TRANSITIONAL JUSTICE AND DISPLACEMENT:
LESSONS FROM LIBERIA AND AFGHANISTAN

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STATEMENT OF ORIGINALITY

I hereby declare that this thesis and the work reported herein was composed by and originated entirely from me. Information derived from the published and unpublished work of others has been acknowledged in the text and references are given in the list of sources. This thesis has not been submitted for any degree or other purposes. It compromises approximately 75 000 words.

Jacqueline Parry
25 October 2016
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ABSTRACT

Forced displacement of people is one of the most complex humanitarian problems facing the international community. Long-term forced displacement generates a range of political, security and humanitarian concerns including regional instability, transnational crime and a regression in the quality of life for both refugees and their host communities. Grappling with this issue, scholars and practitioners have turned to the field of transitional justice as a possible source of solutions. Transitional justice refers to the set of mechanisms societies use to respond to a history of atrocities, including criminal trials, truth commissions and reparation programs. Scholars describe the potential for these mechanisms to respond to the justice needs of refugees, thereby improving prospects for their repatriation, and contributing to the success of their reintegration after return.

To date, the interaction between transitional justice and refugees has had three main features. The first is an almost exclusive use of a legal framework of human rights to structure the interaction between refugees and transitional justice. This means that the law determines the understanding of the harm refugees suffer, as well as the methods by which that harm might be repaired. Second, the existing approach focuses on state-led mechanisms of transitional justice, with limited engagement with local or customary approaches to achieving justice for refugees, and little acknowledgment of refugee voices. And finally, scholars and practitioners describe the ultimate goal of the interaction between transitional justice and refugees as refugee return.

There is little empirical work examining the standard approach to the interaction between transitional justice and refugees. My thesis addresses this gap, offering two case studies: Liberia and Afghanistan. Through these case studies, I scrutinise the claims of the existing scholarship, and compare those claims with the lived experience of refugees. Overall, my findings suggest that transitional justice as conventionally understood is often ill-equipped to support the justice outcomes that refugees seek. In particular, I demonstrate how the dominance of law and the influence of the transitional state restricted the ways that Liberian and Afghan refugees were able to engage with transitional justice processes. Based on refugee perspectives of harm, accountability and reparations, I propose an alternate understanding of the objective of refugee engagement in transitional justice: that of rebuilding the state-citizen relationship. This understanding more closely aligns with the justice outcomes refugees in Liberia and Afghanistan hoped to achieve, and suggests that repair of displacement may take place in the absence of physical return, and in forums other than those of legal, institutionalised transitional justice.
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CHAPTER 1: TRANSITIONAL JUSTICE AND DISPLACEMENT

1.1 Introduction

The idea for this thesis arose over the course of several years, when I was employed as a Protection Officer with the United Nations High Commissioner for Refugees (UNHCR). In a range of different contexts, refugees approached my colleagues and me, seeking to engage with justice initiatives taking place in their countries of origin. In Jordan, for example, Iraqi refugees asked how they could achieve restitution of their property through the Commission for the Resolution of Real Property Disputes, without being required to return to Iraq. Some explained that having access to housing was critical to their ability to consider repatriation. Others, who were unwilling to repatriate, explained that if they could reclaim their property then the proceeds of its sale could support their family to survive abroad. In Indonesia, to give a second example, Sri Lankan refugees asked how they could provide testimony to the Sri Lankan Lessons Learnt and Reconciliation Commission initiated following the end of Sri Lanka’s civil war. The motivation for some refugees was to obtain official recognition of their suffering, while others believed that by participating in the Commission’s activities they could contribute in a small way to a peaceful Sri Lanka.

This type of experience brought to my attention the field of transitional justice. Transitional justice refers to the processes a society uses in an attempt to deal with past atrocities after the end of a conflict, or an authoritarian regime.¹ It includes an array of responses, such as criminal trials, property restitution, truth commissions, and reparations. As a field, it has not typically been concerned with the justice claims of

refugees. However, in the late twentieth century, as both the number of refugees and their time in displacement grew substantially, scholars began to consider the ways that transitional justice might contribute towards achieving a solution for refugees. As such, the existing scholarship is largely concerned with the merits of engaging refugees in transitional justice processes. For example, scholars claim extending the reach of transitional justice to refugees might provide them with an opportunity to receive recognition of the wrongs they have suffered, and obtain redress for that harm.\(^2\) In addition, mechanisms such as truth commissions might generate reconciliation between refugees and their non-displaced compatriots, while reparations could offer economic assistance to support refugees when they return.\(^3\)

This thesis undertakes an empirical study of the interaction between transitional justice and displacement, and the claims scholars make regarding that interaction. It focuses on two case studies: Liberia and Afghanistan. When I first began research for this thesis, I held many of the assumptions reflected in the existing scholarship: that transitional justice should result in positive justice outcomes for refugees, and that the primary question to be determined is the technical design of their engagement. However, once I started fieldwork, I quickly realised that refugee interactions with transitional justice were much more complex. This shifted the focus of my research from the technical design of transitional justice programs to understanding how and why the interests of refugees and states come into conflict, and how the existing practice of transitional justice responds to that conflict. Overall, my thesis findings suggest that the high expectations of transitional justice scholars and practitioners with regard to refugee engagement are not always met. Moreover, transitional justice as conventionally understood is often ill equipped to


\(^3\) Ibid.
produce the justice outcomes refugees desire, mainly because refugees often conceive of harm, accountability and reparations in quite different ways to that of conventional transitional justice.

This first chapter begins by reflecting on the refugee figure: who is a refugee, and why does it matter? It then turns to the history of transitional justice, its theoretical basis, and how it came to recognise the justice claims of refugees. The chapter discusses how the existing practice of transitional justice engages refugees, and the outcomes both scholars and practitioners anticipate will result from the interaction. I then explain the contribution my thesis aims to make, and conclude with an overview of the contents of the thesis.

1.2 The Figure of the Refugee

The primary subject of my thesis is the refugee. This categorisation – ‘refugee,’ as opposed to migrant, or victim, or citizen – is not a trivial matter. Rather, it is of discursive and practical significance, since the way in which people define themselves and how they are defined by others is critical to their ability to act as agents, and claim rights. Moreover, it determines what obligations – if any – a state owes towards persons who are displaced beyond their own borders.

The modern refugee occupies a distinct space and identity. Of course, there have been expulsions and displacements of peoples throughout history, and many examples of

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individuals seeking sanctuary. However, prior to the twentieth century, the act of an
individual seeking refugee abroad was romanticised as something heroic or noble,⁷ and
exile carried with it ‘a touch of solitude and spirituality.’⁸ As the scale of forced migration
increased exponentially in the twentieth century and individuals turned into destitute
masses, all images of heroism were lost.⁹ More fundamentally, and of critical significance
for the figure of the refugee, the twentieth century saw the nation-state system
consolidated as the modern way to group, govern and identify people.

The nation-state system established the idea of the sovereign state as the natural, and only,
form of social and political organisation.¹⁰ In the twentieth century, structuring the world
according to nation-state principles became so routinely assumed and banal that the
construction process vanished from sight altogether.¹¹ The effect was to entrench the idea
that humans are supposed to be rooted to one place,¹² and to generate a vision of
displacement as pathological.¹³ It also resulted in policy decisions such as the sealing of
borders and the establishment of refugee camps and detention centres.¹⁴ However,
although the prevailing system of nation states is entrenched, it is in no way natural,
normal, inevitable or uncontested. To the contrary, it is the result of a variety of
historically contingent practices,¹⁵ primary amongst which are the concepts and practices
of nationalism and sovereignty.¹⁶

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⁹ Emma Haddad, above n 7, 68.
¹⁰ Andreas Wimmer and Nina Schiller, ‘Methodological Nationalism and Beyond: Nation-State Building,
¹¹ Ibid, 304.
¹² Liisa Malkki, ‘National Geographic: The Rooting of Peoples and the Territorialisation of National
¹³ Ibid, 34.
¹⁴ Liisa Malkki, above n 6, 511-512.
¹⁵ Peter Nyers, Rethinking Refugees: Beyond States of Emergency (Routledge, 2006) xi. See also: Nevzat
Soguk, States and Strangers: Refugees and Displacements of Statecraft (University of Minnesota Press,
1999) 38.
¹⁶ Emma Haddad, above n 7, 65.
Nationalism concerns the way those who live within a nation-state conceive of themselves, and others. Benedict Anderson describes this as the process of creating an ‘imagined community.’ Members of even the smallest nations will never know or meet all their fellow members, he explains, and ‘yet in the minds of each lives the image of their communion.’ An essential element of nationalism is the understanding of nations as bordered, finite entities, since no nation considers itself coterminous with all of humanity. The crucial condition making modern politics possible is the ‘distinction between an inside and an outside, between the citizens, nations and communities within and the enemies, others and absences without.’ Therefore, under the nation-state system, the citizen and the foreigner became mutually exclusive, exhaustive categories. Those who do not belong, such as the refugee, form ‘a constitutive outside, a basis for identity formation against the identity or threat of something else.’ They provide the ‘others’ required for people to be able to invent for themselves a ‘we,’ as distinct from a ‘they.’

The second practice underpinning the system of nation states is the concept of state sovereignty. Sovereignty comprises a set of norms concerning the legitimate organization of political authority, and was established with the 1648 Treaty of Westphalia. In its original conception, sovereignty was understood as the physical control a state exercised over its territory. States could point to their established border, and control of territory

18 Ibid, 16.
within, as evidence of their sovereignty. Within this conception, the treatment of citizens was considered a matter for each state, and a mutual respect for each state’s sovereignty constrained states from intervening in each other’s internal matters. However, after World War II, collective horror at the extent to which human rights had been disregarded led to the emergence of a new international legal regime and a transformed understanding of state sovereignty. In this new climate, sovereignty was no longer understood as a purely territorial matter, but also encompassed a state’s responsibility to ensure the human rights of all citizens living within its territory. A wide range of human rights instruments arose, which established obligations upon a state to take (or refrain from taking) certain actions, in order to protect the rights of its citizens.

The new human rights regime was firmly grounded in the concept of the nation state. That meant that while states became responsible for protecting the rights of their citizens, there was no concurrent obligation to protect the rights of non-citizens. The implications of this state-centric system became acutely clear in the period after World War II when, across Europe, hundreds of thousands of people became displaced by conflict and persecution, and, simultaneously, a number of states chose to divest, or refused to recognise, the citizenship of groups of people previously included in their respective polities. Thousands of persons found themselves cast outside the state system, rendered ‘nothing but human.’ As a mere human, and not a citizen, refugees became deprived of a forum through which to claim rights protection. This meant that the loss of citizenship was politically tantamount to the loss of human rights altogether.

24 Ibid, 528.
The effect of the modern system of sovereign states is to deprive refugees not only of rights protection, but also of a forum in which to speak politically. It is the state that decides what qualifies as ‘normal’ political space, practice and identity, as well as which actions, or people, fall outside of it. From the perspective of the state, it is the citizen that is the ‘proper subject of political life: the principal agent of action, the source of all meaning of value.’ Without citizenship, refugees are denied the capacity to speak politically and the expectation that they will be heard. As Arendt explains, the fundamental deprivation of human rights is manifested ‘above all in the deprivation of a place in the world which makes opinions significant and actions effective…[Refugees] are deprived not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right of opinion.’ For Arendt, this lack of political significance was identical with a lack of life itself, since ‘life without speech and without action…is literally dead to the world; it has ceased to be a human life.’

Bearing this context in mind, who, then, is a refugee? The instrument primarily responsible for creating the legal identity of the refugee is the 1951 Refugee Convention. Article 1A specifies that a refugee is a person, who, ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that

28 Peter Nyers, above n 15, xii.
29 Nevzat Soguk, States and Strangers: Refugees and Displacements of Statecraft (University of Minnesota Press, 1999) 9.
30 Peter Nyers, above n 15, 17.
32 Hannah Arendt, The Human Condition (University of Chicago, 1958) 176.
country. In general, scholars are critical of the 1951 Refugee Convention definition as too arbitrary or narrow to provide a plausible normative account of who is owed asylum.

One of the most influential critiques of the 1951 Refugee Convention originates with Shacknove. Shacknove identifies four implicit assumptions underlying the 1951 Refugee Convention definition: that a bond of trust, loyalty, protection and assistance between the citizen and the state constitutes the normal basis of society; that in the case of the refugee this bond has been severed; that persecution and alienage are always the physical manifestations of this severed bond; and that these manifestations are necessary and sufficient conditions for determining refugeehood. The limitation with this definition, he argues, is that persecution is a sufficient – but not necessary – condition for the severing of the bond between the state and the citizen. Rather, persecution is just one manifestation of a more fundamental absence of state protection. Therefore, Shacknove argues, a refugee should be understood as someone whose government fails to protect their basic needs, and who thereby has no remaining recourse other than to seek international restitution of these needs.

This understanding of the refugee highlights that states and citizens are bound by a minimal set of rights and duties. In exchange for their allegiance, citizens can minimally expect that their government will guarantee physical security, vital subsistence, and liberty of political participation and physical movement. When the state fails to respect citizens’ rights – or their ‘basic needs’ – the bond between the citizen and the state is

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35 Andrew Shacknove, ‘Who is a Refugee?’ (1985) 95(2) Ethics 274, 275.
36 Ibid, 277.
37 Ibid, 284.
38 Ibid, 281.
fractured. The refugee is thus created when norms of good governance within a state fail and she is forced to search for governmental protection in another state. Therefore, the fundamental criterion necessary for refugee status is a breakdown in the state-citizen relationship, and a refugee can be understood as someone who has been forced, in significant degree, outside the domestic political community indefinitely.\(^\text{39}\)

If refugeehood constitutes a breakdown in the state-citizen relationship, then repairing the harm associated with refugeehood must also address the state-citizen relationship. At the heart of this process is the concept of repatriation. Long argues that repatriation is far more than a simple act of return: it is a political commitment to the restoration (or in some cases construction) of political trust between refugee-nation and state.\(^\text{40}\) It involves complex, long-term and gradual processes of reintegration and reconciliation.\(^\text{41}\) These processes involve ‘the remaking of citizenship and consequent re-accessing of rights through reavailment of national protection in the country of origin.’\(^\text{42}\) Repatriation, then, is fundamentally a political process.\(^\text{43}\)

Similarly, Bradley argues that the state is obligated to provide reparations for the forced severing of the state-citizen relationship. In her understanding, reparative action involves the state recognising the unacceptability of the abuses at the root of displacement, repositioning the refugee as a citizen empowered to make claims against the state, and deterring future violations of returnees’ rights.\(^\text{44}\) Through reparations, the state of origin

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\(^{39}\) Emma Haddad, above n 7, 42.


\(^{42}\) Ibid, 1, 3.

