribunals or the ICC—the different audiences have little or no opportunity to be physically present and are dependent on public accounts of what took place from governments, journalists or activist groups, all of whom may be politically or emotionally involved. Moreover, in the context of transitional justice, transparency is not an unambiguous concept—a quality that attaches to justice automatically if certain (legal) conditions are met, such as

publicly accessible procedures and free media, and that promotes rational debate and accountability. What people see of and in justice after conflict and mass atrocity depends to a large extent on perceptions of the past, on definitions of what was and is criminal, and who the perpetrators and victims are. As the past has often been largely hidden and documents and evidence have often been destroyed, a wide space opens up for decidedly differing interpretations in courts and truth commissions as well as among the public. As much as interpretations of the past differ, so do expectations for the future.

Transitions imply that new and different truths emerge that will distinguish the troubled past from the peaceful future, that truths are defended and defeated in processes of transparency and ‘counter-transparency’, where spaces of ‘non-truth’ are created. But what kind of truth is requested, by whom and for whom? The quest for justice might emerge even after decades of suppression and acquiescence, as in Spain, or after starting with a landmark trial subside and re-emerge, as in Germany. Both processes testify to the *longue durée* of transitional justice and to the possible necessity of specific types of transparency and engagement in order to promote legitimacy and achieve acceptance among its different audiences, locally as well as globally. Questions then arise as to the role of the public and the media in changing the discourse and public spaces of justice, and to the role of courts and trials in this process: how do the newly created institutions of international criminal justice muster support, and how do actors in the public sphere actively engage with and shape transitional justice?

The public sphere of transitional justice is made up of spaces that are created by different actors: courts, tribunals and other truth-finding bodies, and those leading the procedures, media and journalists, perpetrators, victims, and civil society and cosmopolitan actors. The legitimacy of the institutions of transitional justice requires that courts, tribunals and commissions present themselves as principled, independent and impartial institutions, indispensable to truth-finding, history-telling, retribution and reconciliation. That is no easy task in highly charged, politicised and divided public and international spheres. It means that they must find a way through the intricate constellation of networks and actors with different narratives and understandings of truth and justice in order to reach out to the relevant public and open up new spaces for victims and families of victims of mass atrocity crimes and gross human rights violations, thus restoring their space and presence in society. For this reason, and contrary to the domestic criminal process, the victim is said to take centre stage in these institutions and proceedings, as a participant, a witness and a ‘moral institution’. Indeed, victims’ quests for justice have been a driving force in establishing transitional justice institutions, and their engagement in and satisfaction with the process are seen as decisive for its legitimacy. The provision of protection and security for victim witnesses testifies to the efforts of courts and truth

commissions, and thus enhances their credibility in the search for justice and truth. However, victims come with goals and hopes, and with very specific quests for knowledge and truth, which do not sit easily with the requirements of legal institutions and procedures. These are received as 'victims' expectations' by courts and commissions that need not only be addressed but also channelled and 'managed' in order to make them compatible with the exigencies of justice, the legal restraints of criminal procedure or the remit of a truth commission.

At the same time, courts, tribunals and commissions have the perpetrators and their group to deal with, to speak to and to whom to convey their message of an end to impunity and of 'never again', in order to gain legitimacy across the dividing lines of post-conflict societies. The intensive and sweeping efforts around the Nuremberg trials to engage the public and solicit support and legitimacy have never been repeated, perhaps because failures soon became visible and the actual long-term impact was hard to detect. However, the quest for legitimacy needs to engage the whole of society and the claims of justice need to be acceptable and accepted across all social sections and factions.

Past and/or ongoing atrocities, whether committed by state or non-state agents, are not only highly politicised issues, but wider (international) public knowledge about such events is dependent on those who witness them. Without their reports, there would be little incentive or support for the very procedures that are meant to ensure truth-finding, retribution and reconciliation. Non-governmental organisations (NGOs) and victims' organisations operate at the local and global level as moral crusaders and entrepreneurs. They have often been seminal in bringing atrocities to the attention of local and international communities, and establishing transitional justice institutions or engaging the wider public in activist endeavours to end impunity and find the justice that victims seek. As much as this enhances public engagement with the legal process, it poses continuous challenges and puts considerable pressure on courts and commissions. Rather than being assured, legitimacy needs to be constantly re-asserted, and courts and truth commissions are confronted by hostile publicity both locally and globally, not only from perpetrators but equally from victims. Furthermore, the presence of high-profile victims and victim-activists in the public sphere, and widely circulated narratives of their plight make their role as witnesses in court particularly difficult.

