Transition by Boat: No State for Justice?

*Transitional Justice for Statelessness in Pre-Transitional Zones*

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This thesis evaluates the extent to which the field of transitional justice can address statelessness in pre-transitional zones, that is, cases of protracted statelessness resulting from ethnonationality-based exclusion and attended by gross and systematic violations of human rights in a region where the supra-state governance regime is in pre-transition. The evaluation begins with a literature review to establish the normative case for transitional justice to address statelessness in pre-transitional zones, to critically assess the capacity of paradigmatic transitional justice to address this context and finally, to draw together multidisciplinary insights that can guide transitional justice’s adaptation for the context of statelessness in pre-transitional zones. The thesis then proceeds to develop a normative and structural adaptation of transitional justice for statelessness in pre-transitional zones, which both normatively reorients the field and structurally reframes its measures for application to the context. In order to assess the practical merits of its theoretical propositions, the thesis studies an ongoing case of statelessness in a pre-transitional zone, that is, the Rohingya crisis. The limits of paradigmatic TJ in the Rohingya case are delineated and the corresponding potential of the adapted model is also illustrated. Hence, the thesis demonstrates that the field of transitional justice, in its paradigmatic incarnation, is ill-equipped for addressing statelessness in pre-transitional zones. However, based on the normative and structural adaptations developed in this thesis, the field of transitional justice can secure backward and forward-looking justice for the stateless in pre-transitional zones.
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<td>ECOSOC</td>
<td>Economic and Social Council</td>
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CHAPTER 1: INTRODUCTION

1.1 Research Question

This study is undertaken to evaluate the extent to which the field of transitional justice (TJ) can address statelessness in pre-transitional zones (SPTZ) and propose the field’s adaptation for SPTZ. This question is significant as TJ’s role for SPTZ has not yet been explored in the literature and therefore, the study has the potential to make a novel contribution to TJ scholarship. The study further assesses the potential application of TJ’s proposed adaptation to the Rohingya crisis. The study of the Rohingya context and Asian experiences of mass atrocity and political transition generally is also important, since the field has concentrated mostly on Eastern European, Latin American and African transitions.¹

1.2 Background to the Problem

It is a fundamental goal of TJ to render justice for gross and systematic violations of human rights to ensure non-repetition of such violations.² Despite this general orientation, the field is conceptually and practically approached as State transitions from oppressive to liberal-democratic regimes.³ However, human rights are not beholden to the international State system, whether in possession, realisation or violation. Statelessness is the condition where a human being is not a citizen of any State.⁴ However, this condition has no bearing whatsoever on one’s possession of human rights which are inherent in the condition of being human. As such, where the human rights of the stateless, including their right to nationality, are subjected to gross and systematic violation, this demands the engagement of TJ.

However, TJ has not addressed statelessness in the context of gross and systematic violations of human rights by multiple States, such that the case may be described as one of SPTZ. There are several complexities that distinguish such contexts from paradigmatic cases of TJ. A fundamental complexity lies in defining the conceptual and practical scope of the field’s engagement since atrocity against the stateless is potentially committed by multiple States in

¹ Tazreena Sajjad, Transitional Justice in South Asia (Routledge 2013)
⁴ Office of the United Nations High Commissioner for Refugees (UNHCR), Handbook on Protection of Stateless Persons (UNHCR 2014)
the region. This complexity transmits along individual TJ measures, requiring recalibration for SPTZ.

This thesis will delineate the normative case for TJ to address SPTZ and demonstrate the conceptual and practical limits of paradigmatic TJ in addressing SPTZ. Borrowing from the diverse fields of international law, international relations, minority rights and psychology, it will propose an adaptation of TJ to deliver backward and forward-looking justice for SPTZ. In order to ground its theoretical contributions in reality, the thesis will explore the *Rohingya* crisis, which is an ongoing case of SPTZ.

1.3 Research Methodology

TJ is necessarily interdisciplinary⁵ and therefore, to adapt TJ for SPTZ, the study requires insights from the disciplines of law, minority rights, international human rights, international relations and psychology. The study will therefore be of the category ‘Advanced Interdisciplinary Research Type I’, following the classificatory framework of Siems, as the research question is not about law *per se*.⁶ As the research question itself is multi-disciplinary, the socio-legal approach offers the necessary depth and breadth for the complex phenomenon under study.

The primary sources for this research will be legal sources including the International Bill of Rights, United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness. The domestic laws of Myanmar will be studied, along with the relevant domestic laws of host countries. In addition, primary sources include official documents and statements on the conflict. Secondary sources for the study include scholarly works, UN reports, NGO reports and media reports as these will provide the most recent information on the ongoing *Rohingya* crisis.

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⁵ Christine Bell, Colm Campbell and Fionnuala Aol’ain, ‘Justice Discourses in Transition’ [2004] 13(3) Social and Legal Studies 305
1.4 Objectives

The objectives of this study are firstly, to establish the normative case for TJ to address SPTZ. Secondly, it aims to evaluate the extent to which paradigmatic TJ can address SPTZ. Finally, it proposes the field’s reorientation for this context. This inquiry will shed light on a latent potential of the field and stimulate the realization of this potential.

There are two major limitations of the study, both of which relate to the assessment of the Rohingya context. Firstly, as it uses secondary sources, it will reflect any biases and inaccuracies in these sources. However, as a large volume of material from different sources with the most neutral reportage will be used, the risk of bias and/or inaccuracy is minimal. The second limitation arises from the ongoing nature of the Rohingya crisis. The mapping of theory onto this case of SPTZ can therefore rely on only the most recent information available.

1.5 Organisation of the Study

The thesis organises its response to the overarching research question in five chapters. The next chapter contains the literature review based on which it builds the normative case for TJ to address SPTZ, identifies the present inadequacies of the field in this regard and draws on emergent developments both within and beyond the field that can shape responses to SPTZ. The third chapter proposes TJ’s normative and structural adaptation for SPTZ. The normative adaptation discusses the appropriate orientation for TJ to identify the entity that should be the subject of its efforts and balances the opposing forces of democratic self-determination and human rights in the SPTZ context. The structural adaption builds on this normative foundation to reconstitute the TJ pillars of justice, truth, reparations and guarantees of non-repetition (GNR) for SPTZ.

In the fourth chapter, the thesis attempts to establish the nexus between theory and reality. It offers a succinct practical assessment of its theoretical propositions based on their applicability to the Rohingya crisis. This assessment is twofold. The chapter first illustrates the limits of paradigmatic TJ to contribute to the Rohingya crisis and then examines how the proposed adaptation fares in this context. The fifth and final chapter concludes the study by recapitulating the discussion and reaffirming the core theses.
CHAPTER 2: LITERATURE REVIEW

The literature review answers the core questions of whether TJ should address statelessness in pre-transitional zones (SPTZ), whether the field adequately does so and how it can be adapted to this end. The review begins by establishing the normative case for TJ to address SPTZ. A critical review of TJ literature follows, demonstrating that TJ is presently ill-equipped for SPTZ. The final part of reviewed literature draws together multidisciplinary developments for adaptation to SPTZ.

2.1 Normative Case

The normative case begins by identifying the type of contexts in which TJ engages. The phenomenon of SPTZ is then examined to ascertain whether this is analogous to such contexts. TJ delivers justice for mass atrocity, reconstructs the state’s institutional framework and rebuilds society after conflict. While there is much controversy as to the aims of the field and the kind of contexts in which it should engage, there is broad consensus that TJ has a role in situations of gross and systematic human rights violations during a transitional process. This goal of TJ to dispense backward and forward-looking justice for grave violations of certain categories of human rights is consistently recognized across diverse transitional contexts, across broader conceptions of justice and across individual TJ mechanisms. Given that this is a fundamental goal of TJ, the review now turns to the literature on statelessness to ascertain what, if any, human rights are at issue in SPTZ that warrant TJ’s engagement.

Statelessness refers to the condition of lack of nationality, i.e., where there is no bond between the stateless person and any State. This study concerns the case of ‘SPTZ’, meaning cases of protracted statelessness that result from ethnonationality-based exclusion and are attended by gross and systematic violations of human rights in a region where the supra-State governance

8 Bell (n 2)
13 UNHCR (n 4)
regime in is in pre-transition. SPTZ falls within the TJ’s teleological ambit because, firstly, the SPTZ condition is itself a gross and systematic violation of the human right to nationality, to which TJ should respond and secondly, the stateless possess human rights irrespective of their lack of nationality, and the gross and systematic violations of these rights warrants the engagement of TJ.

The condition of statelessness exposes that while human rights are inherent, for their realization, one must possess ‘the right to have rights’ through membership of a community that is willing and able to protect his/her rights. In contemporary human rights law, this is the right to nationality. The human right to nationality is enshrined in the UDHR and is vital as most States allow only their nationals to exercise the full range of human rights. Although the denial of citizenship and consequent non-fulfilment of the right to nationality may arise for any number of reasons, in the context of SPTZ, the denial constitutes a violation of the human right to nationality that is gross, systematic and itself a perpetual facilitator of further violations of human rights. Therefore, SPTZ entails mass violations of human rights. As such, the engagement of the field of TJ is justified.

Secondly, notwithstanding their lack of nationality, stateless persons inherently possess human rights, as acknowledged in contemporary international law. Several international legal instruments now focus specifically on the protection of the stateless and on the reduction of statelessness, including the 1954 Convention Relating to the Status of Stateless persons and the 1961 Convention on the Reduction of Statelessness. Further affirmation that nationality is not a precondition to human rights is implicitly demonstrated as terms relating to citizenship are seldom used in human rights instruments to prevent discrimination against the stateless and non-citizens generally. Therefore, the abuse suffered by the stateless cannot be distinguished from orthodox TJ contexts based on victims’ lack of nationality. The systematic and gross violations of human rights suffered by human beings who are stateless are equally a concern for TJ. In SPTZ, injustice suffered by the stateless arises from oppressive State action rooted

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14 Bridget Cotter, ‘Hannah Arendt and “The Right to Have Rights” in AF Lang and J Williams (eds), Hannah Arendt and International Relations: Reading across the Lines (Palgrave Macmillan 2005)

[10]
in exclusivist ideology. As with TJ’s conventional focus, in addressing SPTZ, both State and society must be reconstructed. Hence, SPTZ is aligned with TJ’s fundamental goal of addressing mass violations of human rights and to ensure the non-repetition of such violations.