\(^{43}\) Ibid; Lucy Hovil, ‘Hoping for Peace, Afraid of War: The Dilemmas of Repatriation and Belonging on the Borders of Uganda and South Sudan’ (UNHCR Research Paper No. 196, November 2010) 11.

may affirm or re-establish its legitimacy by acknowledging and attempting to make good on the duties it abrogated by forcing its citizens into exile, as well as enabling returnees to rebuild their lives and their place in the political community.\(^{45}\) This understanding of repatriation shifts the focus from crossing a border, to the process of restructuring political relationships between states and citizens.\(^{46}\) This means that it is the restoration of citizenship, rather than a return to physical territory, which is at the very heart of repatriation.\(^{47}\)

Citizenship, as understood in this context, is not just a matter of legal status, but encompasses a much broader sociological notion involving social membership and identity.\(^{48}\) At its most fundamental, it implies a legal and political status of belonging, imbuing large groups of people with a collective identity that makes sense of who they are both in relation to each other, and in relation to structures of power.\(^{49}\) What citizens share is membership in a rich cultural community constituted by common social practices, cultural traditions and shared ethical understandings.\(^{50}\) There are a number of different frameworks for understanding citizenship. While a comprehensive discussion of each of these frameworks is beyond the scope of this thesis, the following paragraphs set out two dominant conceptions of citizenship, and how they justify different courses of action in reconstructing the state-citizenship relationship between refugees and their state.

\(^{45}\) Ibid, 240.
\(^{46}\) Ibid, 23.
\(^{47}\) Katy Long, above n 41, 7.
Two dominant ways of framing citizenship are the liberal model, and the civic republican model. The former casts citizenship as a status granted and secured through individual rights, while the latter casts it as a practice involving responsibilities to the wider society. The most influential exposition of liberal citizenship is Marshall’s *Citizenship and Social Class*. According to Marshall, citizenship is essentially a matter of ensuring that everyone is treated as a full and equal member of society. The way to ensure this sense of membership is through according people an increasing number of citizenship rights: civil, political, and social. This conception of citizenship places an emphasis on passive entitlements and the absence of any obligation to participate in public life: Participation is required only insofar as it is necessary to protect people’s basic rights and liberties. Public and private spheres are kept distinct, and citizens are under no obligation to participate in the public arena if they have no inclination to do so. As Heater describes, ‘citizenship largely means the pursuit of one’s private life and interests more comfortably because the private life is insured by state-protected rights.’

The modern civic republican tradition, by contrast, is a form of participatory democracy that emphasises the intrinsic value of political participation for the participants themselves. According to civic republicans, individual are socially embedded, and a failure to participate in politics makes one a ‘radically incomplete and stunted being.’ Civic republicans focus on the development of shared values, social norms, history and culture with responsibilities and duties. The ideal citizen is active, and involved in civic

56 William Kymlicka and Wayne Norman, above n 54, 362.
activities in the local community, aware of the values, duties and responsibilities they share.\textsuperscript{58}

These two models each generate a different understanding of the role of the citizen vis-à-vis their interaction within the polity, and with their state. The liberal approach to citizenship allows for active citizenship (through legal entitlements) but cannot directly bring it about. It locates the capacity of citizens in the power to retrieve their rights, and does not put any value on participation in governance for its own sake. The civic republican approach, by contrast, defines participation in self-rule as the essence of freedom, and part of what must be secured.\textsuperscript{59} Its emphasis on civic obligation leads to the idea of citizenship as a practice, rather than a set of rights.

Scholars and practitioners advocate a number of strategies for rebuilding the relationship between refugees and their state, such that their citizenship may be remade. One such strategy is the involvement of refugees in transitional justice processes. The following sections seek to explain what transitional justice is, how it has engaged refugees, and how it might contribute to the remaking of citizenship.


1.3 Transitional Justice

Transitional justice encompasses a legal, political, and moral dilemma about how to deal with historic human rights violations in societies undergoing some form of political transition. A 2004 report by United Nations Secretary-General Kofi Annan provides the most common definition, stating that transitional justice comprises:

the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.

The modern conception of transitional justice is usually traced back to the post Second World War Nuremberg trials. The Nuremberg trials established the principle of individual criminal accountability for human rights violations perpetrated against civilians in wartime, and introduced the idea that certain crimes are so heinous that they violate the ‘law of nations’ and may be prosecuted anywhere. Until this time, international law was not usually relied upon to provide a framework to address a state’s treatment of its own citizens, or to impose criminal sanctions against states for abusive treatment of their own citizens. During the period after the Second World War, the

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demand for justice took on a retributive character. This was not tempered by any other value – and especially not with the values of peace or negotiation – largely because post-war justice processes were imposed by the victorious party.65

Retributive justice refers to the idea that justice requires perpetrators to suffer, characteristically via punishment. It posits that wrongful actions involve the violation of a moral standard for conduct, and when such violations result in wrongful harm to an individual, a retributive response is required.66 Based on this idea, in the post-World War II period many perpetrators of crimes against humanity were held responsible and severely punished.67 Proponents of retributive justice claim that prosecutions fulfill a duty owed to the victims, and serve as a partial remedy for their injuries, while also asserting democratic values.68 Opponents of retributive justice, on the other hand, often point to its incompatibility with reconciliation; Braithwaite, for instance, explains that ‘retribution is in the same category as greed or gluttony; biological they once helped us to flourish, but today they are corrosive of human health and relationships.’69

The term ‘transitional justice’ only emerged after the Cold War, during the period of accelerated democratisation and political fragmentation that took place across Latin America and Eastern Europe.70 Scholars and practitioners used the expression to describe the ways in which countries in those regions were addressing a history of serious human rights violations, and transitioning to democracy.71 As repressive regimes in Latin

65 Ruti Teitel, above n 62.
67 Ruti Teitel, above n 62, 72-74.
70 Ruti Teitel, above n 62, 71.
71 Roger Duthie, above n 2, 12.
America came to an end, the human rights movement began to recognise that undertaking criminal trials during a political transition could have undesired political implications, as well as an adverse effect upon human rights.72 As a result, leaders of the newly emerging Latin democracies moved away from criminal prosecutions, and aimed instead to present a formal accounting of the violence, crimes, and civil and human rights abuses that characterised their previous regimes.73 This led to the creation of the truth and reconciliation commission, a temporary body mandated to investigate a history of human rights violations.74

Truth commissions introduced the idea of restorative, rather than retributive, justice. Broadly defined, restorative justice is focused on ‘making things right, [and the] repair of social injury,’75 as well as reparations as an alternative to punishment.76 Unlike retributive justice, restorative justice is victim-centred, and seeks to empower the victim.77 The focus on the victim demands a participatory approach that treats victims as ‘stakeholders’ in the reparation process,78 space ‘to move beyond the rather masculine discourse of crime and punishment towards a notion of repairing relationships.’79 In light of these traits, the restorative justice of truth commissions is often viewed as a direct rejection of retributive criminal trials and their emphasis on inflicting ‘equal and just measure of pain’.80

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73 Neil Kritz, above n 64, 386.
77 John Braithwaite, above n 69, 7.
The 1990s and, to a lesser extent, the 2000s were marked by fierce scholarly debate around the merits of trials versus truth commissions, framed in terms of ‘truth versus justice.’ \(^{81}\) The purpose of transitional justice was often discussed in binary terms: punishment versus reconciliation, retributive versus restorative justice. \(^{82}\) However, by the twenty-first century, government, practitioners and scholars reached a more nuanced and comprehensive understanding of justice, and transitional governments usually implement both retributive and restorative approaches to justice in tandem. Typically, the transitional justice ‘package’ consists of some form of criminal accountability, truth-telling, and institutional reform. Such is the acceptance of these mechanisms that the question most frequently asked by transitional governments is not whether to conduct some form of transitional justice, but what the scope, modalities, and sequencing might be. \(^{83}\)

A third form of justice commonly engaged in transitional justice process, and sitting outside the retributive/restorative binary, is reparative justice. Reparative justice seeks to repair wrongs committed against the victim by returning what was taken from the victim, whether material or symbolic. \(^{84}\) It usually takes the form of restitution and apology. \(^{85}\) The overall aim of reparative justice is to restore to the victim their sense of dignity and moral worth, and eliminate the social disparagement and economic marginalization that accompanied their targeting. \(^{86}\) In reparative justice, as with retributive justice, the primary responsibility for repairing harm remains on the perpetrator, since it is the responsibility of the perpetrator to follow through on promises for restitution or apology.

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This is in contrast to restorative justice, where both the perpetrator and the community hold active roles throughout the process.

The final type of justice associated with transitional justice is what Laplante describes as ‘civic justice.’ Whereas restorative justice refers to a vision of micro-reconciliation within communities, civic justice refers to a vision of macro-reconciliation that mends the relation between the government and the governed. Civic justice acknowledges that the abuses committed by a state, or permitted by its lack of protection, may lead victim-survivors to feel they were treated as ‘second class citizens,’ and imagines a type of macro-level ‘civil reconciliation’ that seeks to mend the relationship between the State and its subjects while lending legitimacy to the new governing enterprise. This type of justice in particular demonstrates a range of commonalities with the concept of citizenship. Both are concerned with how a society can avoid violent social rupture by developing a sense of national solidarity, and a shared commitment to democratic principles and practices. In addition, they both conceive of justice being achieve by restoring, or possibly building afresh, the relationship between the state and its citizens. This understanding of justice highlights the importance of mechanisms such as constitution-building, or enfranchisement as methods of repairing harm.

The distinctive element of transitional justice is that these different theories of justice are underpinned by the normative aim of facilitating a transition to democracy. Paige Arthur traces the conceptual history of transitional justice, and explains that a transition

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90 Pablo de Greiff, above n 88, 460–462. See also: Megan Bradley, above n 44, 240.
to democracy was the dominant normative lens through which political change was viewed when the field first emerged. Since the focus was on a transition to democracy, certain mechanisms – prosecutions, truth-telling, restitution, and reform of abusive state institutions – were favoured above others measures of justice, such as those associated with claims for distributive justice. Since those early days, a number of challenges have arisen concerning the nature of a transition, and the type of justice that a different transition might entail. In the case of South Africa, for example, there was a reactivation of distributive justice claims, associated more with a transition to socialism than a transition to democracy.Coupled with this, some critics argue that justice for the crimes of apartheid requires more than the standard legal-institutional reforms, and should include a redistribution of wealth that was unjustly accumulated through an inhuman political and economic system.

1.4 Transitional Justice and Displacement

Displacement was a relatively late addition to the transitional justice landscape, emerging largely after the Cold War ended. There was some limited precedent for this connection. In 1923, the Turks and Greeks concluded the Treaty of Lausanne, one result of which was a large-scale population exchange that forced almost two million people to leave their homes. The Treaty of Lausanne established a Mixed Commission, which (theoretically) allowed forcibly displaced Turkish and Greek nationals to obtain compensation for their abandoned property. In another early example, after the Second World War Israel sought and received reparations from West Germany, in order to pay for the resettlement

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92 Ibid, 325 – 326.
93 Ibid, 321, 359.
95 Treaty of Peace With Turkey, Greece-Turkey, signed 24 July 1923, LNTS No 16 (entered into force 6 August 1924) arts 10 and 11.
of Jewish refugees from Europe.\textsuperscript{96} At the same time, the displacement of some 750,000 Palestinians from the newly recognised state of Israel triggered a number of precedent-setting political statements that foreshadowed the right of refugees to reparations for their displacement.\textsuperscript{97}

The post-Cold War period saw more consistent engagement between transitional justice and refugees. The impetus for this inclusion was an international preoccupation with refugee return. During the Cold War, many states accommodated large numbers of refugees on their territories, and were growing increasingly resentful of their presence.\textsuperscript{98} There were various reasons for this resentment: the global economic downturn post-1973; a shift towards higher numbers of global South refugees seeking asylum in the North (as opposed to the original political paradigm of East-West flows) which resulted in a decline in the ideological value of refugees; and increased suspicions by states concerning refugee motives for flight.\textsuperscript{99} As the immigration policies of refugee-hosting states hardened, UNHCR began to advocate voluntary repatriation as the ‘most desirable’ solution that should be promoted and facilitated whenever possible.\textsuperscript{100} Seeking to make refugee return more sustainable, UNHCR and host states focused their collective attention on the restitution of homes for returning refugees.\textsuperscript{101} As a result, in the 1990s property restitution rose to prominence as a remedy for forced displacement.\textsuperscript{102}

\textsuperscript{97} Megan Bradley, above n 44, 77.
\textsuperscript{99} Ibid.
\textsuperscript{100} UNHCR, Inter-Office Memorandum No.5, UNHCR/IOM/5/87 (10 February 1987) 1, cited in Katy Long, above n 16, 20.
At first, the right to property restitution developed quite apart from the broader transitional justice framework. Scholars and practitioners believed that housing and property restitution was essential to the sustainable large-scale return of refugees, and concentrated their advocacy towards this issue with little regard for other avenues of reparation. The dominant medium of this pursuit was international law, and from the end of the Cold War until the mid-2000s, transitional justice scholars and human rights NGOs advocated through international forums for the adoption of international standards concerning property restitution for displaced persons.

The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accords) presents the first example of successfully implemented mass restitution in the wake of full-blown conflict. The Dayton Accords established the right of return for all refugees and displaced persons, as well as their right to restitution of property lost during the war, and almost every peace agreement since that time has included provisions on the right of refugees to return to their homes, as well as the right to restitution or compensation for those who lost property. Annex 7 of the Dayton Accords stated that the imperative for restitution lay in the ‘rights of the displaced,’ and asserted that all refugees were entitled to restitution of any property lost during the war. In addition, the Accords provided that refugees who did not wish to return to Bosnia and obtain

108 Ibid.
restitution of their property could instead apply for financial compensation.\textsuperscript{109} As such, the Dayton Accords seemed to make a significant contribution towards achieving justice and a more sustainable return for refugees.