This tension that is built into the role of victim-witnesses also applies to witness-activists. Without the commitment of journalists, camera crews and ordinary members of the public to promote the cause of victims through the (social) media or even risk their lives to report on situations of conflict, efforts to establish the transitional justice process would be in vain. However, as the media promote the publicity and transparency of events, this brings its own problems when it comes to both the credibility of media

reports for establishing the ‘truth’ and the proceedings in which the perpetrators are called to account. It has been known for professional journalists to identify with victim groups, both emotionally and in their reporting, which endangers professional-ethical standards of an objective and impartial journalistic search for the truth. Likewise, while they can—indeed, as professionals, should—claim immunity from testifying, they may come to regard it as their duty (albeit unprofessional) to do everything in their power to assist in bringing perpetrators to justice, and thus ensuring justice for victims, by testifying and telling the truth as they see it. This endangers the impartiality required from the media to promote rational public debate on the process of justice, for action groups and citizen journalists are, by definition, part of the events they are reporting and, in the contested spheres of transitional justice, therefore by definition partisan.

To a great extent, the transparency of transitional justice is established and driven by individual emotion and a desire for individual participation, interests that are essentially private. Simultaneously, collective emotions drive transitional justice processes, which in turn contribute to the emotional climate in post-conflict communities and societies. While the increasing invasion of the public sphere of justice by private emotion is seen as a ‘new’ development with which national systems of justice also struggle to cope, it should not be forgotten that this is precisely what justice is about—turning private interests into public ones. Justice defines the violation of, and by, the private as a public interest, but at the same time the delivery of justice is a rational endeavour that leaves little room for emotion and participation. This rationality has been increasingly contested in the domestic sphere, and particularly for transitional justice from the outset, where individual and collective emotions are writ large. In a way, transitional justice has been groundbreaking in this respect, becoming the epitome of highly emotionalised justice; in many ways, its legitimacy is based on giving space to and addressing both individual and collective emotions. This has consequences for the nature of what could be termed the ‘emotional transparency’ of transitional justice and the particular mechanisms through which it aims to achieve legitimacy.

Publicity and transparency are seen as a condition of accountability of the instruments and authorities through which justice is enacted; this is why the Allies who presided over the Nuremberg trials took great pains to ensure that they could not be blamed for providing ‘victor’s justice’. In a different sense, these conditions are also essential for making the perpetrators of mass atrocities accountable. The nature of the events with which the ongoing process of transitional justice deals precludes making the emotional transparent exclusively through the rational mechanisms that justice has on offer. It needs more: activism, art, film and memorialisation. However, these operate in highly contested spaces where legal and political elites frame these events in terms and concepts that hide the other ‘truths’ that such processes would

promote. 'Counter-framing' by alternative mechanisms and the emotions these solicit has to be transparent and public for it to have any effect, but risks being captured and contested by the more powerful.

This brings us to the question of the power to silence. In some cases such power may be used directly to suppress alternative truths and definitions by hindering, preventing or even criminalising efforts to make them public or to find evidence that supports them. But the power to silence is also a much more subtle mechanism embodied in the regulation of the public sphere in general. The vast majority of those who are affected by mass atrocity and would participate in transitional justice have little choice but to participate vicariously. They do so either in the context of (legal) procedures or through others, such as journalists, who are familiar with and are prepared to obey the rules of the rational public sphere. Even if direct participation is possible (for example, as witnesses in court or to truth commissions), this is still regulated by the rational context of the endeavour and the prescriptive rules that surround it. Social action is direct, unregulated participation, as are the use of social media and all journalism outside of the professional rules of impartiality and objectivity. This in its turn throws transparency as a precondition and mechanism of accountability into doubt: transparency in itself is a notion deriving from the necessity of the (democratic) public sphere being regulated rationally, and promoting rational and responsible engagement with information.

Nonetheless, justice mechanisms are the defining core of transitional processes, even if they operate in conjunction and disjunction with numerous other endeavours. This raises the question of how legitimacy can be generated by transitional justice processes per se and why and how it is granted by its different audiences. Here, expectations by different audiences and the demands and expectations that are seen as legitimate by courts and tribunals as well as in the public sphere play a decisive role. Legitimacy of transitional justice is overwhelmingly measured by its outcomes rather than the fairness of its procedures and is permanently contested. More than criminal justice institutions that are part of legal traditions and culture, the institutions of transitional and international criminal justice operate under constant pressure to justify themselves—their very existence, their procedures and their outcomes. They are easily criticised for their lack of tangible outcomes that are acceptable to all concerned, and as a consequence they are burdened with ever more tasks and expectations. Institutions of transitional justice and their public spheres are intricately linked and constantly interact. Nonetheless, both the public and the courts and commissions follow their own logic when defining past events, and both are powerful actors in transitions. How do transitional justice institutions navigate the complexity of different public spheres in order to elicit legitimacy? How are these public spheres defined and which actors are powerful enough to define what justice means and how it should be done? These questions constitute

what can be termed the ‘twin puzzle’ of transitional justice that this volume aims to address.