The normative case is strengthened by examining the congruencies between SPTZ and general contexts of TJ. ‘SPTZ’ captures the trans-state nature of ethnonationality-based exclusion and attendant violations of human rights and is identified by the condition of statelessness in contexts marked by the indicia of ‘pre-transition’ and ‘zone’. Firstly, pre-transition is understood in its standard sense in TJ scholarship in the case of states with which TJ has engaged despite the transition process not having begun or having been underway for a protracted period, as in Uganda. In including pre-transitional processes within TJ’s ambit, transition is viewed not as an event but a process with intermittent periods of stagnation for even years after the transitional process first begins. Hence, in pre-transitional contexts, there is no definite transition of regime or cessation of conflict and commencement of peace, and atrocity may persist even as ad hoc TJ mechanisms are initiated. However, the inclusion of the pre-transitional context within TJ’s scope is nonetheless justified as ‘critical openings’ manifest in the pre-transitional phase that offer real prospects for change.

SPTZ is a case of pre-transitional TJ since, as regional crisis unfolds, there are junctures at which TJ mechanisms can be instituted to achieve certain measures of justice. As States in the region and the international community join efforts to resolve a case of such protracted statelessness, there is a phase leading to the final resolution in the form of naturalisation wherein justice may be sought and secured as the governance regime for that stateless people undergoes a transition.

Secondly, the concept of a zone demarcates the scope of the case of statelessness to identify the primary interface for TJ’s engagement. In orthodox contexts, it is the State that is the locus of the TJ process. However, this is clearly unworkable in SPTZ, as several States perpetrate abuse against the stateless. Hence, the concept of a pre-transitional zone is apt, borrowing from

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22 Ibid 74
Sriram and Ross’s notion of ‘zones of impunity’ based on wrongs and relationships between victims and States, rather fixating on a single state. A pre-transitional zone demarcates the scope of TJ’s primary engagement in addressing the case of SPTZ, capturing within its ambit all those States that are responsible for mass violations of the human rights of the stateless people for whom TJ is sought. This is similar to the rationale whereby the parameters of orthodox TJ are defined, as a State is identified as the ideal unit because it defines the territorial and jurisdictional bounds of atrocity. Hence, this is a point of congruence as well.

The final element of the normative case concerns TJ’s potential contribution to SPTZ. To address this question, firstly, it is necessary to examine current responses to SPTZ. Existing responses to statelessness may generally be classified into three types - pre-emptive remedies, minimization remedies and naturalizing remedies. Pre-emptive remedies are intended to prevent statelessness before it can arise such as granting of citizenship upon birth within State territories. Minimization remedies aim to minimize the hardships of the stateless. Finally, naturalizing remedies secure citizenship. Naturalizing remedies are not obligatory on States under international law. While the 1954 Convention does call for the facilitation of naturalization for stateless persons ‘as far as possible’, the provision is both weak and open-textured. However, the authoritative view is that the plight of statelessness can be fully resolved only through the acquisition of citizenship. It is thus clear that these remedies are based on an understanding of the ‘stateless’ as a purely legal category and the condition of statelessness as an anomaly that needs only to be rectified by an act of positive law. The socio-political context of prevention, minimization and naturalization are not recognized. Therefore, there is scope for TJ’s contribution to SPTZ as discussed below.

There are normative lacunae in the protection scheme that negate much of the effective protection for the stateless. Firstly, there is a fallacy in how the correlative duty for the human rights of the stateless is conceived and secondly, there is an unresolved tension between liberal democratic citizenship and universal human rights. While there is a recognized human right to nationality, no principle of international law identifies its correlative duty-bearer or lays the terms whereby a bond of nationality is forged. The deep-rooted concept of State sovereignty in

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24 Weissbrodt and Collins (n 16)
international law allows States wide discretion in drawing the boundaries of citizenship.\textsuperscript{27} Hence, the essential requisite of a correlative duty which gives a human right its character as a right, is absent in the case of the right to nationality. The problematic theorization of the duty for human rights of the stateless is not limited to the right to nationality. International law, both in its general human rights instruments and its specialized instruments for statelessness, adopts a State-centric approach. The centrality of citizenship in realizing human rights\textsuperscript{28} is evidenced in the right to participate in government. Art.21 of the UDHR proclaims that this is an entitlement of every human being \textit{with respect to the government of their own country}.\textsuperscript{29} Similarly constrained are the rights of free movement.\textsuperscript{30} Finally, developing countries have wide discretion in determining the economic rights to be granted to non-nationals.\textsuperscript{31}

Turning to the specialized framework, the 1954 Convention establishes protection based on increasing levels of attachment between the State and the stateless person, where the greater the level of attachment the more rights are granted to the individual.\textsuperscript{32} Nonetheless, gaps remain in the protection regime. Firstly, the stateless are not accorded rights to participate in government. Moreover, even rights to free opinion, expression and political assembly, which are vital to the empowerment of the stateless, are not protected.\textsuperscript{33} The right to free movement is where the Convention reveals its most debilitative feature. The entire gamut of rights is based on a correlation between level of attachment and entitlement. However, attachment, as types of physical presence, while imposed as a precondition, is nowhere itself the subject of a right. Thus, the stateless are not guaranteed rights to lawfully enter and remain within a State’s territory and State-parties to the Convention may circumvent their obligations altogether through denial of access, detention or expulsion where stateless persons seek entry.\textsuperscript{34} Finally, the status of the economic rights of the stateless in developing countries is left entirely unaddressed. In analysing these protection regimes for the stateless, it is essential to understand that the purpose of such international instruments is not to ‘grant’ human rights, which are inherent entitlements, but to identify and impose the correlative duties that will facilitate the

\textsuperscript{27} Brad Blitz and Maureen Lynch (eds), \textit{Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality} (Edward Elgar Publisher 2011)

\textsuperscript{28} Ibid

\textsuperscript{29} Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) Art.21

\textsuperscript{30} International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

\textsuperscript{31} Ibid Art.2(3)

\textsuperscript{32} 1954 Convention (n 24) Art. 7(1)

\textsuperscript{33} 1954 Convention (n 24) Art.2

\textsuperscript{34} There is no equivalent to the non-refoulement principle for the stateless
realization of these rights. Thus, the current framework imposes unjustifiable limits on protection due to State-centrism.

The second normative lacuna lies in the unresolved tension between democratic self-determination and universal human rights. In the contemporary global order, States are increasingly conferring, denying and withdrawing citizenship as a political weapon. Due to overarching State sovereignty, discriminatory exclusion of certain groups may occur where laws are purposefully designed to prevent a group from claiming citizenship in the name of democratic self-determination. International law is silent on how a bond of nationality is forged between the State and the individual, and thus the status quo allows States to both deny citizenship on their own terms and yet effectively remain compliant with international law.

TJ is apt to address both facets of the international politico-legal framework’s normative impoverishment. Though distinguished by its State-centrism, the struggle for TJ is ultimately a struggle for substantive citizenship and bridging social divides, and thus, TJ can contribute to SPTZ. Moreover, TJ is uniquely equipped to produce the necessary re-constitutive effect on the international State system because of its second normative aim. The field of TJ is oriented to view political change from the normative stance of ‘transition to democracy’. Hence, TJ approaches past mass atrocity as rooted in politically defunct systems, flawed primarily in their legal-institutional character.

Against this backdrop, SPTZ arises from exclusivist nationalist ideologies that breach norms of universalism and equality but purport to be legitimate expressions of democratic self-determination, whereby the majority determines the terms of membership of the democratic polity. SPTZ arises from a regionalized instance of the democratic deficit in the global order.

A democratizing transition is necessary to both uphold the dignity of the stateless in the international arena by revising the normative framework for identifying correlative duties for the human rights of stateless persons and facilitating the reconceptualization of citizenship.

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36 Laura van Waas, *Nationality Matters – Statelessness under International Law* (Intersentia 2008)
within individual States. TJ mechanisms, appropriately deployed, can both secure the deserved status of the stateless in the international arena and facilitate the overpowering of exclusionary narratives, facilitating substantive citizenship for the stateless.

The envisioned role for TJ is grounded in the unmet claim to justice in SPTZ contexts. While existing responses to statelessness assume that formal citizenship fully resolves the crisis, across diverse case studies the limits of formal citizenship for stateless populations are evident. The granting of citizenship officially confers a range of rights. However, in practice, the access to rights is severely constrained. Due to persisting systemic barriers, acquisition of formal citizenship does not reverse social exclusion. Moreover, citizenship campaigns may even lead to greater social polarization, aggravating persecution of this vulnerable group. There is no compensation for the ‘stolen years’ and no prospect of any official apology or exoneration and the group is still not seen as part of the general population and is instead regarded as “the other”. The cumulative effect has been described as a perpetual condition of collective ‘social statelessness’ for the population, notwithstanding the conferral of citizenship on individual stateless persons in formal terms. Hence, formal citizenship, while crucial to the solution, is not a panacea. The resonances between the unmet need for justice in situations of legally-resolved statelessness and narratives of wrongs redressed in TJ are striking, delineating the scope for TJ’s contribution to SPTZ.

The practical dynamics of SPTZ also illustrates TJ’s potential for contribution. The field’s capacity to contribute to the empowerment and political organisation of the stateless is vital for the envisioned justice. International law leaves statelessness to be resolved by international agreement and calls on States to assimilate stateless persons as far as possible. Hence, as in international law generally, it is only States that are constituted as actors while individuals are mere subjects. While this stance is justified where States represent their citizenries, this is obviously unsatisfactory in statelessness. Hence, the stateless are unjustifiably denied a political presence on the international plane and similarly, their political presence is repressed

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41 Blitz and Lynch (n 27)
42 Anver Salojee (2005), ‘Social Inclusion, Anti-Racism and Democratic Citizenship’ in T Richmond and A Salojee (eds), Social Inclusion: Canadian Perspectives (Fernwood Publishing 2006)
on the domestic plane and they are thus reduced to passive subjects. Obversely, the stateless are pitiful figures in the popular imagination, both a burden and source of insecurity whom some State must accommodate from its beneficence. Similar unjust and injurious narratives against victim communities are overturned in orthodox TJ settings. Moreover, viewing SPTZ thorough TJ’s “transition lens” in the sense of effecting a transition in the governance regime from statelessness to acquisition of citizenship has the merit of facilitating the management of countervailing dynamics of normative and political forces as in orthodox TJ. Thus, here also, there is evidence that TJ can be adapted to achieve the envisioned justice.