However, despite the language of justice and rights, critical scholars argue that the Dayton Accords in fact undermined justice outcomes for refugees. The compensation fund proposed by the Accords never materialized, due to a concern that offering compensation for property would minimise the will of refugees to return. The international community and domestic political leaders were committed to the goal of reversing ethnic cleansing in Bosnia, and if refugees did not return home, it would undermine this goal.\textsuperscript{110} Property restitution formed a key element of the political aim of reconstituting Bosnia as a multi-ethnic country, regardless of whether returning refugees were themselves interested in contributing towards such a goal.\textsuperscript{111} Within this context, the language of human rights was used to detract from the obvious political emphasis being placed on refugee return. By relying upon a rights-based framework, practitioners were able to replace the highly politicised emphasis upon refugee return with a more impartial ‘rule of law’ framework.\textsuperscript{112}

An important point to recognise in the interaction between transitional justice and refugees is that displaced populations often include large numbers of perpetrators, and not just victims. A primary example of the former is found in the case of Rwanda.

\begin{footnotesize}
\begin{enumerate}
\item[109] Ibid.
\end{enumerate}
\end{footnotesize}
Between April and July 1994, Rwanda experienced a devastating genocide, which resulted in the death of nearly three-quarters of the total Tutsi population, while hundreds of thousands fled to neighbouring countries.\textsuperscript{113} After the genocide, an additional two million predominantly Hutu Rwandans fled into neighbouring countries, among them members of the former national army and Hutu paramilitary units.\textsuperscript{114} Transitional justice in Rwanda subsequently centred on the perpetrators of the genocide and Congo-based rebels. The government instituted a process of prosecuting genocide crimes through the International Criminal Tribunal for Rwanda, a national court system, and the neo-traditional gacaca courts (established in 2005). Alongside these criminal mechanisms the government also established a disarmament, demobilisation and reintegration program. Of great significance to refugee perpetrators, the two processes operated in strict isolation, and any DRC-based combatants who chose to participate in demobilisation were excused from prosecution. The strict separation of these processes succeeded in encouraging the demobilization of tens of thousands of combatants, but also led to widespread criticism of rebels who completely avoided prosecution and therefore were never held accountable for genocide crimes.\textsuperscript{115} To date, the ICTR has not prosecuted cases of high-level genocide suspects based in the DRC, hampered by a lack of cooperation from either the UN peacekeeping mission or the Rwandan government, both of which favour a clear separation between DDR and transitional justice.\textsuperscript{116}

The 1990s also witnessed the development of a soft law framework around arbitrary displacement. From 1992 until 1998, the Representative of the UN Secretary-General for


\textsuperscript{116} Ibid, 253.
IDPs, Francis Deng, worked with Walter Kaelin and a small number of supportive states to identify existing normative gaps in protection for IDPs. Having identified the gaps, they drew upon existing international human rights, humanitarian and refugee legal norms to create the Guiding Principles on Internal Displacement.\footnote{117} These were subsequently adopted by states as a non-binding framework for interpreting their obligations towards IDPs.\footnote{118} While some of the Guiding Principles are embodied in hard law instruments, those that clarify grey areas or fill gaps are still soft law.\footnote{119}

The term ‘soft law’ describes norms that are formally non-binding but habitually obeyed.\footnote{120} Chayes and Chayes argue that the ‘interpretation, elaboration, application, and, ultimately, enforcement of international rules [are] accomplished through a process of (mostly verbal) interchange among the interested parties.’ Because states feel compelled to justify their conduct and have those justifications accepted by other states, it pushes them in the direction of compliance with international law.\footnote{121} Soft law can ‘harden’ – that is, become international law – when states or international entities conduct activities in a regular manner and in the conviction that even if not responding to positive requirements of international law, they are at least authorized by and in conformity with such law.\footnote{122} In the case of the Guiding Principles, they are regularly cited and used by UN agencies, regional organisation, NGOs, and governments.\footnote{123} In 2003, the UN Commission on Human Rights declared that the Guiding Principles had become a

\begin{footnotes}
\item[122] Paul Szasz, above n 120, 43.
\end{footnotes}
‘standard’ in international efforts to protection internally displaced persons.124 Their wide usage and recognition as the normative framework for protection and assistance activities on behalf of the internally displaced, indicates a gradual hardening of the Guiding Principles.125

While the Guiding Principles are directed at internally displaced persons, the provisions regarding the harm and repair associated with displacement are equally relevant and are regularly applied to refugees. The Guiding Principles explain that forced displacement is not necessary unlawful under international law. Displacement, forced evictions, and population transfers may be legal, if they are justified and if the state undertakes them in accordance with international standards. However, if the state forcibly displaces people in a way that is not in line with international standards, then it will be deemed illegal and termed ‘arbitrary displacement.’126 On this basis, the Guiding Principles require states (and non-state actors) to prevent and avoid conditions that might lead to arbitrary displacement.127 The recognition of arbitrary displacement as a violation of human rights is also articulated in article 12 of the International Covenant on Civil and Political Rights (ICCPR), which protects against all forms of forced displacement through the right to choose one’s residence;128 the Pinheiro Principles, which protect all persons against being arbitrarily displaced from their home, land or place of habitual residence;129 and

124 Ibid, 467.
125 Simon Bagshaw, above n 119, 173-174.
127 Ibid, principle 5.
customary international humanitarian law, which restricts the forcible displacement of civilians.130

Building upon the international recognition of arbitrary displacement as a breach of international law, advocates pushed to achieve criminal accountability for the violation of arbitrary displacement.131 International criminal prosecutions in Timor-Leste,132 the former Yugoslavia,133 and Iraq134 have treated displacement as a crime. Scholars have pushed such mechanisms to recognise that the experience of displacement goes beyond the act of arbitrary displacement, and includes the violations triggering displacement such as mass killings, arbitrary arrests, torture, and rape, as well as those that took place while the person was displaced, such as forced conscription and sexual assault.135

Another transitional justice mechanism that has witnessed increased engagement with displacement is the truth commission. Historically, the crime of arbitrary displacement and the abuses endured by displaced populations have not been included in truth commission mandates, and have not figured prominently in the reports and recommendations issued by these institutions. Case in point: of the 32 truth commission reports publicly released to date, only nine address displacement.136

134 Anfal Cassation Panel Decision (Iraqi High Tribunal Appellate Chamber, September 4, 2007).
135 Roger Duthie, above n 2, 13.
The South African TRC was pivotal in the development of the field of transitional justice. However, although over 3.5 million non-white South Africans were displaced from their homes and lands in the decades prior to the end of apartheid, South Africa did very little to pursue recognition or repair of the harm associated with forced displacement.\textsuperscript{137} The TRC was tasked with uncovering and recording instances of ‘gross human rights violations’ – defined narrowly as killings, torture, and severe mistreatment. This exclusive focus on individual crimes and the ‘excesses’ of the apartheid regime came at the cost of largely ignoring the institutional violence that characterised apartheid. Victims and activists had assumed that forced migration would be a core focus of the TRC. However, after noting that ‘forced removals’ were ‘an assault on the rights and dignity of millions of South Africans,’ the TRC claimed it could not acknowledge them since these violations ‘may not have been ‘gross’ as defined by the Act.’\textsuperscript{138}

By contrast to the South African TRC, truth commissions in Liberia, Sierra Leone, Guatemala, Peru, and Timor-Leste have each engaged with displaced persons, and the harms that led to their displacement, as well as those that took place during flight, and during asylum.\textsuperscript{139} The Liberian Truth and Reconciliation Commission, for example, noted that poverty and the loss of livelihoods led to forced displacement,\textsuperscript{140} and argued that many of the violations faced by Liberian women were heightened for women who had been displaced.\textsuperscript{141} Timor-Leste’s truth commission documented the way that displacement caused more deaths than any other factor during Indonesia’s occupation.\textsuperscript{142}

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\item[\textsuperscript{137}] Ruth Hall, ‘Rural Restitution’ (Briefing Paper No 2, University of the Western Cape Programme for Land and Agrarian Studies, Evaluating Land and Agrarian Reform in South Africa Series, 2003) 1.
\item[\textsuperscript{139}] Susan Harris Rimmer, above n 131, 1.
\item[\textsuperscript{141}] Ibid, 273.
\item[\textsuperscript{142}] Roger Duthie, above n 2,14.
\end{itemize}
\end{footnotesize}
The Guatemalan Commission for Historical Clarification is one of the more successful TRCs in terms of integrating the perspectives of displaced persons. A primary aim of the Guatemalan Commission was to document the suffering and stigma endured by the displaced while in asylum. CEH investigators hiked into remote areas of the country to interview thousands of civilians who were displaced by the war. The Commission concluded that the murder and forced displacement of thousands of Mayan civilians during the Guatemalan civil war was genocide.\(^{143}\)

In addition to setting the framework for accountability for displacement international law also provides a framework for reparative action. The primary way this is framed is through the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. The Basic Principles assert that victims of human rights abuses have a right to ‘adequate, effective and prompt reparation’ from the violating state.\(^{144}\) In this context, reparations are understood to encompass not only compensation and restitution,\(^{145}\) but also satisfaction, which refers to remedies such as official apologies, judicial proceedings and truth commissions,\(^{146}\) and guarantees of non-repetition, which refers to the reform of laws and national institutions.\(^{147}\) According to this broad understanding, then, reparation constitutes an array of remedies that mirror the conventional mechanisms of transitional justice. While this framework does not provide a right to reparations specifically for refugees, the duty upon a state to redress harm for which it is responsible does not cease when the victim leaves its jurisdiction, as the duty


\(^{144}\) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, 64th plena mtg, UN Doc. A/RES/60/147 (2005) art 11(b).

\(^{145}\) Ibid, art 18.

\(^{146}\) Ibid, art 22.

\(^{147}\) Ibid, art 23.
arises as a result of the violation itself.\textsuperscript{148} As a result, refugees fall within the standard international law approach to reparations.

De Greiff notes that ‘whatever consensus there is in international law about reparations, it is only just emerging,’ and the boundaries of this obligation remain porous.\textsuperscript{149} Falk adds that as a result of this mixed state practice, the legal framework retains an ad hoc character that makes it impossible to draw any firm conclusions about legal expectations, much less frame this practice in the form of legal doctrine. For this reason, it is more appropriate to view reparations as ‘primarily an expression of moral and political forces at work in particular contexts.’\textsuperscript{150} Notwithstanding the inconsistent application of reparations, there are some positive examples, and reparations programs in Guatemala,\textsuperscript{151} Bosnia, Kosovo, Lebanon, and Northern Cyprus have attempted to distribute benefits to displaced persons for the violations that caused them to flee, for those they suffered while displaced, and for the crime of displacement itself.\textsuperscript{152}

While the number of mechanisms engaging refugees has increased, the framework structuring the interaction between transitional justice and refugees has remained fairly consistent. This framework is typified by three characteristics. The first is that transitional justice processes understand displacement as a legal violation of human rights. This shapes the understanding of the harm refugees suffer, the violations that each mechanism

\textsuperscript{148} Human Rights Committee, \textit{Junior Leslie v Jamaica, Communication No 564/1993, 63\textsuperscript{rd} sess, UN Doc CCPR/C/63/D/564/1993 (7 August 1998); Maritza Urrutia v Guatemala (C-103) [27 November 2003] IACHR; Moiwana Community v Suriname (C-124) [15 June 2005] IACHR.

\textsuperscript{149} Pablo de Greiff, ‘Repairing the Past: Compensation for Victims of Human Rights Violations’ in Pablo de Greiff (ed), \textit{The Handbook of Reparations} (Oxford University Press, 2006) 1, 6-7.

\textsuperscript{150} Richard Falk, ‘Reparations, International Law, and Global Justice: A New Frontier’ in Pablo de Greiff (ed), \textit{The Handbook of Reparations} (Oxford University Press, 2006), 478, 485 (emphasis in the original.)


will recognise, and the type of reparation that scholars deem most appropriate. Secondly, all refugee interactions with transitional justice have taken place within institutions led by the state. This means that it is the responsibility of the transitional state to set the mandate, decide the methodology, and manage the implementation of the transitional justice mechanism. And finally, refugee interactions with transitional justice have consistently prioritised refugee return as the ultimate goal.

The following sections examine each of these factors in turn, in order to understand how scholars and practitioners structure the interaction between transitional justice and refugees, and what they hope the interaction will achieve.

### 1.4.1 Displacement as a Violation of Human Rights Law

Transitional justice is constructed around a framework of international law.\(^{153}\) This begins with the standards its mechanisms apply, which are based on four pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law.\(^{154}\) In addition to applying legal standards, transitional justice mechanisms also mirror legal processes. Sometimes this connection is explicit, as in the case of criminal prosecutions, drafting a new constitution, reforming the justice system or designing a system of amnesties. In other instances, such as truth commissions, the law often retains its influence indirectly. A truth commission might receive a mandate to make recommendations for criminal prosecutions, for instance, or may structure its testimony-gathering process along the lines of receiving evidence in court. This structure also means that people working on

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\(^{154}\) UN Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (March 2010) 3.
transitional justice are usually required to possess legal expertise, and are, in fact, usually lawyers.\textsuperscript{155} This reinforces the influence of law.

When it comes to the engagement of refugees in transitional justice, scholars seldom apply a critical lens to the dominance of international law. There seems to be wide acceptance that international law can somehow displace politics and resolve conflict.\textsuperscript{156} Moreover, the uncritical use of legal discourse and legal mechanisms has the effect of portraying the institutions of transitional justice as neutral and apolitical, and, therefore, as an objective method of delivering justice.\textsuperscript{157} This lack of critical scholarship appears in sharp contrast to the broader scholarship on transitional justice as a whole. There is a large body of scholarship challenging the idea of transitional justice as a technical, legal process.\textsuperscript{158} Critical scholars assert that the understanding of the law and justice as apolitical and easily abstracted from the surrounding social context is an exclusively Western and ethnocentric notion.\textsuperscript{159} When practitioners apply the legal framework without considering the local political and social context, critical scholars emphasise, it contributes to transitional justice programs that do not function well in the political and legal cultures into which they are deployed,\textsuperscript{160} a lack of engagement between local communities and those programs,\textsuperscript{161} and a field that struggles to account for indigenous

\textsuperscript{161} Kieran McEvoy, above n 153, 425.
and customary mechanisms of justice that do not fit within its legalistic and individualistic framework.\textsuperscript{162}

Rather than deploying a critical approach to the interaction between transitional justice and refugees, scholars tend to focus their attention on doctrinal issues associated with achieving legal accountability for displacement. Few scholars question what the dominance of law means for the understanding of the harm, and repair of displacement, and whether it impedes the ability of refugees to achieve their preferred justice outcomes.

### 1.4.2 The State as a Transitional Justice Actor

The second characteristic of the interaction between transitional justice and refugees is that it is a state-centred and state-driven process. This is typical of transitional justice generally.\textsuperscript{163} Each of the prominent transitional justice mechanisms – trials, truth commissions and reparations programs – consists of an institutionalised process administered by the state.\textsuperscript{164} In each case, the state is almost always responsible for initiating the mechanism, setting its mandate and determining its methodology. Moreover, the governing framework of transitional justice, that of human rights law, international criminal law, and international humanitarian law, is primarily concerned with holding states accountable for breaches of their legal obligations.

In counterpoint to these state-driven mechanisms, transitional justice scholars have developed a rich body of scholarship examining local, traditional or ‘grassroots’

\textsuperscript{164} Kieran McEvoy, above n 153, 412.
mechanisms of transitional justice. However, this ‘bottom up’ approach is yet to extend to instances of refugee engagement. Scholars addressing refugees confine their attention (and advocacy) to the processes of trials, truth commissions and reparations programs. A small number of scholars consider alternative forms of transitional justice, such as the legal empowerment of refugee communities or the reconstitution of inter-personal, familial and communal relationships disturbed by displacement. Despite these examples, non-institutional alternatives exist only in the margins. Perhaps an even larger gap is the lack of scholarly critique regarding the dominance of the state as a transitional justice actor, and what this means for the ability of refugees to obtain the justice outcomes they desire.

A critical approach to the role of the state in transitional justice is even more important given that since the late twentieth century, most transitional justice interventions – and virtually all of those involving refugees – have taken place within the context of state-building. State-building is the dominant paradigm for structuring international intervention and assistance in the wake of conflict. It emerged in the late 1990s and early 2000s as part of the broader practice of peacebuilding. During the Cold War, the main security focus of the UN was traditional peacekeeping operations, which typically involved monitoring ceasefires or neutral buffer zones between former combatants. However, the post-Cold War political climate enabled a different type of engagement with countries emerging from conflict, which extended well beyond monitoring. This included what UN Secretary-General Boutros Boutros-Ghali termed ‘post-conflict peace-

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165 See, eg, Kieran McEvoy and Lorna McGregor (eds), above n 155; Rosalind Shaw, Lars Waldorf and Pierra Hazan (eds), Localizing Transitional Justice (Stanford University Press, 2010); Rosalind Shaw, ‘Rethinking Truth and Reconciliation Commissions, Lessons from Sierra Leone’ (Special Report No. 130, United States Institute of Peace, February 2005).
167 Ibid.
At first, peace-building missions emphasised rapid democratisation and marketisation, but as countries descended back into conflict this approach became discredited. Instead, state failure – the problem these missions were aimed at ‘fixing’ – came to be seen primarily as an issue of poor governance and weak state capacity. As a result, in the late 1990s and early 2000s peacebuilding agencies began to emphasise the importance of strong government institutions, leading to the advent of ‘state-building’.