INTRODUCING THE VOLUME

This volume aims to cover the many facets and angles from which these puzzles can be addressed, without providing an exhaustive and conclusive perspective. The contributions explore an array of different mechanisms that are seminal in constituting and shaping the public sphere of transitional justice. They cover different courts and tribunals across time and space—from the Nuremberg trials to the Extraordinary Chambers in the Courts of Cambodia (ECCC)—and transitions and transitional justice mechanisms in Africa, Latin America, Asia and Europe. The authors take a close look at different actors—from witnesses and journalists to artists and activists, and their specific activities, as well as critically discussing, questioning and assessing the guiding principles of transparency, accountability and participation in transitional justice. Without deliberately aiming at a comparative perspective, the volume provides such a perspective through the different approaches taken by the authors, and the diversity of contexts and situations which they explore. The contributions vary between in-depth analyses of specific cases, laws and countries, and more sweeping comparative and historical perspectives.

We guide our readers through three parts: Part I explores principles of (transitional) justice, Part II engages with the different patterns of transparency and accountability, and Part III looks beyond justice mechanisms per se and into the public spheres created by other actors and in different media of communication. The aim of the volume and its individual chapters is modest: rather than providing grand new schemes and tools, and asserting ‘what needs to be done’, it lays out puzzles, raises questions and promotes inside as well as insightful perspectives.

Part I sets the scene with questioning the well-established principles of transparency, accountability and participation in (criminal) justice procedures, and exploring the ways in which they are embedded and work in transitional justice settings. Anthony Pemberton and Rianne Letschert start this part by canvassing the global pool of conceptualisations of justice in order to find one that befits the complex situation in which transitional justice operates. Using a distinction between the classical Sanskrit concepts of justice as *niti* and justice as *nyaya*, they argue that justice based on a blueprint of perfection can hardly achieve legitimacy, in contrast to a concept of justice (*nyaya*) that seeks to avoid manifest injustice in the reality of a given situation. The authors find that the diverse contexts in which international criminal and transitional justice operate suggest that the latter type of

justice will be more adapted to its aims, in particular when the situation of the victimised population is taken into account.

Chrisje Brants takes up the question of emotional transparency, and the complex and often antagonistic relationship between emotions and the quest for rationality in the public sphere which justice requires and creates. She takes issue with the role assigned to ‘the victims’ and their interests in international criminal justice and other mechanisms and fora of transitional justice. This actually reflects similar developments in domestic criminal justice systems. However, in such claims the concept of justice itself in relation to criminal law or procedure is rarely problematised. Indeed, the ‘existing model [is] geared in all its procedural rules and safeguards ... in its essential underlying assumptions with regards to its own legitimacy, to establishing an offender’s guilt—rationally, accountably and transparently. In that sense, the victim paradigm asks too much of (international) criminal law, ignoring its reality ... and disqualifying its goals and functions where they run counter to the demands of “justice for victims”’. However she finds that ‘there can be no way back to the trial in which the victim plays no part’, although the way forward can only be to thoroughly rethink the goals and functions of (international) criminal law and procedure, and the role of victims in it.

Susanne Karstedt explores the principle of credibility that recently has become one of the benchmarks for the success (or failure) of transitional justice. As the concept and term has made its way into UN documents, reports and claims by NGOs, the question arises as to what credible justice actually means in the context of transitional justice and how it is achieved. Credible justice is both justice expressed and perceived, with transparency being its necessary institutional and procedural precondition. She identifies three different dimensions of credibility in the context of transitional justice: credibility as generated by internal judicial and court procedures; credibility of information and its sources in the education of the public; and institutional credibility and credible commitments by responsible actors. Three case studies of transitional justice illustrate each of these dimensions, ranging from the Nuremberg Trials to the International Criminal Tribunal for the former Yugoslavia (ICTY) and addressing questions relating to the credibility of victim-witnesses as well as of public apologies. The cases illuminate the uphill battles that transitional justice institutions confront in becoming a credible source of both justice and information.