2.2 Critical Review

The review now turns to a critical assessment of TJ’s capacity to address SPTZ. Although a fundamental objective of TJ is the post-atrocity realization of human rights, it defines ‘transition from’ and ‘transition to’ in terms of regime-types, bound by State borders. The “transition” in TJ is that of the State. This segment of the review thus focuses on how TJ is theorized and practiced, demonstrating that the field is ill-equipped for SPTZ.

The origins of the field lie in late 20th century Latin American transitions to liberal democracy. Early conceptualisations of TJ firmly framed the field as justice in State transitions from oppressive regimes to liberal democracies. Such conceptualization continues to undergird contemporary scholarship. Thus, the field is oriented to re-establish the relationship between the State and the individual and to reconstruct the State, to uphold the rights of those oppressed by the previous regime. Mechanisms are therefore geared to re-legitimize the State and foster trust among the people. With TJ’s evolution, the field has begun to incorporate minority rights in transitions to peace and democracy, as social divides along ethnic, religious or cultural axes underlie the (re)ignition of conflict. However, the distinctive nature of statelessness render these developments inadequate, as they are premised on the standard presumption that members of minority groups are nationals of the

47 Arthur (n 38)
48 Ibid
49 McAuliffe (n 3)
(transitioning) State and are therefore indisputably individual subjects of the State’s protection, possessing both legal and social citizenship.\(^5\)

Hence, TJ relies on the normative framework of international human rights law in conjunction with a fundamental orientation towards liberal democracy. It is thus understood that State reformation to establish a liberal democracy can best ensure the non-repetition of the human rights violations to which the field responds. However, as discussed, the normative framework is inadequate for rendering justice for the stateless. As to the establishment of an internally liberal-democratic State, clearly, this cannot resolve the SPTZ crisis which depends on how States are externally constituted. TJ’s standard presumption that the substantiation of victims’ liberal democratic citizenship is equal to the establishment of a human rights-based regime is thus inappropriate for SPTZ.

Moreover, in the SPTZ context, given the absence of a bond of nationality between victims and perpetrator States and without the identification of the correlative duty-bearer for the right to nationality, the State border that so naturally maps out the parameters of orthodox TJ, becomes part of the labyrinth of the global system, with no obvious delineation of TJ’s scale and scope. As to other human rights, no State is the sole perpetrator of human rights violations and thus, which State is to be the subject of TJ initiatives is ambiguous.

Finally, the dynamics of paradigmatic TJ generally involves victims as central actors in post-conflict reconstruction, as fully-recognized citizens. Moreover, State reconstruction is based on the essential common denominator that the future of the State is a shared burden and peaceful coexistence is necessary for divided factions to survive and prosper. By contrast, in SPTZ, wrongs against the stateless are not even recognized as such. Beyond outright violence, the violations of right to nationality and the range of civil, political, economic, social and cultural rights are not analysed as the gross and systematic human rights violations that they are, with the consequence that the essential foundation in TJ settings that there are wrongs to answer for, is absent. A shared fate of the transitional society, inclusive of both victim and perpetrator groups, that advances reconstruction, is absent in SPTZ. Instead, States and their populace have little incentive in dealing with the legacy of abuse against the stateless. Since the stateless are perceived as having no claim to any State, they are seldom accorded political standing and lack the clarity and convergence of purpose of a political collective necessary to

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\(^5\) Susan Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2000)
participate in securing the ends that best serve them. Therefore, there are clear disjunctions between paradigmatic TJ and SPTZ. These transmit into individual TJ mechanisms rendering them ill-suited for SPTZ, as demonstrated by the following examination of the four pillars of TJ, which are justice, truth, reparation and guarantees of non-repetition (GNR).  

2.2.1 Justice

Criminal prosecution is a principal TJ mechanism. In the SPTZ context, given that domestic justice generally cannot be availed, international accountability would be probable. In the contemporary international criminal justice system, this is likely to mean prosecutions at the International Criminal Court (ICC). However, the ICC only intervenes where the relevant national judicial system is either unwilling or unable to hear the case. For SPTZ, given that multiple States are potential perpetrators of international crimes, it is unclear which judiciary is to be assessed for competence before ICC proceedings are justified. Moreover, the possibility that only a fraction of these States are parties to the Rome Statute means that certain perpetrators may be brought to justice while others are not. This arbitrariness would itself produce injustice, undermining the legitimacy and relevance of prosecutions.

More fundamentally, TJ’s fixation on individual criminality is particularly unsuited to address the systemic criminality behind SPTZ. This is part of a broader discussion regarding the inadequacy of criminal accountability as presently conceived in TJ. Criminal accountability, and the role of law broadly, is grounded in the field’s liberal foundation that rejects notions of system criminality and State accountability. Individual criminal accountability represents the highest measure of international justice for atrocity crimes and with the State as the unit of analysis, culpable individuals within it are removed, allowing the State to be internally reconstituted so justice and peace can prevail. This is the absolutist model of accountability.

Through successive phases in TJ’s evolution, new models of accountability have emerged, termed ‘hybrid accountability’ and ‘grafted accountability’. In the hybrid model, individual criminal accountability is one of TJ’s several goals and the multiple goals are pursued with

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52 Pablo de Greiff, (Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence), September 7, 2015, Report to the Human Rights Council, UN Doc.A/HRC/30/42
53 Carsten Stahn and others (eds), The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011)
victims’ needs and experiences as the focal point of TJ efforts. The grafted model of accountability advances a conception of TJ as ‘transformative justice’, that draws accountability into the arena of development, peacebuilding and restorative justice. The model shapes TJ from local priorities with no intrinsic value of law presumed. Hence, in both models, State legal accountability for mass atrocity is absent.

Turning to SPTZ, the crisis is a product of system criminality that requires fundamental restructuring of the culpable states in the zone. TJ’s liberal undergirding has led it to denounced State accountability for mass atrocity on a supra-State level. Thus, moral and legal impunity for State criminality is established and States evade obligations to eliminate system criminality. The State’s ‘system criminality’, whereby the very structure of the State becomes weaponized in the commission of mass atrocity against the stateless and State infrastructure is built into instruments of international crimes, is not presently addressed in TJ as State crimes. Identifying States as culpable for their roles in the perpetration of international crimes both underscores the highest denunciation for the offending State structure and creates a legal basis for imposing the obligation to eradicate system criminality, thereby ending State impunity.

2.2.2. Truth

The second TJ mechanism under consideration is truth commissions (TCs). TCs focus on patterns of past abuse during a specific period of atrocity. These are temporary bodies that engage with the affected population directly and on a large scale. A TC will usually investigate and report on the principal causes of the conflict and make policy recommendations to prevent the recurrence of abuse. Truth is understood to be essential for reconciliation, peace

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57 Sharp (n 11)
58 Andre Nollkaemper, ‘Introduction’ in Andre Nollkaemper and Harmen van der Wilt (eds), System Criminality in International Law (CUP 2009)
60 Priscilla Hayner, Unspokeable Truths: Facing the challenge of truth commissions (2nd edn, Routledge 2001)
62 Ibid
and democracy.\textsuperscript{63} Moreover, the victim-centric structure of TCs is understood to empower the victim population and facilitate a restoration of dignity and self-worth.\textsuperscript{64}

Turning to SPTZ, the normative framework for these commissions is ill-fitted to the context. TCs assess wrongs as existing State obligations that were unfulfilled. In SPTZ, there is no uncontested conception of State obligations that can frame the conceptualization of the truth of the full range of wrongs against the stateless. Similarly, TCs’ standard role in promoting reconciliation and empowering marginalized groups presume unchallenged rights of participation by victim groups, that is the recognition of their having nationally relevant truths to tell, which is not the case for the stateless. It is also important to consider how truth realizes its transformative potential to reconstruct the transitional State.

Transitional history ‘is a fundamental factor in restoring citizens’ confidence in the institutions of the State’.\textsuperscript{65} Thus, the fundamental character of truth as an essential component of forward-looking justice relies on an equation of victims with citizens and uncritical dependence on correlative State duty. However, the past truth of the stateless does not similarly hold any promise for the future.

The practical problem of scale is somewhat mitigated by the fact that trans-State TCs are not unprecedented, albeit rare. However, as Indonesia and Timor-Leste’s Commission of Truth and Friendship demonstrates, this requires a sense of shared purpose and willing cooperation that is elusive, if not absent, in SPTZ settings. SPTZ involves multiple States, none of which are willing to assume responsibility for the stateless and are keen to impose all burdens on one or other of the States. It is not readily conceivable that States self-representing as victims of illegal inflows of alien populations would willingly commit to a process intended to expose their own culpability in the oppression of the stateless. Although TCs are occasionally instituted by repressive elites where appropriate internal or external incentives are present,\textsuperscript{66} in the SPTZ context which will typically involve several States, this demands a level of synchronicity that can seldom be achieved by design. Thus, this TJ measure is also not readily applicable to SPTZ.

\textsuperscript{64} Victoria Sanford, Buries Secrets – Truth and Human Rights in Guatemala (Palgrave Macmillan 2003)
2.2.3 Reparations

Turning to reparations, this TJ measure forges a specific nexus between the perpetrator’s accountability and the victim’s compensation. As reparation attempts to redress governmental abuse against individuals, it signifies State responsibility, which is contested in SPTZ. In the SPTZ context, multiple States commit violations and the violation of the right to nationality can potentially be attributed to all States. There are further difficulties in the normative underpinnings of reparation. Reparations are provided on the basis of existing legal categories of human rights violations[67] that are mapped onto the facts, to identify victims deserving of reparation.[68] The burden of proof to establish victimization generally falls on victims[69] and even in orthodox TJ, issues of citizenship and residence raise particular problems such as where victims are excluded from reparations programs on account of their lack of citizenship or proof of permanent residence.[70]

There are obvious complexities in determining which States in the SPTZ context should be required to provide reparations, which violations should be addressed and what form reparations should take. In orthodox TJ settings, reparations are either symbolic or material,[71] framed according to the nature of State obligation to citizens.[72] In the SPTZ context, existing forms of reparation are incongruous with the violations suffered by the stateless. The right to nationality poses obvious difficulties but even where correlative duties for the human rights of the stateless are indeterminate for lack of requisite attachment to a State, it is unclear which entity has violated these rights and consequently on what terms reparations should be framed.