The end goal of state-building interventions is to construct a liberal democracy. State-building practice generally assumes that the most effective way to assure the long-term resolution of conflict is to develop strong economic and political state institutions, and therefore emphasises building or strengthening the capacity of government to perform effectively the functions associated with modern statehood. This entails three general objectives: to foster democratic institutions; introduce the ‘universal’ value of the rule of law; and develop a market-driven economy. Within this paradigm, transitional justice is valued for its perceived contribution to the rule of law and democratisation, and, since the mid-2000s, has become increasingly embedded in state-building strategies.


177 Chandra Sriram, above n 160, 112, 113.
Since the focus of a state-building intervention is to create a strong and legitimate state, it is common for the new government to prioritise transitional justice activities intended to strengthen state institutions.\textsuperscript{178} This means that mechanisms such as building courts or prosecuting former leaders are favoured over longer-term, non-institutionalised processes oriented towards reconciliation, community-level justice mechanisms or redistribution.\textsuperscript{179} This ‘top-down’ approach to justice ignores many of the actual mechanisms of social change at work, such as the agency of non-state actors,\textsuperscript{180} and often reduces engagement with the local communities and victims it purports to serve.\textsuperscript{181}

Delivering transitional justice in the context of state-building can jeopardise the ability of victims to achieve the justice outcomes they desire. One example is in relation to violations of economic and social rights. When transitional justice is delivered in the context of a state-building intervention, its mechanisms tend to foreground violations of civil and political rights, while pushing questions of economic violence and economic justice to the margins.\textsuperscript{182} This ignores structural violence such as systematic economic abuses, and the legacies of inequality and poverty, which is particularly damaging for marginalised groups such as women, minorities and those of a lower socio-economic status.\textsuperscript{183} By excluding socio-economic crimes from its mechanisms, critical scholars

\textsuperscript{178} Ibid, 120.
\textsuperscript{179} Paige Arthur, above n 14, 321. See also, Patricia Lundy and Mark McGovern, ‘The Role of Community in Participatory Transitional Justice’ in Kieran McEvoy and Lorna McGregor (eds), above n 165, 99.
assert, transitional justice fails to address versions of harm, loss and violence that relate to the experience of these marginalised groups.\textsuperscript{184}

Much of this critical scholarship holds relevance for the interaction between refugees and transitional justice. One additional factor related to the specific engagement of refugees in transitional justice is the relationship between the state and its refugee population. Refugees are those who have been forced out of their own national polity due to a lack of state protection. This raises particular questions concerning the way that state control over transitional justice mechanisms might affect refugee engagement in transitional justice, and whether state interests and refugee interests always align. This issue is addressed in further detail in the following section.

\subsection*{1.4.3 Refugee Return as the Ultimate Goal}

A third theme of the scholarship and practice of transitional justice and displacement is refugee repatriation. There is a broad consensus amongst both scholars and practitioners that the ultimate goal of transitional justice is to resolve displacement through refugee return.\textsuperscript{185} UNHCR urges states to facilitate the participation of refugees in peace and reconciliation processes prior to their return, so that such peace processes might ‘encourage repatriation, reintegration and reconciliation.’\textsuperscript{186} Scholars, also, suggest that exile can act as a transformative space, enabling refugee communities to develop their capacities to engage as political citizens when they eventually return.\textsuperscript{187} The opportunity

\begin{flushleft}\textsuperscript{184} Fionnuala Ní Aoláin and Catherine Turner, ‘Gender, Truth and Transition’ (2007) 16 \textit{UCLA Women’s Law Journal} 229, 238. \\
\textsuperscript{185} Roger Duthie, above n 2, 23. \\
\textsuperscript{187} Katy Long, ‘Permanent crises? Unlocking the Protracted Displacement of Refugees and Internally Displaced Persons’ (Policy Briefing, Refugee Studies Centre, University of Oxford, 2011) 9.\end{flushleft}
to participate in a truth commission, for instance, might help refugees to organise themselves into victim-advocacy groups, or to frame their grievances in terms the state recognises. This might enable them to better communicate their injuries, and needs, to the government of their home state, such that they might receive targeted support on return.

The emphasis upon return is seen most clearly in the way that property restitution for refugees has been prioritised. However, a growing body of scholarship critiques the status of property restitution as the preferred remedy for displacement. Some claim that the emphasis on property return is fueled not by an intention to help refugees achieve justice, but by the political and economic concerns of (usually Western) asylum countries no longer willing to support large refugee populations.\(^\text{188}\) Moreover, placing an emphasis on property restitution associated with, or contingent upon, return can overshadow alternative remedies that refugees might prefer: some may not wish to return to a ‘home’ altered by war, but may prefer other forms of reparations such as compensation.\(^\text{189}\) Even for those who do wish to return, the principles of property restitution as currently reflected in international law are designed by Westerners with Western notions of property, law, process, and enforcement in mind, and do not necessarily reflect the reality of non-Western, developing, agrarian or post-conflict societies.\(^\text{190}\) Relying on these essentially


\(^{189}\) Giulia Paglione, ‘Individual Property Restitution: from Deng to Pinheiro and the Challenges Ahead’ (2008) 20 International Journal of Refugee law 2, 7-8; see also Jose-Maria Arraiza and Massimo Moratti, ‘Getting the Property Question Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999-2009)’ (2009) 21 International Journal of Refugee Studies 426, 450 (arguing that compensation may have been the preferred remedy for the majority of those displaced during conflict in Kosovo.)

\(^{190}\) Derrick Fay and Deborah James, ‘Restoring What Was Ours: An Introduction’ in Derrick Fay and Deborah James (eds), The Rights and Wrongs of Land Restitution: Restoring What Was Ours (Routledge-Cavendish, 2009) 1, 3-6.
Western standards may result in unintended, harmful consequences, particular if a one-size-fits-all model of law reform is taken.\textsuperscript{191}

Notwithstanding this critique of property restitution as the best remedy, scholars continue to advocate the link between transitional justice and refugee return. Some assert that transitional justice can contribute to conditions of safety and dignity, necessary for refugee return.\textsuperscript{192} It can do this, scholars suggest, by prosecuting those who committed human rights violations during the conflict, reforming security institutions, such as the police and military, or distributing benefits through restitution and compensation processes to strengthen displaced persons’ socio-economic security.\textsuperscript{193} In addition, transitional justice may create condition of dignity by recognising refugees as rights-bearers, and offering them a way to obtain redress for the past violation of their rights.\textsuperscript{194} This can restore the dignity of refugees by acknowledging their individual and collective suffering, and establishing their inclusion as full citizens in the new state.

Other scholars discuss the intersection of transitional justice and refugee return through the lens of reconciliation. Reconciliation in this context remains a fluid and contested concept, but most authors agree that it describes a process, rather than an end state or outcome.\textsuperscript{195} In general terms, it constitutes a process through which a society moves from a divided past to a shared future,\textsuperscript{196} and is fundamentally about building relationships of

\textsuperscript{191} Megan Ballard, above n 188, 473.
\textsuperscript{192} Department of International Protection, Handbook on Voluntary Repatriation: International Protection (UNHCR, 1996) 16.
\textsuperscript{194} Pablo de Greiff, above n 1, 43.
trust and cohesion at multiple different levels, from the individual, inter-personal and communal, to the national and international.\textsuperscript{197} Scholars suggest that reconciliation is relevant to refugee return in two respects. Firstly, they argue, reconciliation is necessary in order to address the open and underlying tensions that exist between returned refugees and their non-displaced compatriots, and amongst the displaced community itself.\textsuperscript{198} By revealing and validating the experiences of different groups, transitional justice can reduce social tensions between ‘those who stayed, and those who left,’ thus contributing to reconciliation on an interpersonal level.\textsuperscript{199}

Secondly, scholars suggest that reconciliation must take place between the refugee and their state. Human rights violations – including those associated with displacement – often lead victims to feel they were treated as less than human or ‘second class citizens,’ which is a serious harm that a government must repair if it is to govern effectively.\textsuperscript{200} Reconciliation in this context seeks to mend the relationship between the state and its citizens, while lending legitimacy to the new government enterprise.\textsuperscript{201} Advocates claim that the processes of transitional justice may contribute to reconciliation between state and citizen by officially acknowledging periods and patterns of past violations,\textsuperscript{202} working as a tool of social reintegration for previously marginalised refugees,\textsuperscript{203} and enabling returning refugees to rebuild their lives and their place in the political community.\textsuperscript{204} The overall aim of these interactions is to restore, or possibly build afresh,

\begin{footnotes}
\footnotetext[197]{Joanna Quinn, ‘Introduction’ in Joanna Quinn (ed), \textit{Reconciliation(s): Transitional Justice in Postconflict Societies} (Queen’s University Press, 2009) 1, 5.}
\footnotetext[198]{UN Secretary-General, \textit{Decision No. 2011/20: Durable Solutions: Follow up to the Secretary-General’s 2009 Report on Peacebuilding} (4 October 2011) paragraph 12.}
\footnotetext[199]{Roger Duthie, above n 2, 24.}
\footnotetext[201]{Pablo de Greiff, above n 88, 460-462.}
\footnotetext[202]{Megan Bradley, above n 136, 189.}
\footnotetext[203]{Pablo de Greiff, ‘Articulating the Links between Transitional Justice and Development: Justice and Social Integration’ in Pablo de Greiff and Roger Duthie (eds), \textit{Transitional Justice and Development: Making Connections} (Social Science Research Council, 2009).}
\footnotetext[204]{Megan Bradley, above n 44, 240.}
\end{footnotes}
the refugee’s state-citizen relationship. The return of refugees is itself sometimes described as integral to reconciliation of a society as a whole, and essential to the goals of peace, stability, reconciliation and economic development.

Whether refugee return is, in all circumstances, an appropriate end for transitional justice to pursue features only rarely in the literature. Missing from this discussion completely is the voice of refugees themselves. There is limited recognition that for many refugees, repatriation is both less ideal and less desired than is generally assumed by the international architects of postwar reconstruction. Generally, however, return is viewed as an inevitable part of the refugee experience, and a desirable part of a transitional justice strategy.

1.5 Inclusion of Refugee Voices

The voice of the refugee is of central importance both to my thesis, and Refugee Studies in general. One of the most influential scholars on this topic is Agamben, who argues that the act of excluding persons from the nation-state system – that is, the very process of generating refugees – is not just a consequence of the nation-state system, but the very signifier of sovereign power. The defining feature of sovereignty, according to Agamben, is the ability to revoke the privileges of citizenship, what he refers to as the ‘sovereign exception.’ Revoking the privileges of citizenship results in the suspension of sovereign protection and law, and creates what Agamben refers to a ‘zones of exception.’

205 Ibid.
208 Giorgio Agamben, above n 26, 6.
When a person is banned from the realm of sovereign power to one of these zones of exception, they are stripped of their political life (bios) and revert to a form of bare life (zoe). In doing so, they become the homo sacer (‘set-apart man.’) The homo sacer was a figure in Ancient Roman law who could be killed with impunity, and whose death also held no sacrificial value. He could not rely on the protection of the state but was still subject to its power over his life and death. As such, the homo sacer possesses biological life, but that life has no political significance.\textsuperscript{209}

For Agamben, the refugee camp constitutes one such zone of exception. It is a non-political space that facilitates the bio-political management of ‘life as animal.’\textsuperscript{210} Once relegated to the camp, the refugee is left with no reliable form of protection, respect, accountability, or method to make claims and seek enforcement of his or her rights, since the state is the only party to whom such petitions may be made, and those living in the camp are outside the state’s protection.\textsuperscript{211} While citizens are able to experience a full existence that comes from a politically qualified form of life and the ability to participate in various social, cultural and economic pursuits, refugees are allocated a bare life which necessitates only the basics of food, shelter and medical care to be sustained.\textsuperscript{212}

Humanitarian actors responding to refugee needs occupy a controversial position for scholars such as Agamben. Agamben argues that humanitarian organisations ‘grasp human life in the figure of bare or sacred life, and therefore, despite themselves, maintain a secret solidarity with the very powers that they ought to fight.’\textsuperscript{213} Malkki builds upon this position by detailing the standardised way of talking about and handling the ‘refugee

\textsuperscript{209} Ibid, 18.
\textsuperscript{210} Ibid, 167.
\textsuperscript{211} Ibid, 171.
\textsuperscript{212} Peter Nyers, above n 15, 98.
\textsuperscript{213} Giorgio Agamben, above n 26, 133.
problem’ that has emerged among national governments, humanitarian and refugee agencies since World War II. Camp administrators remain constantly focused on the physical condition and wellbeing of refugees with little regard for their political needs, and the encamped victims are expected to display an attitude of passive acceptance of the external aid and intervention provided, up to and including being spoken for in the name of their safety. The effect of these representational practices is to set up an anonymous, minimal humanity from which refugees cannot escape, with the effect that refugee voices are systematically silenced.

Critical scholars charge that most discourse on refugees is dominated by the languages of refugee relief, policy science, and development, each of which claims to produce authoritative narratives about refugee lives. The same might be said of the existing scholarship on transitional justice and displacement, where there are few empirical case studies, and only very rare acknowledgement of refugee voices. Rather than describing refugee perspectives on their own terms, the scholarship deals predominantly with policy concerns, describing the practical, legal and methodological challenges of involving displaced persons in transitional justice through a discourse of human rights.

In order to counter this bias, I aimed for my thesis to engage with the perspective of refugees, so that ‘voices from below’ might be heard and heeded. I drew on the work of other transitional justice scholars who emphasise the importance of place-based approaches, rooted in an understanding of transitional justice as co-constructed by those whom it affects most. I also drew on scholars who bring a more nuanced reading to

216 Liisa Malkki, above n 214, 386 and 390.
217 Ibid, 386.
218 Roger Duthie, above n 2, 17.
219 Patricia Lundy and Mark McGovern, above n 75, 265.
220 Moses Okello, ‘Afterword: Elevating Transitional Local Justice or Crystallising Global Governance?’ in Rosalind Shaw and Lars Waldorf (eds), Localizing Transitional Justice: Interventions and Priorities
Agamben’s work, such as those who argue that although refugees may have lost their communities and livelihoods, they still hold political views and political agency.\textsuperscript{221} When refugee lives and communities are analysed at the micro-political level, individual lives far more complex than bare life emerge, and moments of refugee resistance and political agency become clear.\textsuperscript{222}

1.6 Structure of Thesis

My thesis offers an empirical study of the interaction between transitional justice and displacement in Liberia and Afghanistan. My overall research question is: Does transitional justice, as currently practised, address the harm suffered by refugees, and align with the justice preferences of refugees? In each country, I examine how refugees participated in formal transitional justice processes, and how they engaged with the ideas and objectives of transitional justice on their own terms. I interrogate the three themes that dominate the literature on transitional justice and refugees: namely, the use of human rights law to understand displacement; the reliance on state-led mechanisms; and the assumption that refugee return constitutes the ultimate objective of refugee involvement in transitional justice. In doing so, I aim to make the following contributions:

Firstly, an understanding of how the use of a legal, rights-based approach affects refugee engagement with transitional justice. I examine how the dominance of law affects the


way in which harm is defined, and the way in which the repair of that harm is consequently approached; and, ultimately, how these understandings, and the dominance of law generally, affect the ability of refugees to achieve their preferred justice outcomes.