Paul de Hert leads the reader back from the ground of transitional justice to the global level and ‘global criminal law’. Taking a global perspective, he unpacks the ‘complex multi-actor and multi-layered criminal law problems’ that we encounter in this sphere, but that easily migrate down to the local high-tension environment in which transitional justice seeks legitimacy. He casts these principles as ‘governance’ rather than justice principles. He discovers contextual analogies and links between transitional and global

justice, which both defy the mere application of general criminal law principles rooted in national constitutional values. Like global criminal justice, transitional justice demands more flexible, process-oriented principles, and opportunities to ‘explain and justify intentions, and to obtain feedback from other actors, enhancing acceptance and confidence’. In cases of the tragedies of mass atrocity, public account giving can help to provide ‘public catharsis’. However, he warns that none of the principles comes to us as ‘absolute’ or ‘a good per se’.

The chapters in Part II shed light on the interaction between international criminal courts and tribunals, and the public which they seek to address inside and outside of the courtroom. Olga Kavran is a long-term practitioner of outreach at international criminal tribunals and opens this part with a rare view from within the institutions. She takes us on a fascinating journey from the beginnings of outreach activities at the ICTY in 1994 to the Special Tribunal for Lebanon. Whether dealing with a government-controlled and partisan press, like at the ICTY, or a situation where there is tension at the highest level, like in Lebanon, each situation requires the design of public relations strategies adapted to the specific context. Her account of the development of the institutional understanding and realisation of such necessities in the realm of international criminal justice simultaneously highlights the challenges and deficiencies of transparency, participation and legitimacy that these institutions face and have to address.

Lauren Gould uses the first case brought before the International Crimes Division of the High Court of Uganda—the case of former child soldier Thomas Kwoyelo—to illustrate the difficult relationship between domestic and international justice, and the public sphere and political environment in which complementarity between the two is played out. She shows how an assembly of actors, including international actors, were instrumental in institutionalising legal and judicial reform in Uganda, but were unable to achieve government compliance. Rather, the dominant accountability frame prevailed in the public sphere, and contestations were gradually weakened. This an exemplary case of how outsiders and activists might be engulfed in political struggle and used by different factions if they do not reflect on the political and social impact of the international justice regime they promote; unintentionally they might entrench rather than break cycles of exclusion, impunity and violence.

The following two chapters by Cheryl White and Ray Nickson focus on the role of victims and their participation in procedures of international courts and tribunals. As both authors explore questions relating to public engagement, transparency and legitimacy through an in-depth analysis of the interaction of and in the court with victims, they provide exemplary illustrations of ‘transparency’ as conceptualised by Paul de Hert in Part I. White argues that the discursive proceedings and communicative style that was facilitated by the representation of victims as civil parties at the

ECCC—a mechanism that had been used in all major trials of Holocaust-perpetrators in Germany—greatly enriched the ECCC’s inquisitorial procedure as it activated the communicative dynamics of narrative testimony and made it *dialogical* in nature. Based on an analysis of witness testimonies and civil party statements in the Court’s first cases, she demonstrates that the more discursive proceedings amplified important social issues in Cambodia and engaged the public. This and the ECCC’s success in making the proceedings accessible to the population suggest that the transparency of proceedings and the space they give to different voices have the potential to enhance their legitimacy.

Ray Nickson takes a view from within two institutions, the ICTY and the ECCC, and examines how these courts perceive, define and respond to expectations of justice held by, among others, victims, post-conflict communities and international donors. Staff working for, and with, the ICTY and the ECCC experienced such expectations as overblown with respect to what these institutions could achieve and deliver, and as a consequence believed that expectations and groups had to be managed. Each institution developed a set of practices of expectation management. Nickson’s analysis suggests a more proactive approach to expectation management and a more active consideration of the role of expectations, including identification of the type of expectation and how it might best be addressed in order to enhance legitimacy for transitional justice institutions.

Part III explores the public sphere outside of courtrooms, and the mechanisms and actors through which transparency and legitimacy is created in this fluid as well as highly contested environment. Here, actors vie for acceptance of their testimony by society at large, and they fight against the obfuscation of and silence about the crimes that have been committed, against destruction of evidence and ‘cleansing’ of public spaces of remains, and for the memory of victims, often long after the events. Naturally, the creation of memories in the public sphere is a focal point of discussion and analysis in the five chapters in this part. Antonius Robben explores the presence and testimony of survivors of torture and disappearance during the 1976–83 Argentine dictatorship. Different transitional justice fora like fact-finding missions, truth commissions and criminal courts all use testimony to discover human rights violations, and they ask for different types of testimony from different actors. This chapter focuses on the tensions between the public sphere and the different fora, and the dilemmas they create for ‘witnesses torn between providing narrative truths, with a strong emotional veracity to convince people of their unimaginable suffering, and supplying the factual evidence demanded by courts as legal proof to convict perpetrators’.