As a TJ measure, reparation furthers peace and reconciliation.[73] Integral to reparation programs is the aim to give victims due recognition as citizens. Reparations are thus part of a broader socio-political project to reconstruct a political community[74] based on recognition of individuals as agents and victims, civic trust and social solidarity.[75] Reparations thus affirm

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[69] ibid 183
[70] Garcia-Godos (n 56)
[71] Pablo De Greiff (n 59)
[75] Garcia-Godos (n 56)
State commitment to victims’ full and equal inclusion in society. The differences with the SPTZ context could not be starker. Thus, this TJ measure is also ill-equipped to address SPTZ.

2.2.3 Guarantees of Non-Repetition (GNR)

Finally, GNR comprise measures that reform the State institutions that enabled violations through, for instance, the ratification of human rights and humanitarian law treaties, domestic reforms to criminalize international crimes, and appropriate judicial and constitutional reforms. GNR are understood to restore confidence in the State and facilitate social healing. In TJ literature, GNR have thus far been conceptualized and implemented at the level of individual States. However, in the SPTZ context, internal reforms to the State are inadequate given that statelessness subsists in the interstitial spaces between States. Turning to the normative undergirding of GNR, these measures delineate the scope of State responsibility and address the causal factors behind the State’s oppression. GNR constitute forward-looking justice in that they deconstruct those systems that enabled State abuse. Thus, GNR convey normative, if not legal, condemnation of the State, akin to sanctions against individuals under international criminal law. However, in SPTZ, the condition of statelessness is yet to be characterized as State abuse and any measures proposed are therefore unlikely to come to fruition given that GNR are advanced as policy, not law. States are merely advised to adopt such measures despite potential legal obligations to that effect. There is, thus, a level of complexity here that is yet to be addressed, let alone resolved. To conclude the critical review, therefore, TJ’s theory and praxis are presently inadequate for SPTZ.

2.3 Adaptation

Multidisciplinary insights will guide the proposed adaptation of TJ for SPTZ. The constraints of TJ’s State-centrism can be overcome using the concept of ‘zones of impunity’ in transnational crimes. Recent advances in scholarship also contribute to broadening justice that embraces State accountability for atrocity crimes. This is useful for SPTZ, which is the

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76 De Grieff (n 59)
78 De Greiff, Report (n 59)
80 Fletcher (n 54)
81 Sriram and Ross (n 23)
82 Fletcher (n 53)
product of ‘system criminality’.

TJ’s application in mass displacement\(^{84}\) is also instructive in adapting the field to the trans-State problem of SPTZ.

The constraints of the statist conception of human rights can be overcome and correlative duty re-conceptualized, as Miller\(^ {85}\) has argued, laying the foundation for international responsibility. Moreover, the literature on transitions in multi-ethnic societies shows an increasing recognition of the need to establish distinct mechanisms for minority rights’ protection,\(^ {86}\) providing a useful point of departure in considering the possible alternatives for the stateless who, like national minorities, are numerically inferior and oppressed. TJ scholarship on transitions with identity-based divides\(^ {87}\) is also instructive for SPTZ as this condition of statelessness is also a form of identity-based exclusion. Finally, social-psychological insight on ethnic minorities and the causes and resolution of inter-group conflict also inform TJ’s adaptation.\(^ {88}\)

\(^{83}\) Nolkaemper (n 57)

\(^{84}\) Susan Harris-Rimmer ‘Reconceiving Refugees and Internally Displaced Persons as Transitional Justice Actors’ [2010] 2 Contemporary Readings in Law and Social Justice 163

\(^{85}\) David Miller, ‘The responsibility to protect human rights’ in LH Meyer (ed), Legitimacy, Justice and Public International Law (CUP 2010)


\(^{87}\) Paige Arthur (ed) Identities in Transition: Challenges for Transitional Justice in Divided Societies (CUP 2010)

\(^{88}\) Muzafer Sherif, Group conflict and cooperation (Routledge 1966)
The preceding chapter aimed to demonstrate the need for TJ to engage with SPTZ and stimulate the conceptual growth of the field in this direction. The present chapter is an attempt to envision the potential contours of such expansion. The adaptation of TJ explored here begins by laying the normative foundation for correlative duties for the human rights of the stateless and the balance between democratic self-determination and universal human rights in the SPTZ context. Based on this foundation, TJ’s structural adaptation is proposed.

3.1 TJ’s Normative Adaptation for SPTZ

To recapitulate the earlier discussion, the first normative lacuna is that the international positive law framework for human rights identifies States as the exclusive correlative duty-bearer. However, for the right to nationality, no State is identified as correlative duty-bearer and the duty for other human rights of the stateless are also defined relative to the State and are therefore either only partially protected or else entirely unprotected and there is no entity bearing the correlative duty for the full extent of these rights. This is international law’s observance of State sovereignty, whereby the terms of membership of the body-politic and state obligations towards non-citizens are largely subject to State prerogative.

However, a State-centric framework for human rights does not follow inexorably from the UDHR. The Declaration establishes ‘a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society…shall strive…to secure their universal and effective recognition and observance.’ The positive law framework that has evolved around the Declaration has identified states as correlative duty-bearers for the realization of human rights. Within this framework, even where some other entity is the direct violator, the duty lies with the State to establish the necessary mechanisms to punish violators and redress victims. The State-centricity of the framework results from an interplay of pragmatics and historical contingency, its logic rooted in the basis of the UN as the global response to State atrocity in the Second World War.

The UN Charter forged the foundations of a new international order based on human rights. Within this order, the UDHR focuses on right-holders rather than duty-bearers and it neither
codifies States’ obligations nor explicitly addresses obligations of other actors. Tracing an earlier draft of the UDHR’s preamble further evinces the approach of the Declaration to correlative duties. The draft called on States both in their individual capacity and in their collective capacity as the UN, given their overarching regulatory powers. This signifies the basis of responsibility to be the capability of the entity rather than any special legal status that it holds. In addressing “every individual and every organ of society”, and not only States and the UN, the final draft of the preamble re-inscribes the erga omnes91 nature of the UDHR and the rights it enshrines.

The essential logic for identifying the correlative duty-bearer for human rights is thus to find the entity with maximal capability for rights’ realisation. Hence, contemporary international law may be interpreted as having crafted one instrument to affirm human rights as binding entitlements in conjunction with an all-encompassing injunction on every entity to institute whatever means necessary for securing human rights and incrementally developing specific duties and enforcement frameworks in later instruments, as with the Covenants that followed the UDHR. While States clearly possess maximal capacity for securing the human rights of their citizens, in the SPTZ context, States are made only partially responsible for certain human rights. The international normative framework does not provide for the remainder of stateless persons’ human rights, implicitly demonstrating both that the individual State lacks capacity to secure the full range of human rights of the stateless and that these entitlements can fully be upheld only once the right to nationality has been secured.

Against this normative backdrop, it is submitted that the UN is the entity with maximal capability to secure the unprotected human rights of the stateless in pre-transitional zones, and thus, the UN is the correlative duty-bearer for these rights. The threshold condition for an entity to bear duties in the international order is the possession of international legal personality, that is, the legal capacity to be directly addressed by and engage with international law. The international legal personhood of the UN was recognized in the early Reparations for Injuries case. Thus, this threshold criterion is met.

91 Used literally as rights that can be claimed against anyone, universally.
The proposition that the UN possesses maximal capacity for securing the unprotected human rights of the stateless in pre-transitional zones can be justified on several grounds. Firstly, the 1954 Convention has no monitoring mechanism\(^93\) and the capacity for regulatory oversight, and thus the ability to secure these rights against specific States, obviously lies with the UN, as for other convention-based regimes. Secondly, the rights that are either entirely unprotected or unprotected where preconditions are unmet collectively constitute a category of rights for which no entity is recognized as the unconditional correlative duty-bearer. In this context, the concept that “responsibility derives from control”\(^94\) is pertinent. The application of this concept has been established in contexts where effective control ensued from exercise of jurisdiction, thus generating the UN’s responsibility for its conduct.\(^95\) The condition of statelessness is ultimately produced by the global State system over which the UN has the highest regulatory control.

The role of the UN as duty-bearer for human rights was clearly envisaged at the time of its founding and in the UDHR. The UN Charter provides that one of the four purposes of the UN is “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights...”\(^96\) This human rights mandate is further elaborated in Articles 55 which states that the UN is to promote: “…universal respect for, and observance of, human rights.”\(^97\) Such a notion of human rights obligations on the UN pervades the Charter\(^98\) albeit it is not concretised.

Finally, a legal obligation on the UN to secure human rights can be deduced from the present framework. The treaty regime whereunder human rights obligations attach exclusively to States does not negate the possibility of legal obligations for other entities. The concept of rights must be extricated from the operational framework for their implementation.\(^99\) An obligation is not necessarily invalidated for lack of enforcement or even the absence of any enforcement

\(^{93}\) Blitz and Lynch (n 27)
\(^{96}\) Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI Art.1
\(^{97}\) Ibid Art.55
framework.\textsuperscript{100} Thus, the responsibilities of non-State actors have been recognized by the monitoring bodies of the human rights treaty regime.\textsuperscript{101}

As for the UN, there is an explicit obligation to uphold the UN Charter and in particular, to realize the Art.55 goals, of which human rights constitute a principal goal, and as such, it can be construed as bearing at least the barest duty to respect human rights. Moreover, it is now established that the UDHR has assumed a legally binding status in the international order, whether as customary law, general principles of international law or as an authoritative interpretation of the UN Charter.\textsuperscript{102} Art.30 of the Declaration implies that non-State actors are duty-bound to respect human rights in their activities. While a positive duty to fulfil these rights is less straightforward to derive from this Article, given that these actors are called upon to do all that is necessary for the realization of these rights, it is submitted that positive duties are appropriate where the entity possesses the power to regulate other actors and the primary capacity to fulfil the rights, akin to the State in orthodox contexts, as is the case with the UN for SPTZ.