Secondly, I address what the dominance of the state as a transitional justice actor means for refugees. I build upon the critical scholarship concerning the delivery of transitional justice in the context of state-building, and address the gap in knowledge concerning refugees as specific actors. I consider how state and refugee interests aligned or differed in the two case studies, the type of conflict that arose between the state and its refugee population in relation to transitional justice, how that conflict was resolved, and the affect this had upon the ability of refugees to achieve their preferred form of justice.

And, finally, my work offers an understanding of the way in which refugees consider the objective of their participation in transitional justice. In doing so, I question the scholarly assumption that repatriation is the ultimate objective of the interaction between transitional justice and displacement. I examine how the emphasis on return affects refugee engagement in transitional justice, and whether an alternate understanding might result in justice outcomes better aligned to those preferred by refugees.

I acknowledge that my own thesis research suffered a number of deficiencies concerning the inclusion of refugee voices. While I was able to meet with Liberian refugees and interview them directly, in Afghanistan my position as a researcher made it impossible (or at least unethical) to conduct interviews with Afghan refugees. To compensate, I sought alternate sources of data that provided insight into refugee perspectives: for example, I was able to spend long periods observing refugees engaged in activities associated with transitional justice, and I located newspaper articles that directly quoted
refugee voices, as well as secondary research sources that offered direct engagement with Afghan refugee populations. Through these and other sources, I aimed to construct a detailed picture of how refugees engaged with the ideas transitional justice, and thereby generate a clearer understanding of their perspectives on the harm and repair of displacement.

Chapter 2 explains my conceptual framework, ethical considerations, data collection methodology, and process of analysing the data resulting from fieldwork. It integrates my choice of methodology with the objectives of my thesis, and describes how, and why, I designed my particular thesis methodology.

Chapters 3, 4 and 5 then discuss the first case study, Liberia. The case study begins by examining the Liberian TRC, which engaged the Liberian refugee population resident in Buduburam refugee camp, Ghana. The Liberian government, together with practitioners and scholars, assert that participating in the TRC gave refugees the opportunity to communicate to their government whatever information they felt was most important to them, and that, by participating in the TRC, Liberian refugees and members of the diaspora became part of the reconciliation process, and were included within the Liberian nation. I interrogate this claim from the perspective of refugees themselves, taking into account the TRC’s mandate, objectives and methodological framework.

The second part of the Liberian case study shifts attention from the conventional, state-led mechanism of the TRC, to the different way that refugees themselves engaged with

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the ideas and practices of transitional justice. I examine the activities of one NGO active in Buduburam refugee camp, Population Caring Organisation. Through two community programs known as Peace Cells and the Tribal Leaders’ Reconciliation Forum, refugees pursued ideas of truth-telling, reconciliation and accountability in a form that differed significantly from the TRC. I demonstrate that the TRC and the refugee-led forums understood the harm and repair of displacement very differently, and that their different structures and objectives led to the recognition of markedly different voices.

Chapters 6, 7 and 8 turn to the second case study, Afghanistan. I begin by examining the conventional approach to transitional justice in Afghanistan. Generally, scholars describe the Afghan government’s attempts (or lack thereof) to implement transitional justice as a failure. I challenge this perspective by examining alternate forums for the pursuit of transitional justice objectives, including those initiated by refugees themselves. I first examine the process of drafting the 2004 Constitution in Afghanistan, and consider whether engaging refugees led to a more inclusive idea of citizenship, and provided a platform through which refugees could rebuild their state-citizen relationship.

The second part of the case study on Afghanistan examines two processes not typically recognised as transitional justice mechanisms: out-of-country voting, and community development through the National Solidary Program. I consider how these two processes related to the understanding of harm and repair held by refugees, and how these processes enabled refugees to pursue the justice outcomes they valued. I also examine how these two forums provided alternative ways for refugees to engage with their state, and rebuild their state-citizenship relationship in a contextualised way.
Chapter 9 concludes by reflecting on the findings of the case studies. Despite the disparate contexts, a number of similarities emerged between refugee experiences in Liberia and Afghanistan. Overall, refugee engagement in transitional justice emerged as far more complex than the normative predictions made in the literature. In conventional transitional justice forums, refugees often struggled to speak, and be heard, which compromised their ability to obtain justice on their own terms. Instead, refugees often pursued accountability, truth-telling and reparations through forums that would not be recognised as transitional justice in a conventional sense, but which reflected the broad objectives of transition justice while providing refugees with an opportunity to engage with their own justice priorities. This prompts a reconsideration of the way scholars and practitioners conceive of, and analyse, the interaction between transitional justice and displacement, and how we should understand the ultimate objective of this interaction.
CHAPTER 2: METHODOLOGY

2.1 Introduction

The field of transitional justice has been characterised as ‘faith-based,’ rather than ‘fact-based.’¹ This is evidenced in the scholarship in two different ways. Firstly, there is a disproportionate emphasis on the ‘moral-philosophical and jurisprudential aspects’ of transitional justice processes.² Scholars are more often concerned with laying out the value-driven justification for transitional justice than assessing its impact, or understanding local experiences. Secondly, scholars frequently direct their attention to determining ‘best practice,’ and explaining to other advocates how transitional justice might be most effectively implemented. In doing so, they emphasise issues of legal doctrine, and centre their attention on responding to policy concerns, with little concern shown towards establishing an evidence base for their approach.³ Overall, then, there is paucity of evidence-based literature on the effects of transitional justice, and the experiences of those who participate in its processes.⁴

These concerns informed the design of this thesis, and are discussed in detail in this chapter. The chapter begins with the conceptual framework that underpins the thesis, and how this framework determined the choice of methodology. I outline some of the key ethical challenges that arose during the research, and how I adapted my research design to them. Then I explain how I designed my thesis methodology, including my choice of

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⁴ Oskar Thoms, James Ron, Roland Paris, above n 1, 31.
data collection sites, participants, and documentary sources. I conclude by reflecting on the process I used to draw conclusions from the thesis data.

### 2.2 Conceptual Framework and Ethical Considerations

The field of Refugee Studies has grappled with the methodological challenges of researching refugee populations, and provides a starting point for my research. Refugee Studies emerged as a field of enquiry in the 1980s, primarily in response to the rapid growth of refugees and asylum-seekers during that decade.\(^5\) It takes the category of refugee as both its primary object and the boundary for its research, focusing on the exploration, analysis and definition of that label.\(^6\) It is a cross-disciplinary field, with the majority of contributions coming from the disciplines of Law, Anthropology and Political Science.\(^7\)

The term ‘refugee’ requires critical consideration, in order to understand exactly what the term signifies, and the implications of that categorisation.\(^8\) The history of the academic use of the word reveals that it is not, in fact, a sociological category but a bureaucratic label, originating from the world of policy.\(^9\) This means that bureaucratic state interests and the procedures of humanitarian agencies are crucial determinants in defining the label of refugee.\(^10\) It is widely recognised by anthropologists that there is no such thing as a

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generalisable refugee experience, and no set of particular traits that exist within every refugee.  

Moreover, refugees themselves often conceive their identity in very different terms from those bestowing the label.  

Acknowledging that ‘refugee’ is not a natural label but a constructed one, and one that is often contested by those to whom it is applied, raised both substantive and methodological issues for my research. Substantively, it led me to explore how the field of transitional justice came to recognise the categories of refugee and displacement, the meaning that transitional justice scholars and practitioners assign to those terms, and what this means for the way in which transitional justice engages refugees in practice. Methodologically, it prompted me to recognise that governments, the UN and refugees often hold very different understandings of the term refugee, and to critically consider the way I use the term refugee myself. This is not to suggest that my approach avoids such categorisation, since there is no methodology that can escape labels, and no matter what definition or terminology the researcher chooses to use, it will have implications for the research project. However, what I did attempt to do was consider how the labels I employ are defined, who controls those definitions, and how different perspectives concerning the definition of ‘refugee’ can complement or conflict with each other.

Throughout my thesis I adopt an ‘actor-oriented’ perspective, which means that I engaged with refugees as social and political agents, rather than as passive victims. I was conscious that labels involve relationships of power, in that more powerful actors use

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12 Roger Zetter, above n 10, 40.
labels to influence how particular issues and categories of people are regarded and treated. This affected the way in which I use the term refugee, as well as the term transitional justice. I intentionally sought refugee perspectives on the two labels, and then engaged their views throughout my research. For example, in 2012, UNHCR issued a cessation clause with respect to Liberia, which meant that as of 30 June 2012, UNHCR and the governments of Liberia and Ghana no longer recognised Liberians as refugees.16 Regardless of this legal change, Liberians continued to refer to themselves, often very consciously, as refugees. Throughout my thesis, I refer to Liberians living in Buduburam refugee settlement as refugees, in recognition of their self-defined identity. I also incorporated their explanations for why they remained in exile, which often differ from those conventionally associated with refugeehood.17

Another methodological challenge common to both Refugee Studies and transitional justice is the way that scholarship often combines scholarly research with advocacy. Research on displacement often takes place within a policy setting, and has developed side by side with humanitarian agencies such as UNHCR.18 The same can be said of transitional justice, where scholars regularly work as legal advocates.19 These scholar-advocates use the lives of vulnerable others not only to generate scholarship, but also to promote their own research, and ultimately their own careers.20 This position, scholars argue, creates an ethical obligation upon researchers to add value to the lives of the people they are researching, recognising them as subjects in the process and not simply as

16 UNHCR, Implementation of the Comprehensive Strategy for the Liberian Refugee Situation, including UNHCR’s Recommendations on the Applicability of the “Ceased Circumstances” Cessation Clauses (UNHCR, 13 January 2012).
18 Richard Black, above n 8, 67.
sources of data. Some take this a step further and justify research into others’ suffering only if alleviating that suffering is an explicit objective. This ‘dual imperative’ of scholarship and advocacy creates a fundamental conflict for the researcher. There is a constant battle to maintain academic independence and intellectual rigor, while simultaneously producing research relevant to policy concerns and that is able to ameliorate suffering.

To address these concerns in my research, I designed the methodology for data collection in a way that is empowering for refugee participants, and that has the potential to bring about social change for, or within, refugee communities. In doing so, I focused on the capacity of refugees to challenge existing structures. This meant, for example, that I did not only ask refugees their views in relation to the conventional mechanisms of transitional justice; but, I also questioned their responses to those mechanisms, and the actions they took outside or in parallel to the conventional processes. I framed interview questions in a way that encouraged participants to reflect upon their own, or their community’s, strengths and agency.

My thesis also engaged a range of traditional ethical concerns, revolving around the principles of consent, the right to privacy, and protection from harm. The minimum requirements for informed consent are that participants are fully and adequately informed about the purposes, methods, risks and benefits of the research and that agreement to participate is fully voluntary, the end goals being that informed consent safeguards

23 Richard Black, above n 8, 58.
participants from harm, coercion and exploitation.\textsuperscript{25} However, the standard interpretation of informed consent is based on the assumption that participants are autonomous, understand the implications of giving consent, and are in relatively equal positions of power with researchers. In the refugee context, vulnerability, compromised autonomy, mistrust and the complexities of community representation make the issue of informed consent more complex.\textsuperscript{26} This means that obtaining informed consent in the traditional sense may not be sufficient to discharge the ethical burden on the interviewer. In the case of my research, it meant that I closely considered the topics and questions for which I could ethically seek refugees’ consent. For instance, when interviewing refugees in Liberia, I avoided any questions about past harm, since revisiting traumatic events could cause the narrator to experience further emotional suffering, and I did not feel I could ethically ask participants to assume that risk. In Afghanistan, I made the decision not to interview refugee participants since my position as a UNHCR officer diminished the possibility of obtaining genuine informed consent.

In order to incorporate both the methodological and ethical issues arising throughout my research project, I focused on developing reflexivity. Reflexivity, according to Giddens, refers to the uniquely human capacity to reflexively monitor one’s own actions.\textsuperscript{27} Reflexivity occurs in two forms: ‘endogenous’ and ‘referential.’ Endogenous reflexivity requires the researcher to reflect on the way in which they construct the process of research, for instance by being conscious about bias and assumptions. Referential reflexivity involves the relationship between the researcher and the researched.\textsuperscript{28}

\textsuperscript{26} Ibid, 302.
Together, these forms of reflexivity constitute an acknowledgement that the researcher is not an objective, impartial recorder of facts, but holds their own conceptual frame and worldview, interprets and mediates the data in their own way, and affects by their very presence the kind of research data that is collected.  

A reflexive approach recognises the value in human research subjects engaging directly with the research. This contrasts with modernist approaches to research, which intentionally create distance between observer and observed in order to maintain control over their subjects, setting up unequal power relations between the researcher and research subject. A reflexive approach, by contrast, prompts researchers to consider how their research subjects may react to the ways they are portrayed, and to give them the opportunity to comment on, modify, change and/or correct scholars’ interpretations of what the subjects said.

My research design aimed to take into account these conceptual and ethical considerations. It intended to produce what McEvoy describes as a ‘thick’ description of what took place, an account of the ‘complex, multilayered and actor oriented’ dimensions of transitional justice. I took a qualitative approach to data collection in order to gain insight into a field where little is known, and to highlight the participants’ point of view. As refugee views and experiences emerged during interviews, I looked beyond

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the data as a source of objective or factual information, and sought to understand what it revealed about the broader culture, framework and relations of power in which people made sense of their lives.\textsuperscript{35}

Overall, my thesis takes the form of a structured, focused case study. This means that it is structured around general questions that reflect the research objective, and that these questions are asked of each case study to guide and standardise data collection.\textsuperscript{36} It is focused in that it deals only with certain aspects of the historical cases examined.\textsuperscript{37} In both cases I limit my examination to transitional justice mechanisms: in Liberia, to the TRC and the grassroots activities of PCO; and in Afghanistan, to the process of drafting the Constitution, out-of-country voting, and national development.

Another methodological challenge concerned the choice of case studies. There are few instances where refugees have been involved in transitional justice, and as a result it was difficult to meet the traditional criteria for a comparative study, such as choosing two cases that are literal replicates, or that are notable for their difference.\textsuperscript{38} Instead, within the limited case study options, I aimed to identify two countries that shared key contextual features, but differed in the precise way they engaged refugees in transitional justice.

Liberia and Afghanistan share four contextual features. Both countries had experienced a violent and prolonged civil war, characterised by violence carried out by citizens of that country against their compatriots. As a response to this violence, both countries initiated some form of transitional justice, which took place in the context of an active UN state-

\textsuperscript{35} Jane Elliot, above n 29, 28.
\textsuperscript{37} Ibid.
\textsuperscript{38} Robert Yin, \textit{Case Study Research, Design and Methods} (Sage Publications, 2\textsuperscript{nd} ed, 1994) 46.
building mission, and was initiated and managed by the transitional government. In both Liberia and Afghanistan the state chose to engage its refugee population in those transitional justice activities. These commonalities made it possible to compare the effects of state-building upon refugee engagement in transitional justice.