Chrisje and Kees Brants in turn to those who are seminal in creating the public sphere—from the international community to national civil society. Professional and citizen journalists are often eyewitnesses themselves and also make the world witness the atrocities that the international

community needs to address through its justice institutions. As such, they provide informative and emotional transparency and legitimacy in the first instance on which courts and tribunals can later build in prosecuting these crimes. This translates into conflicting dilemmas faced by war correspondents and the international justice system in relation to professional norms of an objective and transparent search for the truth in crimes against humanity, which this chapter addresses. When called to testify, journalists may claim that they need to protect their sources (and themselves), but this may hinder legal truth finding and, possibly, the conviction of perpetrators. In this dilemma, professional journalists are allowed immunity from testifying on certain conditions, precisely because their information is based on a professional guarantee of objectivity and neutrality, and because their role in creating rationality in public discourse should not be endangered. However, the environment of war reporting has changed dramatically, with journalists often being embedded and not neutral, or dependent on unverifiable information or citizen journalists. This chapter describes these problematic developments, raising the question of what they may mean for the transparency and legitimacy of international criminal justice and the public sphere itself.

Marloes van Noorloos takes up a controversial topic and theme—the ‘memory laws’ that regulate and police both acknowledgement and silence and denial of mass atrocity crimes. Such laws are, to some, important means of consolidating the ‘historical truth’, making sure that certain facts can no longer be contested. To others, they are attempts by the state to fix an official truth while outlawing other versions of history, thus consolidating the state’s power. ‘Memory laws’ determine the space of the public sphere within which such events and conflicts are discussed, the transparency of facts and the legitimacy of arguments. Do such memory laws actually ‘succeed’ in shrinking the space for contestation and thus transparency? The author provides a critical analysis of the motives behind such laws and illustrates it by discussing the European Court of Human Rights judgments in *Perinçek v Switzerland*, concluding that the potential of memory laws to police the public sphere after mass atrocity is disputable.

Natalia Maystorovich Chulio explores how social movements that address past atrocity crimes develop and shape public knowledge and acknowledgement of such crimes, and create transparency even after decades of silence and obfuscation. Her participatory research focuses on the exhumation of victims of mass atrocities of the Spanish Civil War, and specifically on the endeavours of the Association for the Recuperation of Historic Memory (ARMH) to exhume mass graves for the purpose of locating, identifying and providing recognition for victims. Through the advancement of victims’ rights and the expansion of international human rights law, the exhumation movement has gained visibility and has ushered in political and legal change domestically. Notwithstanding such changes, there are numerous social,

political, judicial and institutional barriers to exhumations. The author raises questions in relation to who has the power to define victimhood and whether and how the exhumation of mass graves has contributed to justice.

Artists and their works are decisive players in the transitional and post-conflict public sphere, shaping if not rational then emotional transparency for the communities involved. Photography is a major and presently the most prominent medium in artistic endeavours to make crimes and victims visible, perhaps because of its seeming authenticity, objectivity and inherent truth. Olivera Simić presents two artistic projects in the post-genocide countries Bosnia and Herzegovina and Rwanda 20 years after the events, which both seek to promote collective memory and symbolic reparation. Both projects have chosen different modes, in terms of symbolic representation, narratives and aims, as well as messages. While the installation in Bosnia and Herzegovina focuses on the victims, the narrative on Rwanda is about forgiveness. The chapter raises critical questions about the ambiguous role of art in the complex processes of transition, either as a tool to promote peace and reconciliation or, conversely, to reinforce and encourage the perpetuation of ethnic/racial divisions in post-genocide societies. The ambiguity of art becomes obvious in the reflections from viewers of both projects collated from internet blogs and comments left on an online discussion platform, and reactions from observers and academics who in particular question the possibility of forgiveness.

Rather than providing easy answers, the contributions to this volume raise pressing questions and are far from solving the ‘twin puzzle’ of the public sphere of transitional justice and how accountability, transparency and legitimacy are generated for these still-fragile institutions which are increasingly besieged. Furthermore, the volume raises questions regarding rational and emotional transparency that affect domestic as well as international justice, and justice as we know (and see) it, as well as exceptional transitional fora. The chapters testify to and illustrate with representative examples the fact that local and domestic contexts, actors and movements are decisive in all endeavours of outreach and engagement. It is there where legitimacy for international criminal justice has to be engendered and where credible justice ultimately can be achieved.