Hence, it is concluded that the UN bears the correlative duty for the unsecured human rights of the stateless in pre-transitional zones. Following from this, there are two further points to address. The first point concerns the content of the UN’s duty in SPTZ. The tripartite duty of the State to respect, protect and fulfil is inappropriate given that the UN, unlike the State, does not possess notionally unlimited capacity and must counterbalance its role with State sovereignty. On this point, the UN Norms, which consolidate existing human rights norms for corporations, offer valuable guidance.\textsuperscript{103} While the State is recognized as bearing primary duty, including the duty to prevent infringements by corporations, the simultaneous obligation on corporations to secure human rights "within their respective spheres of activity and influence," is recognized.\textsuperscript{104} Taken together with the UDHR’s direction in Art.30, it may be construed that the UN is duty-bound to respect human rights and to further their realization within its sphere of activity and influence, as defined in its mandate.

\textsuperscript{100} Lauterpacht (n 10)
\textsuperscript{102} Ibid
\textsuperscript{104} Ibid 1
The final matter to be addressed is how the UN’s duty is to be operationalized for SPTZ. Just as the State pursues the furtherance of human rights through its various constituent organs as befit the demands of the context, it is submitted that UN’s duty should be operationalized based on the primary competencies of its constituent organs, respective to the lacunae in the SPTZ context. This principle of operationalization will be developed more fully in the proposal for TJ’s structural adaptation.

The second facet of TJ’s normative adaptation concerns the tension between universal human rights and democratic self-determination. TJ aims to prevent the recurrence of gross and systematic human rights violations by facilitating State transition to liberal democracy. However, the extent to which democracy is exclusionary, and hence in tension with universal human rights, is not addressed. Therefore, in SPTZ, TJ’s normative orientation towards liberal democracy ill-suits the requisites of forward-looking justice. Before proceeding, it is important to emphasize that this study does not attempt to resolve the tension between democratic self-determination and human rights and is limited to addressing SPTZ.

The ‘constitutive dilemma’ between democratic self-determination and universal human rights that liberal democracies confront has received ample scholarly attention. Particularly vexing questions this dilemma raises are how citizenship is to be governed and the extent to which inclusion should be based on current citizenries’ preferences. These dynamics of inclusion and exclusion are intrinsic to democracies, as democracy is characterised by representation of and accountability to a specific constituency. However, liberal democracy has limited capacity to address this dilemma, as it aims to fairly coalesce individual preferences into a collective choice, without introducing any form of intersubjectivity between preferences. Thus, there is no interface between the claim to inclusion of the stateless in pre-transitional zones and the democratic will to exclude expressed as the popular sovereignty of State citizenries.

The model of deliberative democracy offers a means to address the dilemma for SPTZ. Deliberative democracy approaches divergent preferences through uncoerced discourse leading to consensual judgment. Deliberation facilitates the transformation of initial preferences through rational engagement with others’ preferences. The common orientation

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106 Seyla Benhabib, The Rights of Others (CUP 2000)
107 Ibid
towards producing an impartial and consensual decision thus inclines participants to embrace general principles that do not singularly serve their self-interest but reflect terms acceptable to others. This model of democracy is thus better-equipped to accommodate diverse public identities and ethnonational allegiances. The structure and content of reason exchanged in the deliberative process can potentially generate fundamental change in the preferences of individual participants as they engage with ‘the other’ as equals and partners in the collaborative effort to produce rational and impartial results.

Hence, the tension between the bounds of the specific demos and the universal force-field of human rights can be eased through democratic iterations that renegotiate the terms of inclusion and exclusion. Democratic iterations embody a process of deliberation wherein reasons are exchanged for sustained exclusion and corresponding claims for inclusion, and through this mutually justificatory process, the terms of just membership can be recast.

Turning to a specific examination of the potential of deliberative democracy in the trans-State phenomenon of SPTZ, the writings of Held, Bohman and Benhabib are instructive. They recognize the potential of deliberative democracy beyond the nation-State, as the public exchange of reason does not rely on national or territorial borders, and moreover, public reasoning is characteristically empowering, demands the justification of exclusion and enhances the legitimacy of the institutions of global governance. The consequent potential for intersubjective results can reinvigorate democratic practice in the global arena.

Thus, it is submitted that in order to adapt TJ for SPTZ, it is necessary to democratisethe international space in which nationality contestations play out. Beginning from the premise that all peoples are entitled to a right to self-determination, it is necessary to institute processes whereby the SPTZ crisis can be resolved through deliberative discourse between the stateless and citizenries in the pre-transitional zone. The full spectrum of possible resolutions to the SPTZ crisis must be recognized in the deliberative process, based on the dignity and equal worth of all peoples, stateless and citizenries alike, and the shared interest in facilitating the impartial and fair resolution of the SPTZ crisis.

109Benhabib (n 105)
3.2 TJ’s Structural Adaptation for SPTZ

The proposed normative adaptation provides the framework for a supra-State TJ process that spans the pre-transitional zone based on the rights and relationships between the stateless population and States, rather than the State as a self-contained transitional entity. The structural adaptation addresses unmet justice claims and reconfigures the dynamics of SPTZ such that the political agency of the stateless is recognized and the crisis is resolved through the democratic cooperation of all peoples in the pre-transitional zone. The remainder of this chapter offers a suggested blueprint for adapting TJ’s four pillars for SPTZ.

3.2.1 Justice

It has been established that legal accountability in TJ must address system criminality for SPTZ. There is precedent for such broad-ranging accountability in the measures imposed on Germany and Japan through the Potsdam Protocol which encompassed democratization, criminal justice, disarmament, socio-economic reforms and reparations. Together these measures constituted comprehensive accountability for the mass atrocity perpetrated by the two States. Individual criminal prosecution was thus a constituent of and not a substitute for the full range of accountability measures intended to exterminate the systemic foundations of State criminality, prevent the recurrence of atrocity, signify international opprobrium for the crimes and transform the offending States into democratic and pacific States.

While peace agreements generally incorporate several structural reforms, these are the product of negotiations for peace – an intrinsically political process in which concessions are made and which secures neither comprehensive nor far-reaching reforms. The policy-reliant approach is especially unviable for SPTZ given that victims do not constitute an effective political constituency. Pursuing the necessary reconstruction in the form of legal obligations owed not only to victims but to the entire international community allows both normative and material gains. Identifying States as culpable for their roles in the perpetration of mass atrocity both underscores the highest denunciation for the offending State and creates legal basis to impose obligations to eradicate system criminality. Understood in conjunction with the breach of erga omnes obligations, these remedies would encapsulate culpability, achieving the value of

individual criminal justice against the State. Characterized as legal remedies, rather than as policy choices, such structural reforms can potentially be systematic and holistic.

The restructuring of States that are culpable for mass atrocity against the stateless in the zone should thus be pursued through the UN organ that is best-placed to achieve the requisite reconstitution as the States’ legal obligations. In the present global politico-legal landscape, this is the UNSC. The UNSC bears primary responsibility for maintaining international peace and security and moreover, possesses the institutional authority to legally compel culpable States in the zone to take measures necessary for restoring peace and human security through its Chapter VII powers.\textsuperscript{112}

However, there is one powerful critique of this proposed adaptation that must be addressed at the outset. The UNSC is empowered in several ways to respond to State atrocity, but nevertheless, it is an institution intended to maintain peace, not to enforce legal accountability.\textsuperscript{113} Thus, the propriety of assigning such a role to the UNSC may justifiably be questioned. However, it is well-established that the UNSC does undertake legal determinations of States’ responsibility for their roles in the commission of atrocity crimes and in addition, it also adopts measures against States in the furtherance of international peace and security agenda\textsuperscript{114} This is illustrated by the UNSC’s response to Iraq’s invasion of Kuwait, which included military action against Iraq and the establishment of a claims tribunal for Iraq to compensate the injured.\textsuperscript{115} Similarly, the ICC Statute accords the UNSC a central role in the international criminal justice system.\textsuperscript{116}

Hence, while global power politics is likely to strongly influence which States are subjected to the proposed accountability mechanism, this arena provides fertile ground for activism and for entrenching the international rule of law. Questions of fair enforcement between States are of secondary priority when contrasted with the immediate justice claims of the victims of State violence. Grounded in pragmatics and pursuant to higher principles, the adaptation offers a pathway to justice that, precarious as it may be, goes furthest.

\textsuperscript{112} UN Charter (n 95) Arts.39-51
\textsuperscript{113} Ian Scobie, ‘Assumptions and Presuppositions: State Responsibility for System Crimes’ in Nollkaemper (eds.) (n 57)
\textsuperscript{114} Andre Nollkaemper, ‘Systemic Effects of International Responsibility for International Crimes’ [2010] 8 Santa Clara Journal of International Law 313
\textsuperscript{115} Ibid
\textsuperscript{116} Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 Art. 13(b)
Hence, for SPTZ, the UNSC could adopt the principle of dual responsibility whereby the Council could both make ICC referrals as appropriate and in tandem, enforce States’ legal obligations based on the doctrine of State responsibility, as conceptualised in the Articles on the Responsibility of States for Internationally Wrongful Acts,\textsuperscript{117} to ensure reparation and impose systemic reforms. States responsible for the violations of their international obligations against the stateless and the international community could thus be required to make remedies in the form of reparations and GNR that reconstruct State structures responsible for the perpetration of atrocity against the stateless. Human rights norms are an obvious source of reference in designing such guarantees.\textsuperscript{118}

However, human rights law alone is inadequate for addressing collective injustice in SPTZ. TJ literature on the protection of minority rights is instructive in modelling appropriate measures. There are several international standards for minority protection, such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.\textsuperscript{119} Specific measures recommended within national transitional contexts are also useful, such as the recommendations of the Nigerian Oputa Panel which called for reconciliation measures for interethnic divisions and official apologies to certain communities.\textsuperscript{120} Essentially, such measures must address the impact of violations on the group’s identity and the relationship between the group and the State in question. The specific measures will necessarily vary greatly between cases of SPTZ. Nevertheless, such an adaptation promises justice for the violations for which the States currently enjoy impunity. States’ international legal duties must therefore be accorded the full force of international law in securing justice for SPTZ.

3.2.2 Truth

The study proposes the establishment of a TC through the United Nations General Assembly (UNGA) for the realization of the right to nationality. UNGA is the appropriate UN organ for both symbolic and practical reasons. To the extent that the world’s State system is presented as a comprehensive network of sovereign States, the condition of statelessness is an anomaly for which all States are notionally responsible, as the system’s makers and maintainers. It is


\textsuperscript{118} Pablo de Greiff, Report to the Human Rights Council (n 36)


appropriate, therefore, to seek to address statelessness through the one organ that is most equally representative of all States of the world. The membership of the UNGA includes all 193 UN Member States of the 196 States in the world today, and moreover, all States are accorded equal representation. Further symbolic reason for addressing the UNGA is that the Assembly is responsible for instituting the international legal framework that has proven inadequate for resolving SPTZ.