The differences between Liberia and Afghanistan give insight into the variety of ways that transitional justice and displaced persons can interact, and the implications of these differences for refugees. For example, in Liberia, the new government sought out the involvement of displaced persons in its TRC, and treated them as a distinct group of citizens characterised by their displacement. In Afghanistan, by contrast, the transitional government integrated refugees into the process of drafting a new Constitution by treating them no differently from other non-displaced Afghan citizens.

Overall, then, my thesis constitutes qualitative research in the form of a structured, focused case comparison. I relied on snowball sampling, and collected data through semi-structured interviews. Within this framework, the contextual differences between Liberia and Afghanistan necessitated some differences in methodology. With this in mind, the following sections reflect on the specific methodology used in Liberia and Afghanistan.

### 2.3 Liberia

Liberia is located on the west coast of Africa, bordering Sierra Leone, Côte d'Ivoire and Guinea. In 2014 its population was estimated at 4.1 million persons. In terms of religious beliefs, the country is predominantly Christian (85.6 per cent), with a large Muslim minority (12.2 per cent). Ethnically Liberia is comprised of sixteen identifiable indigenous ethnic groups, plus those of Americo-Liberian descent (about 5 per cent) and
a small number of miscellaneous groups. It is broken into fifteen counties, each of which corresponds to territory historically claimed by an indigenous ethnic group.

From 1990 until 2003, Liberians suffered through a brutal civil war. The conflict resulted in the deaths of more than 200,000 people, widespread human rights abuse, and pervasive displacement. Since the end of the conflict, the Liberian government has taken a number of steps to address the country’s violent history. Most visibly, in 2009, it established a Truth and Reconciliation Commission, which collected over 20,000 statements, held public hearings, and published a narrative report attributing responsibility for past atrocities, as well as making detailed recommendations to the Liberian government regarding political, economic and legal reforms. One novel aspect of the Liberian TRC was its decision to engage displaced Liberians. This was significant as it allowed Liberian refugees to have their suffering acknowledged by the new government, and gave them the opportunity to contribute to recommendations for political, economic and legal reforms.

My first case study is an examination of the way in which the Liberian Truth and Reconciliation Commission engaged displaced Liberians. Specifically, I examined the experiences of the Liberian refugee population resident in Buduburam refugee settlement in Ghana, as well as those who had lived in the settlement but had since returned to Liberia. I also observed the work of a grassroots NGO initiated and run by refugees in Buduburam settlement that engaged both with the TRC, as well as with the ideas of transitional justice and reconciliation more broadly. My aim was to understand how refugees perceived their engagement in the TRC, and the impact it had on their return and reintegration. I also examined the ways in which refugees engaged in practices of truth-

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telling, accountability and reconciliation on their own terms, and what this reveals about the practice of transitional justice more generally. While there were other mechanisms of transitional justice present in Liberia, such as the Palava Hut national reconciliation program, it was not possible for Liberian refugees to participate while they were living in asylum. My thesis is concerned with those mechanism available to refugees while in asylum, and therefore I have focused on the TRC and grassroots forums active in Buduburam refugee settlement.

I travelled to Liberia in late February 2013. For the first month, I focused on becoming familiar with the local culture and context, identifying key informants, and undertaking archival research at the TRC. I also conducted a first round of interviews in and around the capital, Monrovia. During this period, I realised that I had made a number of assumptions in my original research proposal about the relationship between refugees and transitional justice. Originally, I hypothesised that involving refugees in transitional justice would increase the level of political agency possessed by refugees, and lead to meaningful outcomes for them. However, my initial interviews revealed that rather than a site of ‘empowerment,’ transitional justice was actually a site of conflict between the state and its refugee population. I made some adjustments to my research questions, and then carried out another two months of interviews with participants in and around Monrovia. I then spent approximately one month conducting interviews in Gbarnga in central Liberia, a town with a population of 34,000 persons, and Ganta in northern Liberia, a town with a population of 41,000. Both towns are significantly smaller than Monrovia, whose population is approximately 1.1 million. After completing my fieldwork in Liberia, in mid June 2013 I travelled to Ghana, and spent one month

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conducting interviews in Buduburam refugee settlement, the site of the TRC’s activities with Liberian refugees in 2009.

In both Liberia and Ghana, I conducted interviews with three categories of people. These were refugees, former refugees who had repatriated to Liberia, and key actors, including refugee community leaders, TRC staff, UN and NGO staff, and Liberian academics. Refugee participants were the most difficult to identify, as there are no databases or other records documenting Liberian refugees who have repatriated, and no record of refugees who had participated in the TRC. Therefore, I had to rely on chain referral sampling (also known as the ‘snowball’ method) to identify refugee participants in both Liberia and Ghana. In the snowball method, research participants use their social networks to refer the researcher to other people who could potentially participate in the study.\textsuperscript{42} This form of participant identification is often beneficial – or necessary – in order to identify a hidden population, or groups that are not easily accessible.\textsuperscript{43}

There are a number of risks associated with the snowball method. One risk is that it can exclude those who are not linked to the individual at the centre of the snowball. Another concern, particularly in refugee contexts, is that the researcher may have little choice but to place a community leader at the centre of the snowball, and this leader may exert tight control over their community.\textsuperscript{44} To overcome these risks, I established multiple ‘snowballs’ with unrelated persons at their centre. I conducted interviews in a range of locations, both urban and non-urban, and incorporated refugees who had, and had not, participated in the TRC or grassroots transitional justice forums in order to compare their

\textsuperscript{43} Ibid, 6.
\textsuperscript{44} Catherine Ebbs, ‘Qualitative Research Inquiry: Issues of Power and Ethics’ (1996) 117 (2) \textit{Education} 217, 218.
experiences. I recorded basic biodata to ensure I had a relatively even distribution of participants across ethnicity, sex, age, and background.

In total, I carried out 72 interviews with refugees or returned refugees. Of these, 24 were refugees living in Buduburam refugee settlement in Ghana, consisting of 10 women and 14 men. 11 had participated in the TRC and 13 had not. I also carried out 48 interviews with refugees who had lived in Buduburam refugee settlement, but had since repatriated to Liberia. This consisted of 20 women and 28 men, of whom 18 had participated in the TRC while they were living in Buduburam settlement, and 30 had not. I carried out 15 interviews with key actors including TRC staff, Liberian officials, Liberian academics and NGO staff. I was concerned that asking people their tribe could be a sensitive issue, so replaced it with the proxy question of dialect spoken. Most participants in Ganta were of the Gio or Mano ethnic groups, and in Gbarnga were Kpelle. In Monrovia and Ghana there was a mixture of ethnicities, but a slight majority of Krahn.

I conducted semi-structured interviews, which combine the unstructured, open-ended interview with the directionality of set questions, to produce focused qualitative data.45 Interviews were conducted on an individual basis unless the participant requested otherwise, and on average went for one hour. I conducted the interview wherever the participant felt most comfortable, sometimes in private (such as their home) or sometimes in public (such as a café). The interviews took place in mix of English and Liberian English. Many of those I interviewed had spent time living in Ghana, which meant that they were used to adapting their Liberian English (which can be difficult for non-Liberians to understand) for a non-Liberian audience. During interviews, I took handwritten notes transcribing the conversation, which I later reviewed and converted

into typed transcripts. I also took in-depth field-notes describing what I observed in the communities I was researching in. Before concluding the interview, I provided individuals with an opportunity to ask further questions of me and of the aims of the research. An example of my interview questions can be found at Annex 1.

I took seriously Rodgers’ suggestion that there are academic benefits for researchers to ‘hang out’ with their target population. In Liberia, I rented a furnished room in downtown Monrovia and travelled to each of my interviews by public transport. Due to the irregularity of transport, this meant that I often had time after the interview to talk with my interviewee and their family or neighbours. It also gave me time to chat with Liberians on the bus or in the shared taxi. I also spent a lot of time in local cafes and markets talking to Liberians. When I travelled to Gbarnga and Ganta for interviews, I did so by public transport and stayed in a local setting. In Buduburam refugee settlement, I lived in a rented room within the settlement, and used local facilities. This gave me the opportunity to chat everyday with my neighbours and other refugees living in the area. I also accepted invitations to attend soccer games, church services, choir practice, and primary school classes. While the information or insights gleaned during such conversations did not form part of my formal research findings, it provided an invaluable window into the economic, social, political and cultural context of my research subjects.

Wherever possible, I supplemented my interviews, and triangulated the information I obtained therein, with written records sourced in Liberia and Ghana. One main source of data were written minutes and reports related to the Peace Cells and Tribal Leaders’ Reconciliation Forum, described at length in Chapter 6. However, one limitation is that these written records are almost always ad hoc and incomplete. Numerous PCO staff

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explained that as repatriation and deportation of Liberian refugees increased in 2008, it became difficult to retain systematic records of events that had passed. As a result, while such documents cannot provide a full picture, they do offer a richer understanding of the activities at that time.

At the end of my time in each of Ghana and Liberia, I provided the ‘centre’ of each of my snowballs with a summary of my research and its anticipated trajectory, and asked that they share it with the other research participants. I also recorded the email addresses of participants who wished to receive a copy of my research once completed.

2.4 Afghanistan

Afghanistan has historically been the link between Central Asia, the Middle East and the Indian sub-continent. It shares borders with Iran, Pakistan, Tajikistan, Uzbekistan, Turkmenistan and China and, reflecting its geographic location, is made up of at least a dozen major ethnic groups. The dominant ethnic group is Pashtun (42 per cent), with sizable Tajik (27 per cent), Hazara (9 per cent) and Uzbek (9 per cent) minorities. There are also much smaller numbers of Aimak (4 per cent), Turkmen (3 per cent), Baloch (2 per cent) and other (4 per cent) ethnic groups. The vast majority of Afghans are Muslims, with only 1 per cent of the population claiming to be of another religion. Of those who practice Islam, 80 per cent are Sunni Muslim, and 19 per cent are Shia Muslim. As of 2014, Afghanistan’s population is estimated at 31.8 million.

Afghanistan has been at war almost continuously since 1978. This was not one single war, but a series of conflicts with changing sets of political actors who were alternately

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47 Interview with Morris, Liberian return refugee (Monrovia, 7 April 2013).
in power and opposition. All sides throughout the various phases of conflict committed war crimes and egregious human rights violations. These decades of conflict have destroyed much of the nation’s economy and infrastructure, and produced large refugee populations, estimated at around 30 per cent of the population.

My case study focused on the drafting of the 2004 Constitution of Afghanistan, and the Loya Jirga that accompanied it. The government of Afghanistan involved Afghan refugees living in Pakistan and Iran in both processes on the same basis as other non-displaced Afghans. I examined how refugees experienced this engagement, and whether it furthered the objectives of transitional justice. In addition, I also explored how refugees themselves perceived ideas of justice, accountability and reparations. This led me to focus on two specific mechanisms: refugee enfranchisement in Presidential elections, and the way in which refugees were engaged by a national development program known as the National Solidarity Program.

Afghanistan provided a different set of methodological challenges compared to those I faced in Liberia. In Afghanistan, I was only able to gain access to the country, and permission from my university to conduct research, due to my affiliation with UNHCR. In late July 2013, I took a leave of absence from my thesis to take up a 9 month contract with UNHCR Kabul as a Protection Officer. Unexpectedly, my position with UNHCR gave me responsibility for a number of issues related to Afghan refugees and transitional justice. I represented UNHCR in matters related to refugee participation in the upcoming elections, refugee participation in the Loya Jirga, and refugee repatriation. I also obtained access to relevant internal documents, relevant actors within government, the UN, NGOs and civil society, and had the opportunity to speak directly with refugees about their experiences.

concerns and demands linked to the above issues. This work formed part of my ordinary employment, and was not something that I initiated or pursued for the sake of my PhD. However, midway through my UNHCR contract, and after conferring with the management at UNHCR, I lodged an application with the ANU Ethics Office to include Afghanistan as a second case study, and the Ethics Office approved the application.

The exposure to practical ways in which refugees were engaging with transitional justice allowed me to identify themes and activities that I would not otherwise have recognised. After identifying these areas, I was able to conduct desktop research and identify relevant open sources materials. The bulk of the research I conducted in Afghanistan pertains to document analysis. UNHCR provided me with a number of internal but unclassified documents relating to refugee involvement in the Loya Jirga and elections, as well as refugee repatriation. I was also able to trace records of regular communication between UNHCR and refugees.

On a number of occasions I gained access during work meetings to information from UN, government or NGO staff. I have not used any of this information directly as I obtained it in my role as a practitioner and not as a researcher, and those who were speaking had not given their informed consent. In a small number of instances, I approached key actors outside formal work interactions and explained that, separate to my position with UNHCR, I was also a PhD student. Most were willing for me to interview them provided I did not identify them. I did not approach actors where I thought that doing so could jeopardise the relationship UNHCR shared with them, for instance in the case of government employees, where I was concerned that my joint identity would generate suspicion towards UNHCR.
For ethical reasons, I did not interview any Afghan refugees. I was concerned that my position as an officer with UNHCR would give refugees the impression that I had the ability to provide material or other valuable assistance to them, and, that they would perceive that refusal to participate in my research would have negative consequences for their family. In such a context it would have been impossible to obtain genuine consent. As part of my ordinary work duties, I was required to meet periodically with refugees to discuss issues related to transitional justice. However, I have not directly used any information obtained during such discussions, as there was no ethical way for me to obtain refugee consent.

2.5 Analysing the Data

In analysing the data obtained through fieldwork interviews, I employed an inductive process that combined case study analysis and the identification of recurring patterns or themes. First, I conducted open coding, a process that involves breaking down, examining, comparing, conceptualising, and categorising the data. Through interaction with the data, making comparisons, asking questions about the data and analysing when and why there are differences and the reasons for these differences, I fashioned interconnections and derived concepts. This meant that the theories that emerged arose directly from the data I collected. I triangulated the data through observation, informal discussions with people at the research sites, and a varied based of interviewees, which enabled me to crosscheck the information provided by a single informant. The use of multiple methods and multiple data sources, including drawing on pre-existing literature,

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51 Michael Quinn Patton, above n 49, 470-477.
helped to ensure greater reliability of findings.

Participant observation was a particularly rich method of triangulating, interrogating and better understanding the data collected through interviews. I traveled in person to each case study location, aimed to build rapport with the people I was interviewing or who were involved in relevant aspects of each case study, and spent a prolonged amount of time engaging with those people, or the research sites generally. These methods allowed me to obtain the observational data required to support my fieldwork interviews.52

In addition to interviews and observation, I also critically analysed key texts. Drawing on a range of critical approaches to international law, I examined documents including those produced by the TRC in Liberia and the Constitutional Commission in Afghanistan, political speeches and policy statements of the respective governments, legislation, UN reports, NGO reports and media releases, and newspaper reports.

A number of methodological issues arose during fieldwork that may have influenced the outcomes of my research. One was the difficulty in achieving a gender balance amongst interviewees. The majority of key actors and community leaders were men, reflecting a gendered hierarchy amongst both Liberian and Afghan populations. Although I made an effort to interview equal numbers of men and women, I was unable to achieve this in either case study. A second limitation is that the views of participants reflect their opinions at a particular point in time. When I conducted fieldwork, at least five years had passed since both the Liberian TRC and the Afghan constitution-drafting process concluded. Perspectives on issues as complex as transitional justice, and the way participants view their interactions with transitional justice are not fixed and are

constantly questioned, revised, and reinterpreted by the narrators, as well as the researchers that record them.  

2.6 Conclusion

Through this thesis, I aimed to contribute not only to the gap in scholarly knowledge, but also to the methodological gap. I did this by undertaking a critical, multilayered study of how transitional justice has engaged displaced persons in practice. As far as possible, I employed an empirical methodology, since empirical studies are well placed to explore popular attitudes towards justice and identify sites of resistance, challenge and modification.  

In addition, in order to allow ‘voices from below’ to be heard and heeded, I took a participatory approach, which meant that I focused on the voices of refugees, rather than the normative claims of scholars.

This approach had an impact not only on the methodology of the thesis, but also on the direction of the research, and the way I interpreted the findings. In the Liberian case study, the empirical, refugee-led focus enabled me to identify sites of divergence between conventional understandings of truth, reconciliation and accountability, and those held by refugees. This, in turn, provided a richer understanding of the way in which refugees experienced the work of the Liberian TRC. In the Afghanistan case study, the same approach prompted me to reconsider who, exactly, defines the boundaries of transitional justice. Rather than defining the boundaries of transitional justice according to established normative or legal principles, as is the conventional practice, I focused on the way in

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which refugees themselves defined those boundaries. This led to quite a different conception of the goals, mechanisms, and methods of transitional justice.
CHAPTER 3:
THE LIBERIAN TRUTH AND RECONCILIATION COMMISSION

3.1 Introduction

This chapter introduces the Liberian case study, focusing on the Liberian Truth and Reconciliation Commission. A truth and reconciliation commission (TRC) is a temporary body, usually empowered by the state, to engage directly with the affected population in order to investigate a pattern of past events. TRCs rose to prominence as a practice of transitional justice in the 1980’s, in part as a reaction to the dominance of criminal trials. In contrast to the individualised, combative nature of trials, TRCs use narrative testimony in order to understand the full extent and scale of serious violence that has affected a society. Since that time, they have grown in prominence, and are now considered one of four pillars of successful peacebuilding, essential for achieving reconciliation and lasting peace after violent conflict.

The Liberian TRC was initiated in response to a brutal, fourteen-year civil war that came to an end in 2003. Its proceedings, findings and perceived impact have been subject to mixed assessments by both scholars and the general Liberian population. While some consider the TRC a success, many others are critical. Often, this critique is based on deficiencies faced by many TRCs, such as manipulation by political figures, a weak

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justice system, and insufficient time to carry out investigations. Rather than focusing on these critiques, my aim throughout this case study is to understand how the TRC constructed its ideas of truth, reconciliation and transition, and, equally, how refugees engaged with or contested those constructions.

The chapter begins by sketching the history of the Liberian conflict, and the context within which the Liberian TRC was initiated. I describe the processes and findings of the TRC, and the subsequent reaction of the Liberian public. I then introduce the ideas of truth and reconciliation as constructed, rather than natural, concepts. I argue that the TRC’s mandate, objectives, processes and final report contributed to a particular kind of truth, a certain view of reconciliation, and a specific narrative about the new Liberian state and its people.

3.2 Civil War and Displacement in Liberia

In 1816, a group of wealthy and influential American citizens, connected by their antislavery beliefs, formed the American Colonization Society. Their intention was to find a home for the increasing number of freed black slaves present in the United States, and, in pursuit of this end, in 1822 they established a colony on the west coast of Africa. Using funds they had raised in the United States, they began to resettle to this colony free-born black Americans, freed slaves of African descent, and Africans freed from captured slave ships. People resettled in this way became collectively known as Americo—Liberians, a name that continues until the present day. Although they never constituted more than 5 per cent of the total Liberian population, the Americo-Liberians were

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5 Ibid, para 51.
7 Ibid.
stronger than the indigenous inhabitants politically, economically and militarily. As a result, they were able to acquire land and slowly establish their dominance over the indigenous population. The Americo-Liberians consolidated their power in 1847, when they formally founded Liberia as a nation-state. Over the next hundred years, the Americo-Liberians implemented a political system that denied economic opportunities, political rights and the opportunity for social mobility to indigenous Liberians, and attempted to impose cultural, religious, economic, social and political standards on a diverse collection of indigenous groups.

The first significant challenges to this system began in the 1970s. Throughout the 1970s, a number of progressive Americo-Liberians who had spent time studying in the United States returned to Liberia. They used the University of Liberia as a platform to teach indigenous Liberians about their rights under a democratic system, and worked to mobilise citizens to challenge the Americo-Liberian system of governance. This provided an organised platform for growing social dissent amongst indigenous Liberians. After an Americo-Liberian called William Tolbert assumed the Presidency in 1971, he implemented a number of political reforms intended to improve the situation of indigenous Liberians. They were, however, limited in nature and did not address the fundamental inequalities that existed between indigenous Liberians and their Americo-Liberian compatriots. As social dissent continued to grow, the economy deteriorated significantly. On 14 April 1979, indigenous Liberians gathered *en masse* to demonstrate against a steep rise in the price of the nation’s staple food, rice. Despite the demonstration being peaceful, President Tolbert allegedly instructed the police to shoot at demonstrators, resulting in the deaths of hundreds of indigenous Liberians. Many

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9 Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 99.
Liberians perceive these so-called ‘rice riots’ as the beginning of the civil conflict that would engulf Liberia a decade later.\(^\text{11}\)

Following the 1979 rice riots, tensions between indigenous Liberians and the Americo-Liberians led to a coup in 1980, headed by an indigenous Liberian called Samuel Doe. Doe killed President Tolbert and then assumed the Presidency himself, thus becoming the nation’s first non-Americo-Liberian President. Most indigenous Liberians initially applauded the overthrow of the Tolbert regime, however they were soon disillusioned by the incapability of the new leader and of his military junta to govern the country adequately.\(^\text{12}\) The decade-long reign of President Doe was characterised by repression and violence, and a significant increase in ethnic tensions and ethnic-based violence across the country. Starting with the coup, members of Doe’s ethnic group, the Krahn, came to control most of the leading national political and military state institutions, despite the fact that they constituted a mere 4 per cent of the total population.\(^\text{13}\) Facing significant political opposition from the Gio and Mano ethnic groups, Doe attempted to build a rival alliance with the Mandingo ethnic group by appointing them to political positions and helping them to secure land. As a result, violence between the Krahn and Mandingo on the one hand, and the Gio and Mano on the other, became increasingly frequent throughout the 1980’s.\(^\text{14}\)

It was within this context that the Liberian civil war began. In response to Doe’s repressive and discriminatory regime, a Liberian of mixed Americo-Liberian heritage, Charles Taylor, established a rebel group known as the National Patriotic Front of Liberia.

\(^{11}\) Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 15.


In December 1989, the NPFL invaded Liberia from its base in Côte d'Ivoire, intending to overthrow the regime of President Doe. This incursion marked the opening of a brutal fourteen-year civil war in Liberia. While the war had a distinct ethnic element, it was not simply about ethnic rivalry. Rather, it involved much deeper questions of national identity and distribution of resources, stemming from the very way that Liberia was settled. In a country so rich in natural resources, greed, too, played a prominent role, and as the war continued unabated it came to be characterised by ‘power, money, plunder and revenge.’

This first phase of the conflict ended in 1996. A cessation of hostilities was brokered in September 1995 through the Abuja Peace Accord, but violence continued until a lasting ceasefire finally held in August 1996. The Abuja Peace Accord was signed between Taylor, the Liberian national armed forces and six other warring factions, who agreed to national elections in July 1997. Taylor won the elections, with 75 per cent of the vote. This might seem an anomalous result, given Taylor’s role in the civil war, but many Liberians believed he was the only candidate able to ensure an end to the bloodshed. For the next two years Liberians were able to live without the daily reality of war, although Taylor’s authoritarian and repressive rule was responsible for a range of abuses directly against those perceived to be against him.

In 1999, civil war reignited in Liberia. Liberian refugees living in Guinea, motivated by what they saw as a persistent pattern of ethnic bias, political exclusion, human rights abuses, and corruption under Taylor’s rule, formed a rebel group known as Liberians

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15 Stephen Ellis, above n 8, 72.
United for Reconciliation and Democracy (LURD). The head of LURD, Sekou Damate Conneh, was an ethnic Mandingo, but the membership of LURD itself was more diverse, incorporating Krahn, Mandingo and Gio as well as small numbers of other ethnicities. LURD’s inclusive makeup reflected how widely Liberians had come to oppose Taylor’s rule. In addition, LURD allegedly received support from the governments of Sierra Leone, Guinea and the US, each of whom also had an interest in Taylor’s removal. In April 1999, LURD invaded Liberia from Guinea. Although their primary demand was for the abdication of Taylor from the office of president, their emergence in turn led to a resumed escalation of violence and again destabilised the country.

In 2003, a second rebel group joined the conflict, known as the Movement for Democracy in Liberia (MODEL). MODEL originated in Côte d'Ivoire, drawing many of its members from refugee camps and receiving support from the government of Côte d'Ivoire. Its members were mostly Krahn. Together, LURD and MODEL launched continuous attacks against Taylor’s government, insisting that he relinquish the Presidency. On 18 August 2003, following many failed attempts, the Comprehensive Peace Agreement was signed in Accra, Ghana, between the Government of Liberia, LURD and MODEL. This signaled the end of the 14 year war. By now, the Special Court for Sierra Leone had indicted Taylor for his involvement in the war in Sierra Leone, and he renounced the Presidency and went into exile in Nigeria.

20 Ibid.
22 Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 167.
23 Gerry Cleaver and Simon Massey, above n 16, 183.
The destruction caused by the fourteen-year span of civil war was immense. More than 200,000 people had been killed, mostly civilians, out of a prewar population of 2.5 million. Virtually all of the Liberian population had been forced to flee their homes for some period during the conflict, and at the war’s end, official figures estimated that 1.2 million persons were internally displaced, and 700,000 persons were refugees. The country’s economy and infrastructure were almost entirely destroyed by conflict. As a result of this destruction, many people found themselves unable to return to their pre-war homes and livelihoods. Before the war, about 70 percent of Liberians were rural farmers; however, by 2008, almost a third of the country’s population lived in Monrovia.

Liberian refugees faced significant challenges upon return to Liberia. UNHCR attempted to provide some assistance to the 233,364 Liberians living in neighbouring countries who were officially registered as refugees. However, this was limited to physical assistance to return, and a very basic reintegration package consisting of basic food and house supplies. Once these refugees left the transit centre which was their administrative point of return, they were provided with very little ongoing support. Those who were not registered with UNHCR were not eligible for even this limited assistance. In areas where returning refugees lived, UNHCR consistently reported a lack of basic educational facilities, health care, safe drinking water, sanitation, shelter, roads and employment opportunities. Returning refugees also struggled to access adequate housing, and

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reclaim property.\textsuperscript{30}

The damage caused by civil war has had a lasting impact on the country overall. In 2014, the World Bank estimates that Liberia had a GDP per capita of approximately USD 878, ranking it 181 of the 185 countries in its ranking system.\textsuperscript{31} As a result of poverty and deprivation, Liberia ranks 175 among the 187 countries listed in the 2014 Human Development Report,\textsuperscript{32} and the average life expectancy of a Liberian citizen is just 58 years.\textsuperscript{33}

3.3 The Liberian TRC

The 2003 Comprehensive Peace Agreement created the framework for a two-year transitional government, setting out a broad range of reforms, political commitments, and a demobilisation plan. During the negotiations for the Peace Agreement, all of the warring factions refused to consider the possibility of a war crimes tribunal. However, those same groups feared a backlash from both their domestic and international audiences if they asked for a blanket amnesty.\textsuperscript{34} The compromise agreed to by all factions present was that of a TRC, along the lines of the South African model.\textsuperscript{35} The Liberian TRC was thus established in June 2005, through the Act to Establish the Truth and Reconciliation Commission of Liberia (‘TRC Act’), and given a mandate to investigate violations that took place during the period spanning from January 1979 until October 14, 2003.

\textsuperscript{30} Terra Gearhart-Serna, Stratos Pahis, and Jeffrey Sandberg, above n 28, 21.
\textsuperscript{31} The World Bank, \textit{GDP Per Capita} \textless{} \url{http://data.worldbank.org/indicator/NY.GDP.PCAP.CD} \textgreater{}.
\textsuperscript{33} The World Bank, \textit{Life Expectancy At Birth} \textless{} \url{http://data.worldbank.org/indicator/SP.DYN.LE00.MA.IN} \textgreater{}.
\textsuperscript{34} Priscilla Hayner, ‘Negotiating the Peace in Liberia: Preserving the Possibility for Justice’ (Report, International Centre for Transitional Justice, November 2007) 15-16.
\textsuperscript{35} Ibid, 17.
The TRC commenced its activities in 2008. Its first phase involved the collection of narrative statements from Liberian victims and perpetrators. This process resulted in the collection of 20,560 individual accounts documenting 163,315 violations that took place during the mandated period. The TRC also asked a series of questions about the impact of the conflict, and how Liberia could achieve reconciliation and recover as a nation. The second phase of the TRC’s activities involved public and in-camera hearings, where those who had given narrative statements had the opportunity to voice their experiences. In total, the TRC held more than 800 public and in-camera hearings, receiving testimony from both victims and perpetrators. Throughout these hearings it made a range of efforts to ensure the inclusion of women, children, the elderly, those with disabilities and other vulnerable groups. The TRC published its Final Report on June 30, 2009, taking into account the information gleaned from both narrative statements and public hearings.

3.4 Truth and Reconciliation in the Liberian TRC

Within the field of transitional justice, the idea of justice is generally conceived in two alternative ways: retributive and restorative. Retributive justice constitutes a method for using legal processes as state-sanctioned revenge. It is characterised by criminal trials, and is conventionally focused on the perpetrator. Restorative justice, by contrast, seeks to empower the victim, by focusing on the harm he or she has suffered. It aims to promote the resolution of conflicts through social reconciliation, and, in the field of transitional justice, finds its institutional expression in truth commissions.

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36 Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 185.
37 Ibid, vol 1, 32.
38 Martha Minow, Between Vengeance and Forgiveness (Beacon Press, 1998), 122.
The Liberian TRC, in contrast to most other truth commissions, built its proceedings around a concept of retributive, rather than restorative, justice. The TRC Act mandated the TRC to promote ‘peace, security, unity and reconciliation.’ However, it then required that the TRC pursue these objectives through a retributive framework. The TRC Act mandated the TRC to investigate violations of human rights and international humanitarian law, determine those responsible for such violations, and determine the impact of armed conflict and violations upon victims. Most significantly, the TRC Act stipulated that once it had concluded its activities, the TRC was to make binding recommendations to the President as to which perpetrators should face criminal prosecution. In support of this goal, the Act empowered the TRC with a range of legal powers, including the capacity to compel the production of information relevant to its investigations, to issue a subpoena compelling attendance at its proceedings, and to recommend amnesty for those who disclosed their acts and displayed remorse. This meant that ‘unlike most TRCs that are preoccupied with truth and reconciliation, accountability and justice...were vital to the work of the Liberian TRC.’