As to practicality, the UN Charter fully authorizes the UNGA to perform such a function. The Assembly is empowered to discuss and make recommendations regarding ‘any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter’ and thus, consideration of a case of SPTZ would be within its mandate, as this concerns peace, security, human rights and rule of law. Furthermore, the Charter empowers the UNGA to ‘establish such subsidiary organs as it deems necessary for the performance of its functions.’ Given the width of this Article, clearly, the UNGA could establish a subsidiary organ in the form of a TC for realizing the right to nationality in the SPTZ context. Indeed, there is recent precedent for the UNGA exercising its mandate in a most innovative manner to establish the International, Impartial and Independent Mechanism for Syria.

Although the term ‘truth commission’ has been used loosely thus far, the institutional design envisioned follows the deliberative logic discussed in TJ’s normative adaptation. While the specific structure of the commission will depend on the specific SPTZ case, there are certain general principles that can be sketched out, drawing from literature on deliberative democracy, TJ in identity-based conflicts and social psychology.

TCs’ general administration includes the documentation of individual narratives in the form of testimonies combined with research and investigative functions. Testimonies have a legitimate function in the deliberative model. Certain forms of suffering are difficult to appreciate until these are ‘brought to life’ through personal testimonies. The predicament of

121 UN Charter (n 95) Art.10
123 UN Charter (n 95) Art.22
the stateless in pre-transitional zones is clearly of a kind that general populaces would have little understanding of, as evidenced in the rare recognition that the stateless deserve justice. In the SPTZ context, it is also important for the TC to investigate and reveal the truth of harmful and alienating allegations against the stateless that serve to entrench the perception of them as ‘the other’. Allegations may range from portraying the stateless population as security threats, ‘greedy’ economic migrants or as engaging in self-harm to attract international sympathy.

More complex sociohistorical truth may lie at the root of intergroup conflict. Social psychologists have conducted important work on the psychological processes that drive enduring ethnicity or nationality-based intergroup conflicts, identifying the social representation of history as central to intergroup conflicts. The reconstruction of the past by general populaces provides powerful rationales for validating national identities. Thus, how history is represented in society has a powerful impact on the harmony between identities and the inclusiveness that is achievable. Therefore, where required, the TC must also delve into the sociohistorical truth of the SPTZ condition to overturn false hegemonic social representations that fuel the exclusion of the stateless. Moreover, the standard design of TCs must be adapted to capture the effects of violence on the stateless as a collective. Processes crafted specifically to document atrocities committed against the group, including the violations of group rights and the oppression of group identity are necessary for constructing the group’s narrative of its historical relationship to States and peoples in the zone.

The literature on TJ in identity-based conflicts in instructive in structuring the TC to dignify the identity and sociohistorical narrative of the stateless in the SPTZ context. A useful example is the Guatemalan Commission on Historical Clarification which greatly advanced the cause of the Mayan indigenous people, raising Mayans to national and international visibility. Moreover, the report of the Commission was the essential official text that consolidated the identity of the Mayan people, in both the national and international arenas. The report also played the integral role of locating Mayan history within Guatemalan national history.

SPTZ, where the origin of the stateless will usually be the subject of intense socio-historical contestation, such a format of truth-telling offers much worth emulating.

The resolution of SPTZ requires the engagement of the stateless in a process of deliberative dialogue with citizenries in the pre-transitional zone. It is possible to envision a dialogic institutional design that allows intra-State claims for the continued exclusion of the stateless to engage with corresponding claims for inclusion. Drawing on the concept of hybridity, a model of rational exchange can be instituted whereby identities can evolve across the interfaces of their overlap, to recognize the potential convergences between the stateless and a given citizenry. Hybridity theorists understand identity-formation to be a complex, contingent and contested process and favour reflexivity and change over essentialism. This understanding provides the foundation on which the identity of the stateless as belonging to a distinct group can be consolidated with their legitimate claim for national identity within States, or alternatively, for forging new statehood.

Naturally, there are multiple streams of deliberation to be had in such a context. Radically divergent views are likely to emerge within the stateless population alone. Thus, there may be factions calling for inclusion where the group believes itself to have historically resided. Dispersed segments with diasporic presences in other States in the zone may feel entitled to inclusion in these citizenries. There may even be those demanding statehood for the stateless as a distinct people. The purpose of this model would, therefore, be to organise the stateless such that alternative claims can be rationally made, presented and pursued, and correspondingly allow a transformed understanding of the stateless and citizenries in the zone of the notion of identities that allows the ethnicity of the stateless to stand distinct from and in conjunction to various national identities.

Insight from social psychology is useful in crafting the institutional structure to facilitate constructive deliberation. The general framework for TCs as a medium for reconciliation between conflicting groups resonates with Contact Hypothesis which postulates that enabling equal status contact between conflicting groups in a supportive environment facilitates conflict resolution. However, increased contact between groups has been empirically demonstrated

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130 Gordon Allport, The Nature of Prejudice (Addison-Wesley 1954)
to be inadequate for bridging divides.\textsuperscript{131} In contemporary social psychology, the dominant theory on intergroup conflict is Realistic Group Conflict Theory (RGCT) which expresses the “universal fundamentals” of such conflict.\textsuperscript{132} RGCT posits that the resolution of intergroup conflict requires the establishment of superordinate goals that can only be achieved through the cooperative effort of the conflicting groups. Hence, as research demonstrates, strategies that appeal to personal preferences or form interpersonal avenues to conflict resolution fail while processes addressing the conflict situation itself succeed.\textsuperscript{133} Hence, in instituting the TC for SPTZ, rational exchange should be organised around the common aim to resolve the SPTZ crisis which causes suffering for the stateless and citizenries in the zone alike. The aim of the deliberation would thus be to present views under the rubric of universal principles that are agreeable to all, and to engage with opposing views to allow constructive transformation of initial preferences and arrival at an agreed judgment on the case of SPTZ.

3.2.3 Reparations

In designing a reparations framework for the unprotected human rights in SPTZ, it is not possible to simply repurpose the standard model of reparations in which a principal component is the deliverance of the object of the rights to victims. This is due to the limits of UN jurisdiction over the subject-matter of these rights.\textsuperscript{134} Thus, designing appropriate reparations for SPTZ requires a return to the theoretical underpinnings of this TJ pillar. Reparations in their orthodox sense are framed around State wrongs against victims and are thus intended to signify State commitment to victims and State re-legitimization. However, probing deeper into this State-centric model, it is possible to argue that the overarching goal of reparations is to reaffirm the inherent dignity of victims as human beings, and thus, the re-establishment of the State-citizen bond may be interpreted as a particular application of the core value of human dignity where the State is the most capable actor for upholding this value.

Hence, the study proposes that the reparation framework for SPTZ should be structured to realize the UN system’s maximal capacity to uphold the human dignity of the stateless in the pre-transitional zone. This essentially entails the recognition of the stateless as right-bearing

\begin{itemize}
\item \textsuperscript{132} James Liu, ‘A Cultural Perspective on Intergroup Relations and Social Identity’ [2012] 5(3) Online Readings in Psychology and Culture <http://dx.doi.org/10.9707/2307-0919.1119> accessed 18 January 2019
\item \textsuperscript{134} The right to work, for instance.
\end{itemize}
actors possessing agency. The design of the present structural adaptation draws on TJ’s engagement with mass displacement, where legal empowerment has been proposed as an effective strategy for ensuring that the TJ process foregrounds refugees’ claims to justice.\textsuperscript{135}

Ensuring full political participation requires equipping individuals with capacity for political functioning, developing the cognitive and communicative skills that are critical to vindicating one’s rights.\textsuperscript{136} Legal empowerment is a process that can facilitate this, and it encompasses measures to enable individuals to use the law, legal system and legal services to further their interests and attain increased control over their lives.\textsuperscript{137} The process is expansive and ranges beyond formal avenues of law to include administrative processes, alternative methods of resolving dispute and mechanisms of traditional justice.

Legal empowerment can thus constitute the stateless as agents in supra-State processes aiming to resolve the SPTZ crisis. It both alters the power balance to maximize the agency of individuals and restructures the framework of opportunities wherein this agency is exercised. The development of confidence, skills and knowledge enhance the capacity of the stateless in both their individual and collective capacities to make purposive choices and to drive transformation through the translation of these choices into actions and outcomes.\textsuperscript{138} This model of reparations thus reinforces the envisioned TC discussed above for centralizing the agency of the stateless in resolving SPTZ.

The capabilities thus developed can not only enable the stateless to become political actors in the TJ process, it can safeguard them from subjugation and instrumentalization by States and citizenries. Moreover, fostering leadership and advocacy skills among the stateless will constitute them as potent political actors in the international arena, on a par with the world’s citizenries. This can dispel the perception of the stateless as pitiful objects of beneficence and further the case for their dignified inclusion.

The reparations model conceptualised here can be most effectively implemented through the UN’s specialized agencies that have field presence in SPTZ sites and will generally have jurisdiction to institute these processes of empowerment. The Economic and Social Council

\textsuperscript{135} Anna Purkey, ‘Justice, Reconciliation, and Ending Displacement: Legal Empowerment and Refugee Engagement in Transitional Processes’ [2016] 35 Refugee Survey Quarterly 1


\textsuperscript{137} Purkey (n 134)

\textsuperscript{138} World Bank Institute, Empowerment in Practice: From Analysis to Implementation (The World Bank 2007)
(ECOSOC) is the appropriate UN organ for the realization of this model, as it is empowered to direct, coordinate and oversee the economic, social, humanitarian and cultural activities of the UN’s specialized agencies.\footnote{UN Charter (n 95) Chapter X}

### 3.2.4 Guarantees of Non-Repetition (GNR)

In order to guarantee the non-repetition of the human rights violations in SPTZ, both intra-State and supra-State restructuring is necessary. Possible measures for restructuring States have already been discussed. This section discusses the GNR to be adopted at the level of global governance. The range of measures must encompass prevention of violations by States through enhanced UN oversight, positive fulfilment of unprotected human rights and concretisation of the right to nationality.

To begin with, it is necessary to reform the UN system to ensure greater safeguards for the stateless. None of the human rights treaty bodies are responsible for oversight of State compliance with statelessness Conventions and even compliance with obligations to protect stateless persons in other human rights instruments are not adequately overseen by the relevant treaty bodies.\footnote{Weissbrodt and Collins (n 26)} A monitoring and accountability regime must be established and moreover, issues of statelessness should be mainstreamed in all UN human rights reporting processes. Goldston has made important recommendations in this regard that include the expansion of the UNHCR’s field capacity and the appointment of a Special Rapporteur for the Rights of Non-Citizens.\footnote{James Goldston, ‘Epilogue’ in Blitz and Lynch (n 27)}

Secondly, it is also necessary to restructure the international regime for the protection of the human rights of the stateless, with an individual, rather than State-centric, orientation. The regime must protect all human rights of stateless persons, in each case identifying the appropriate duty-bearer depending on capacity and context. Finally, the right to nationality must be normatively clarified and concretised to allow benchmarking of progress in fulfilment and creative balances with democratic self-determination must continue to be pursued based on progressive and inclusive norms.

\footnote{UN Charter (n 95) Chapter X} \footnote{Weissbrodt and Collins (n 26)} \footnote{James Goldston, ‘Epilogue’ in Blitz and Lynch (n 27)}
CHAPTER 4: MAPPING THEORY ONTO REALITY

This chapter traverses the distance between the ivory-tower archives of theoretical models and the blood-bathed sites of SPTZ, assessing the practical merits of the study’s theoretical propositions based on the *Rohingya* crisis which is an ongoing case of SPTZ.\(^\text{142}\) It begins by illustrating that the *Rohingya* context is a case of SPTZ and therefore, apt for this assessment. The *Rohingya* are a stateless ethnic minority who, despite having resided in Myanmar’s Rakhine for hundreds of years, are denied citizenship.\(^\text{143}\) The 1982 Citizenship Law identified 135 “national races” that exclude the *Rohingya*. Thus, the *Rohingya* are condemned as illegal foreign residents\(^\text{144}\) due to the regional history of migration and ethnic similarity to the people of Bangladesh’s Chattogram.\(^\text{145}\)

Given this lack of legal status and rights, the *Rohingya* have been suffering abuse and violence perpetrated by both State and the general populace.\(^\text{146}\) Myanmar is currently transitioning from military rule to democracy.\(^\text{147}\) While democracy does entail equal recognition for all groups, *Rohingya* are not recognized as a legitimate Burmese group, and as such, unlike for national minorities,\(^\text{148}\) nothing is ensured for the *Rohingya* in a democratic Myanmar. Myanmar’s persecution of the *Rohingya* has resulted in their flights to neighbouring States since the 1970s where many have resided for decades.\(^\text{149}\)

Host States deem the *Rohingya* to be illegal immigrants and thus prohibit domestic assimilation, perpetrating severe oppression including denial of access to basic necessities.\(^\text{150}\) To illustrate, in Pakistan, the *Rohingya* lack access to public education and government health services.\(^\text{151}\) Saudi Arabia and India have forcefully deported many *Rohingya* and/or indefinitely

\(^{142}\) Facts presented as on 24.04.2019
\(^{143}\) Azeem Ibrahim, *The Rohingyas: Inside Myanmar’s Hidden Genocide* (Hurst 2016)
\(^{144}\) Burma Citizenship Law, 15 October 1982 <http://www.refworld.org/docid/3ae6b4f71b.html> accessed 9 May 2018
\(^{145}\) Katherine Southwick, ‘Preventing Mass Atrocities Against the Stateless Rohingya in Myanmar: A Call for Solutions’ [2015] 68(2) Journal of International Affairs 137
\(^{146}\) Ibid
\(^{149}\) Ibrahim (n 142)
incarcerated them in detention centres.\(^{152}\) Similarly, Thai officials have pushed back boats of fleeing *Rohingya* into the seas.\(^{153}\) *Rohingya* living in Bangladesh for decades are confined within squalid camps, lacking full access to even basic humanitarian services.\(^{154}\) Hence, across these States in the zone, there is evidence abound as to gross and systematic violations of human rights along civil, political, economic, social and cultural dimensions. None of these States have ratified the international treaties that could legally protect the *Rohingya*.\(^{155}\) The denial of legal status translates into the gross and systematic denial of human rights. Thus, this is clearly statelessness arising from ethnonationality-based exclusion where there are justice-claims against all States responsible for the gross and systematic violations of the human rights of the *Rohingya*.

The supra-State governance regime is in pre-transition and there have been ‘critical openings’ offering prospects for change, including the establishment of the international advisory commission led by former UN Secretary General Kofi Annan,\(^{156}\) the UNGA resolution calling for *Rohingya’s* indiscriminatory access to rights and group identity,\(^{157}\) establishment of the Human Rights Council’s Independent International Fact-Finding Mission on Myanmar\(^{158}\) and the Independent Investigative Mechanism for Myanmar (IIMM).\(^{159}\) Hence, there are real prospects for effecting TJ for the *Rohingya*. Finally, the scope of the crisis demarcates a zone spanning Myanmar, Bangladesh, Pakistan, UAE, Saudi Arabia, India, Thailand, Malaysia and

\(^{153}\) Danny Gold, ‘Prison Camps or Risking Death at Sea: Anti-Muslim Mob Violence Provokes Dilemma in Myanmar’ (September 17, 2013) <http://www.icfj.org/globalfellows/?p=171> accessed 16 April 2019
\(^{154}\) Sean Garcia and Camilla Olson, “Rohingya: Burma’s Forgotten Minority” (Refugees International: 19 December 2008)
\(^{156}\) AP NEWS, ‘Myanmar names Kofi Annan to head panel on Rohingya Muslims’ (August 24, 2016) <https://apnews.com/671961298f7d4f899898d0c063319ffa> accessed 17 April 2019
\(^{159}\) UN Human Rights Council Resolution 39/2, Establishment of Independent Mechanism to Collect, Consolidate, Preserve and Analyse Evidence of the Most Serious International Crimes and Violations of International Law Committed in Myanmar since 2011 (September 27, 2018) UN Doc.A/HRC/39/CRP.2
Indonesia.\textsuperscript{160} Hence, the \textit{Rohingya} crisis is a clear case of SPTZ. Against this backdrop, the chapter illustrates the limits of paradigmatic TJ for the \textit{Rohingya} crisis and assesses the proposed adaptation against this SPTZ case.

4.1 Paradigmatic TJ for the \textit{Rohingya}?

TJ’s orthodox State-centrism is unworkable for the \textit{Rohingya} context as it is unclear which State TJ should focus on. The limits of TJ’s conceptual architecture transmit into its individual pillars. Several TJ measures have been considered for the \textit{Rohingya}. To begin with justice, the ICC has initiated a preliminary examination of the alleged deportation of the \textit{Rohingya} as a crime against humanity,\textsuperscript{161} despite Myanmar’s non-ratification of the Rome Statute, understanding deportation as a continuing act that was completed in Bangladesh’s territory, which is a State party. This is a deft strategy for extending jurisdiction to a non-State party.

However, even upon successful conviction, only partial and incomplete individual criminal justice is possible through this route as it only addresses injustice against that subset of the \textit{Rohingya} population that managed to reach Bangladesh’s territory, not those who reached other States or who perished in the attempted flight. Finally, this establishes accountability only where the crime extends to a State-party’s territory, implying that the Burmese ethnic cleansing venture is better pursued by containing and exterminating the \textit{Rohingya}, rather than expelling them. Hence, there are serious concerns whether this arbitrary and ad hoc measure will genuinely advance the justice agenda. The IIMM’s mandate also complements the international criminal law approach, as it can amass, analyse and preserve evidence to facilitate trials on international criminal law offences that have occurred in Myanmar since 2011.\textsuperscript{162} Both advances are inadequate for securing justice for the \textit{Rohingya} as this requires fundamental restructuring of the States in the zone and the international governance regime.

Turning to truth, the importance of a TC for Myanmar has been recognized by the international community.\textsuperscript{163} On the other hand, Myanmar established a Commission of Inquiry to investigate

\textsuperscript{161}Rome Statute (n 115) Art.7
\textsuperscript{162}https://www.un.int/pm/head-un-independent-investigative-mechanism-myanmar-level-assistant-secretary-general-0
the allegation of human rights violations of the Rohingya,\textsuperscript{164} which, while not a TC, has a closely related function of unearthing the facts of atrocity. However, it is important to realise the limits of what such institutions can achieve.

Framing the TC based on the obligations and corresponding wrongs committed by any one State against the Rohingya would produce a partial and incomplete narrative of truth. Genuine truth-telling would traverse State borders to weave the narrative of Rohingya suffering. However, orthodox TCs are defined by State borders and hence, cannot serve this purpose. Moreover, the presumption of victims’ rights of participation in standard TCs is unjustified for the Rohingya who are deemed to be illegal usurpers in Myanmar and ‘Myanmar’s problem’ in host States. Ultimately, even if the truth of atrocity is established by a standard-form TC, this does not necessarily pave the way for any permanent resolution for this SPTZ crisis.\textsuperscript{165}

Critical questions arise as to reparations in SPTZ, as crafted for paradigmatic TJ. Reparations are framed by State responsibility towards individual victims. However, in the case of the Rohingya, there is a complex and fragmented mosaic of harm perpetrated by a multiplicity of States and the pathways of responsibility are convoluted, cross-cutting and contested. Moreover, it is unclear on what terms reparations should be framed and how to connect standard-form reparations to any overarching socio-political project for peace and reconciliation that integrates the Rohingya in any society. Thus, while States in the zone may be held to account for atrocities against the Rohingya, this alone cannot ground a claim for the Rohingya’s substantive social inclusion.

Finally, GNR, pursued as policy as in orthodox TJ is unworkable. To advance the agenda for GNR, it is important to be recognised as a legitimate stakeholder in the State’s politico-legal reconstruction. This is not the case for the Rohingya in any State in the zone. Moreover, given Myanmar’s delicate steps towards democratic transition, it is entirely unlikely that such policy options will be prioritised over concerns that most seriously plague the majority population. On the other hand, it is highly improbable that host States in the zone will wish to adopt accommodative policies for the Rohingya, given the apprehension of further influxes. Thus, the Rohingya crisis illustrates paradigmatic TJ’s inadequacies for SPTZ.

4.2 Adapted TJ for the Rohingya

While ‘critical openings’ for all the proposed adaptations may not exist at the present stage of the Rohingya crisis, it is possible to consider whether the proposed model is essentially practicable. The adaptations are assessed in turn, from justice, truth and reparations to GNR. The measure for justice must address the system criminality responsible for Rohingya’s SPTZ. The UNSC is within its mandate in engaging in this context as the Rohingya situation is a recognised threat to global security.\(^{166}\) Therefore, the UNSC may impose structural reforms on States that demolish those structures responsible for atrocities against the Rohingya. However, an ICC referral from the UNSC has been stalled by the political manoeuvrings of China and Russia who have supportive postures towards Myanmar.\(^{167}\) Therefore, whether such broad-ranging systemic reform is realisable through the machinations of the Council is open to question.

However, given that key leaders in Myanmar are fiercely opposed to ICC trials,\(^{168}\) likely due to the individual consequences of prosecutions, it is possible that reforms to State structure may appear to be an agreeable trade-off, especially as concerns are mounting over the resilient pursuit of ICC trials.\(^{169}\) On the other hand, for other States in the pre-transitional zone, the imposition of such reforms would depend on empirical establishment of atrocity against the Rohingya. Thus, the UNSC may establish an appropriately mandated Commission of Inquiry, within its usual capacity,\(^{170}\) to amass the requisite evidence.

Secondly, the UNGA can establish subsidiary organs like the proposed TC, subject to support from two-thirds majority.\(^{171}\) While the international response towards accountability for Myanmar has been underwhelming, there is ample evidence of States’ will to resolve the

\(^{166}\) Ibid


\(^{170}\) UNSC, ‘Commissions and Investigative Bodies’ <https://www.un.org/securitycouncil/content/repertoire/commissions-and-investigative-bodies#cat3> accessed 17 April 2019

\(^{171}\) UN Charter (n 95) Art.18(2)
To institute the proposed TC it is necessary, firstly, to arouse the Rohingya’s political consciousness. Here, it is useful to merge the discussion on the TC with that on reparations. The sufferings of stateless persons are generally neither known nor understood by citizenries. In the case of the Rohingya, there is a plethora of injurious narratives that alienate and demonise them in the eyes of national populations. In the narrative of Burmese authorities, the Rohingya are dangerous foreigners driven by Islamist extremism and determined to claim the Burmese homeland. In host States, the general perception is that the Rohingya gain unjust favour from the international community and exploit host societies. Hence, there is a common rejection of the Rohingya’s entitlement to justice. Such hostile stances are undergirded by particular sociohistorical assumptions regarding the origins and social evolution of the Rohingya, underpinning practices of sustained exclusion.

Hence, the first imperative is bringing to the fore the Rohingya’s testimonies and sociohistorical narrative, consolidating their identity and locating their history within national histories and the broader regional history. Thus, the human dignity of the Rohingya must be reaffirmed. Based on this recognition of the Rohingya as rights-bearing agents, their capacity for political functioning must be enhanced. Developing the cognitive and communicative skills of the Rohingya is essential if they are to expound their narrative and successfully rebut false presumptions regarding their origin, identity and intents. The UNHCR has already opened legal assistance centres to provide legal education in Burmese refugee camps in Thailand. The ECOSOC should thus engage the maximal field capacities of the UN specialised agencies to further these ends.

Viewed through the lens of hybridity, it is possible to envision due protection for the Rohingya identity along with substantive inclusion of the Rohingya in several States as per their disparate notions of belonging, with some claiming Myanmar as their homeland, others calling for

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173 Ibrahim (n 142)
inclusion into other States\textsuperscript{177} and some even seeking distinct statehood.\textsuperscript{178} In aiding the \textit{Rohingya} to organise politically, a crucial objective would thus be to structure, streamline and segregate these alternative claims, possibly establish a framework for political representation from within the people and inform them on the relevant legal framework for pursuing their claims in national and international fora. Existing structures of social organisation within the \textit{Rohingya} populations may be partially relied upon, drawing on TJ’s wisdom as to the need for a bottom-up approach to truth-telling, and prioritisation of popular participation over concentration of power in the hands of the privileged few.\textsuperscript{179}

Multiple such commissions may be required depending on the frequency distribution of views, to facilitate multiple tracks of dialogues. Addressing the conflict situation would require the formulation of appropriate superordinate goals. In Bangladesh, for instance, local populations have incurred heavy costs due to the \textit{Rohingya} influx, in the form of political impact, security challenges, economic effects and social strains to environmental destruction.\textsuperscript{180} Recognition of such sufferings is part of the process of joining efforts to reach a common solution.

Finally, the \textit{Rohingya} case illustrates the institutional inadequacies of the international system to respond to SPTZ and the need for GNR. The lack of oversight on human rights conditions in host States is a particularly serious failure.\textsuperscript{181} It is thus essential that a permanent monitoring and oversight mechanism is established for empirically grounding international pressure for realizing the rights of the stateless. Moreover, there is extensive normative growth required in these dark, seldom-frequented alleyways of international law that the powerful need not tread and the protected can blissfully sidestep. Shaping GNR requires extensive research and consultation, potentially led by the International Law Commission. To conclude, therefore, in a practical case of SPTZ, paradigmatic TJ is inadequate. However, as illustrated, there can be TJ for the \textit{Rohingya} based on the adapted model advanced in this thesis.

\textsuperscript{178} Kazi Fahmida Farzana, \textit{Memories of Burmese Rohingya Refugees: Contested Identity and Belonging} (Palgrave Macmillan 2017).
\textsuperscript{181} Amnesty International, \textit{We Are At Breaking Point: Rohingya: Persecuted in Myanmar, Neglected in Bangladesh} (Amnesty International 2016)
CHAPTER 5: CONCLUSION

This thesis set out to answer the overarching research question as to the extent to which the field of TJ can address SPTZ, that is, cases of protracted statelessness resulting from ethnonationality-based exclusion and attended by gross and systematic violations of human rights in a region where the supra-State governance regime is in pre-transition. This question has been answered by first reviewing literature to establish the normative case for TJ to address SPTZ. It has been shown that TJ has a recognised role in situations of gross and systematic human rights violations and that the SPTZ context is teleologically aligned with TJ given the gross and systematic violations of the human rights of the stateless, SPTZ’s congruencies with TJ’s application in pre-transition and scope of engagement in terms of the scope of impunity. Finally, the normative case has illustrated TJ’s potential contribution in SPTZ.

The thesis has then critically examined the field’s theorisation and practice, thereby delineating paradigmatic TJ’s inadequacies for SPTZ. TJ’s theoretical orientation towards facilitating State transitions and the structure of individual measures have been found deficient for SPTZ. Based on multidisciplinary insights, the third chapter has proposed TJ’s adaptation for SPTZ, including normative and structural adaptations. The normative adaptation has identified the UN as the correlative duty-bearer for human rights in SPTZ. The duty is operationalised based on the primary competencies of the UN’s constituent organs vis-à-vis the lacunae in SPTZ. The second normative adaptation has addressed the tension between universal human rights and democratic self-determination through deliberative democracy which allows rational engagement and intersubjectivity.

Undergirded by this normative foundation, the adapted model has proposed reformulations of individual TJ measures for SPTZ. Along the justice dimension, structural reforms imposed by the UNSC have been proposed to address system criminality in States in the pre-transitional zone. A truth commission established by the UNGA has been proposed to declare the personal testimonies and sociohistorical narrative of the stateless, leading to dialogic engagement with State citizenries in a joint endeavour to resolve SPTZ. The ECOSOC has been identified as the appropriate entity for directing UN’s specialised agencies to implement the proposed reparations for enhanced political functioning and legal empowerment of the stateless. Finally,
several GNR have been recommended for restructuring the UN system to ensure protection of the stateless.

The fourth chapter has mapped the preceding theoretical discussion onto the practicalities of SPTZ as manifested in the *Rohingya* crisis. It has begun by establishing that the *Rohingya* crisis is a case of SPTZ. It has then demonstrated the inadequacies of paradigmatic TJ in the *Rohingya* context and finally, illustrated the potential of the adapted model of TJ to resolve this SPTZ case.

The thesis has proposed TJ’s adaptation for SPTZ in view of the essentially contested nature of TJ’s goals.\(^{182}\) Attempting to standardise TJ in terms of particular tools to achieve the stated goals obscures this essentially contested nature and concedes the opportunity to engage with, negotiate and compromise on the meanings of these concepts. In establishing the nexus between TJ and SPTZ, this thesis has sought to present the conceptual incoherence of the field as fertile ground for deliberation on TJ’s goals and frames of analyses and to remember the “forgotten human rights crisis” of statelessness. The thesis has asked whether, in transitioning by boat, and not in a State, stateless human beings are no longer deserving of justice – whether it is the case that to have no State is to be in no state for justice. The answer can only be a resounding ‘no’ and yet, rhetoric bleeds into oblivion when reality is a chasm between being and belonging. This chasm can be traversed by a bold transitional justice agenda that looks not to the vehicle of transition between world orders but to the human beings who are pilgrims on the path to justice.

\(^{182}\) Bell (n 2)
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APPENDIX A

TRANSITIONAL JUSTICE INSTITUTE/ ULSTER UNIVERSITY

FACULTY OF FACULTY OF ARTS, HUMANITIES AND SOCIAL SCIENCES

LLM IN TRANSITIONAL JUSTICE AND HUMAN RIGHTS

COURSEWORK RETURN SHEET

Student’s name: AISHA BINTE ABDUR ROB
Registration Number: B00725167
Tutor’s name: DR. SIOBHAN WILLS
Course title and code: LLM HUMAN RIGHTS & TRANSITIONAL JUSTICE (6596)
Module title and code: DISSERTATION LAW 827/5269

You must keep copy of your work and submit assignment to relevant School Office.

I confirm

a) that this is my own work and that I have read, understood and abide by the University regulations relating to plagiarism;
http://www.ulster.ac.uk/academicservices/student/plagiarism.pdf

b) that sources of all referenced material have been properly acknowledged.

Signed (by student): ___ X ___ Date: 30/04/2019

N.B. Your work will not be marked unless you have signed this section.
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