The public reaction to the TRC’s retributive approach to justice was mixed. Some members of the Liberian public were enthusiastic about the official accusations of wrongdoing and the naming of names, but many became disillusioned and reproached the TRC when prosecutions did not materialise. Others appreciated the opportunity to tell

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41 Liberia: An Act to Establish the Truth and Reconciliation Commission of Liberia 2005 (Liberia) 10 June 2005, Art IV, s 4
42 Ibid.
43 Ibid, art VII, s 26, ss J.
44 Ibid, art VIII, s 27, ss A.
45 Ibid, art VIII, s 27, ss D.
46 Ibid, art VII, s 26, ss G.
their story of victimhood and receive official acknowledgement from their state, but were dismayed by the lack of remorse shown by perpetrators. These different views on the role of the TRC, and the relationship between reconciliation and accountability meant that, overall, the TRC was considered by many Liberians to be more divisive than reconciliatory.

The mixed public reaction to the TRC demonstrates the contested nature of both ‘truth’ and ‘reconciliation.’ The meaning of reconciliation is very broad, consisting of a process through which a society moves from a divided past to a shared future, primarily by building relationships of trust and cohesion. Exactly what that process looks like, and how such relationships might be rebuilt, is controversial amongst scholars. A prominent question in such debates is whether reconciliation requires forgiveness. In order to avoid the conclusion that reconciliation does require the victim to forgive, some scholars adopt a more modest conception of ‘coexistence’ or ‘social reconstruction.’

Truth commissions are based on the assumption that reconciliation will result from the public documentation of human rights abuses, together with the creation of an ‘agreed-to’ historical record of the past. This was the case also with the Liberian TRC, whose mandate suggested that public dialogue would lead to ‘national peace, security, unity and reconciliation.’ However, the Liberian TRC added an additional element necessary for

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49 Aaron Weah, above n 10, 9.
52 Joanna Quinn, ‘Introduction’ in Joanna Quinn (ed), Reconciliation(s): Transitional Justice in Postconflict Societies (Queen’s University Press, 2009) 1, 5.
53 Daniel Bar-Tal, above n 51, 253-271.
55 Priscilla Hayner, above n 1, 29.
reconciliation: that of criminal retribution. In its Final Report, the TRC asserts that the ends of justice, peace and reconciliation could not be achieved without legal prosecution of those accused of war crimes.\(^57\) In this way, then, the message of reconciliation became intimately tied to a narrative around retribution.

Truth, also, does not mean the same thing to all people. Narratives emerging through truth-telling processes are not universal forms of speaking, nor do they necessarily constitute objective truths; rather, they are ‘particular instances, synopses of experience, told at given times for specific audiences and located in distinct spatial and temporal contexts.’\(^58\) The South African TRC spoke about four different kinds of truth: forensic, narrative, social, and restorative.\(^59\) Forensic truth refers to gathering evidence and facts about human rights violations and missing persons; narrative truth refers to storytelling by victims and perpetrators, and communicating personal truths and multi-layered experiences to a wider public; social or dialogical truth refers to the truth of experience that is established by interaction, discussion and debate; and restorative or healing truth refers to documentation or acknowledgement that gives dignity to victims and survivors.\(^60\)

These different forms of truth are often incompatible.\(^61\) Therefore, if a truth commission encapsulates in its mandate or objectives a number of different kinds of truth, it can face significant methodological problems. For example, if a truth commission is mandated to

\(^{57}\) Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 18, 19.
\(^{59}\) Truth and Reconciliation Commission of South Africa Report (Cape Town: Juta and Company Ltd., 1998), vol 1, ch 5.
promote the healing of victims, then it would be expected to give primacy to the individual stories of survivors, delivered in conditions determined by the needs of those victims, and thus generating a ‘narrative’ form of truth. However, if the truth commission is mandated to achieve accountability of perpetrators, then it owes those who stand accused of crimes a greater measure of due process in order to ensure that the naming of those deemed guilty rests on solid evidentiary ground, and will thus be more likely to generate a form of ‘forensic’ truth.62

As with most truth commissions, the Liberian TRC aimed foremost to generate forensic truth. This perspective was reinforced by the requirement that it provide the Liberian government with a list of perpetrators recommended for criminal prosecution. In this context, the TRC believed that the ‘accuracy’ of the data it collected through narrative statements would be vital to the credibility of the recommendations regarding prosecutions.63 In order to ensure the accuracy of the truth it produced, the TRC contracted a US-based organisation, the ‘Human Rights Data Analysis Group’ (HRDAG), to manage the statement-taking processes.64 The TRC selected the HRDAG due to its claimed ‘scientific approach’ to truth telling: it employs social scientists and statisticians, and specialises in the use of information technology and quantitative methods. Through its technocratic approach to truth-telling, the HRDAG claims to be able to ‘transform information into scientifically-defensible knowledge to create a clear historical record,’65 and, subsequently, create ‘the most accurate truth possible.’66

62 Ibid, 40.
64 Truth and Reconciliation Commission of Liberia, above n 6, vol 1, 31.
The primary way in which the HRDAG generated what it claimed was ‘scientifically-defensible’ truth, was through its use of a data collection model known as the ‘who did what to whom?’ model. As the name suggests, this model is based on ensuring that each narrative statement contains the details of who did what to whom.\textsuperscript{67} The HRDAG worked with the TRC to design its statement form, train statement-takers, take statements and code the resulting data in a way that reflected this methodology.\textsuperscript{68} During each interview, the statement-taker would ask questions in order to obtain a ‘factual account’ of events that took place.\textsuperscript{69} These accounts were recorded onto a standardised statement form, which HRDAG then analysed in order to identify the individual violation, victim and perpetrator, termed ‘countable units.’ The countable units were then coded according to a controlled vocabulary of 23 separate violations. The TRC had identified these 23 violations as reflective of the violence Liberians experienced most commonly during the conflict, and which also fell within its mandate. By coding the narrative statements, HRDAG ensured that every account contained a recognised violation, plus an individual victim and perpetrator. Coded information was then entered into a specialised database,\textsuperscript{70} resulting in a dataset of nearly 180 000 violations and relatively complete data about victims, violations and perpetrators.\textsuperscript{71}

Based on the information collected and coded from narrative statements, the TRC’s Final Report provided the Liberian government with recommendations for prosecutions. In order to do so, it outlined a list of individual violations it determined took place during the mandated period, categorised according to the legal categories of egregious domestic

\textsuperscript{67} Patrick Ball and Herbert Spirer, ‘Introduction’ in Patrick Ball, Herbert Spirer and Louise Spirer (eds), \textit{Making the Case: Investigating Large-scale Human Rights Violations Using Information Systems and Data Analysis} (American Association for the Advancement of Science, 2000) 5.

\textsuperscript{68} Amelia Hoover, \textit{Conflict and Gender: Data Overview} (Benetech Human Rights Data Analysis Group, November 2009) 11.

\textsuperscript{69} Truth and Reconciliation Commission of Liberia, above n 6, vol 1, 31.

\textsuperscript{70} Kristen Cibelli, above n 63.

\textsuperscript{71} Amelia Hoover, above n 68, 11.
crimes, gross violations of human rights, and serious humanitarian law violations.\(^{72}\) It then attributed responsibility for these violations to a list of individuals, including 102 mercenaries from Sierra Leone, Guinea, Gambia, Ghana, Burkina Faso, Côte d'Ivoire, and South Africa.\(^{73}\) Groups of individual perpetrators, corporate perpetrators, and government perpetrators were also attributed with responsibility for a number of violations. While it attributed all warring factions with responsibility for violations of international humanitarian and human rights law, Taylor’s NPFL was identified as the worst violator.\(^{74}\) The TRC Report recommended the establishment of an ‘Extraordinary Criminal Tribunal for Liberia’ and named 116 individuals, including former President Charles Taylor, to face the Tribunal.\(^{75}\) Less punitive actions were recommended against 50 political leaders and others associated with the former warring factions. Under its power to grant amnesty, the TRC relieved 39 persons from prosecution on account of their confessions and expressions of remorse.\(^{76}\)

In addition to criminal prosecutions, the TRC also endorsed the use of the ‘Palava Hut’ system. It recommended 6,000 persons to the Palava Huts hearing process, a traditional justice measure aimed at creating accountability through community engagement.\(^{77}\) It also suggested that if additional persons, outside those it had already named, wished to admit a wrongful act committed during the war and seek pardon from the community, they could approach the Palava Hut mechanism. Its jurisdiction was limited to public sanctions for supporting warring groups, factions and lesser crimes. Through the Palava Hut mechanism, traditional leaders would then adjudicate the matter and come to a

\(^{72}\) Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 54.

\(^{73}\) Ibid, 327-329.

\(^{74}\) Ibid, 336.

\(^{75}\) Ibid, 346-350.

\(^{76}\) Ibid, 350.

\(^{77}\) Ibid, 364.
The TRC’s methodological approach meant it was driven by process, rather than substantive issues of justice. The TRC intentionally prioritised the creation of forensic truth through the use of ‘scientific’ data collection techniques, believing that this would justify its recommendations for prosecution. However, after the release of its Report, the TRC was heavily criticised by both ordinary Liberians and academics for its failure to explain how its processes were linked to its determinations. There is little connection between the evidence set out in the TRC Report and the list of names recommended for prosecution. Some of those recommended for prosecution were not named anywhere else in the Report, making it unclear for which violations they stood accused, and exactly what evidence was levied against them. In addition, there were inconsistencies in the recommendations for punishments. For example, the TRC Report documented in detail the war crimes committed by Senator Prince Johnson, and recommended that he should be prosecuted but not politically excluded. However, for the incumbent President Sirleaf, whose only proven crime was donating USD10 000 to Charles Taylor before his wartime brutality became known, the Report recommended exclusion from political office for 30 years.

The emphasis on process over substantive justice also meant that the TRC was blind to the existence and extent of violations of economic and social rights taking place during the war. The TRC was mandated to investigate all gross human rights violations and international humanitarian law. The scholarly understanding of these categories includes not only violations of civil and political rights such as death or rape, but also violations

78 Ibid, 365.
80 Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 349, 361.
of economic, social and cultural rights.\textsuperscript{81} Under international law, civil and political rights are indivisible from economic, social and cultural rights,\textsuperscript{82} and the High Commissioner for Human Rights has argued that the inclusion of abuses of economic and social rights within post-conflict criminal prosecutions and truth and reconciliation processes is an important element of achieving social justice.\textsuperscript{83} In addition, the TRC’s mandate extended to what it termed ‘economic crimes.’ As such, it was empowered, and arguably even required to discuss violations of economic, social and cultural rights.

Despite its mandate, the TRC’s analysis of past abuses barely touched upon violations of economic, social, and cultural rights. The TRC Report stated briefly that following its investigations, it determined that the root causes of the fourteen-year civil war were poverty, corruption, and inequality. However, in the details that follow, the TRC Report focused almost exclusively on civil and political rights, such as death, rape and property destruction, while sidelining violations relating to economic, social and cultural rights, such as those related to healthcare, poverty or extreme deprivation. On a very few occasions, the TRC did identify an individual perpetrator (usually a company) as responsible for economic crimes in relation to timber, logging and mining. However, it completely avoided the pervasive issue of economic inequality and social discrimination, despite its direct links to the cause of the conflict, and the prevalence of these issues in the lives of ordinary Liberians. This created a significant gap between the TRC’s findings on the causes of the conflict, and its legal analysis of abuses committed.\textsuperscript{84}


The TRC’s reliance on the individualised, ‘who did what to whom’ methodology contributed in large part to the invisibility of violations of economic and social rights. In order to be recorded, and thus included in the findings of the TRC Report, each narrative statement had to identify a recognised violation, as well as an individual victim and perpetrator. Violations that did not have an easily identifiable perpetrator – such as lack of access to livelihoods, or an inability to achieve an education – could not be recorded, and were thus sidelined in the reporting. The lack of an identifiable person to be held accountable for violations of economic and social rights is a recognised challenge within transitional justice processes, making these types of injustices unsuitable for criminal prosecution, and, even in truth seeking processes, difficult to account for.85 While the TRC could arguably have moved away from the strict data collection model set up by the HRDAG, it prioritised a consistent process over engaging in substantive issues of justice, and thus undermined its ability to address the violation of economic and social rights.

A second implication of the TRC’s focus on process over substantive justice concerns was that it limited the identity of those giving testimony to one of two options: victim, or perpetrator. A key element in the TRC’s construction of truth was its creation of victim and perpetrator as distinct, and opposed, identities. This began with the TRC Act, which specified that the TRC was to provide the opportunity for ‘victims and perpetrators’ of human rights violation to have their voices heard and to present testimony to the TRC.86 This was also a requirement of the ‘who did what to whom’ methodology, which required each violation to be associated with a distinct victim and perpetrator. The Final Report reflected this dichotomy, reporting that 94 per cent of those who contributed to the TRC

were victims, versus the other 6 per cent who were perpetrators. The TRC Report made one exception: that of child soldiers, whom it describes as ‘perpetrators and mainly victims,’ and notes that it has become common practice of international criminal tribunals to exclude children under the age of 18 from prosecution for grave human rights violations.

Recognising only victims and perpetrators undermines substantive justice outcomes by excluding those who do not fit clearly within either category. In practice, the distinction between victim and perpetrator is often unclear, and individuals can share elements of both. Moreover, recognising only two categories of identity excludes those persons who were beneficiaries of the system or mere bystanders, for instance, despite the fact that they often constitute a vast part of the population. This oversight has the potential to undermine the aims of a truth commission, since the inclusion of people who do not fit precisely into the category of victim or perpetrator is vital for the regeneration of an inclusive civic national identity and thriving political community. By excluding bystanders, beneficiaries and populations that were structurally and indirectly, rather than directly, affected by war, truth commissions often fail to provide a sufficient bridge from the divided past of ‘perpetrators versus victims,’ to a united future of all survivors of conflict, regardless of their past role.

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87 Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 202.
88 Ibid, vii and Annex II.
91 Ibid, 521.
3.5 The Narrative of Transition

Any attempt to deal with the past presents a number of challenges to countries recovering from conflict. New governments are often concerned with turning previously bitterly and brutally divided polities into spaces of unity and democratic stability.\textsuperscript{92} This requires grappling not only with questions concerning accountability and reconciliation, but also those pertaining to the way in which a nation should remember its past. This is a problem of history writing: how to create the ‘imagined community’ of the new democratic nation on the strength of an account of the past to which previously warring groupings – with disparate, even incommensurate, versions of events – would now consent.\textsuperscript{93} Despite the difficulties, creating an imagined community is essential to a country’s ability to recover from conflict, since a nation’s unity depends on a shared identity, which in turn depends largely on a shared memory.\textsuperscript{94}

Since there is no one ‘theatre of memory’ which all members of a national polity inhabit, the process of arriving at a national narrative, or shared memory, is very much one of construction.\textsuperscript{95} Modern societies need a wide range of different institutions that store and construct collective memories, and, in the modern context, legal institutions replace rituals and traditions, institutionalised archives and bureaucracies provide a way of storing memories, and museums and memorials celebrate the past.\textsuperscript{96} Within this process of memory construction, transitional justice, and truth commissions in particular, often play a key role. A central task of a truth commission is to write the history of a period of

\textsuperscript{93} Ibid.
\textsuperscript{95} Jay Winter, Remembering War: The Great War Between Memory and History in the Twentieth Century (Yale University Press, 2006) 185.
In contrast to popular memories of violence and conflict, which are multiple, fluid, indeterminate and fragmentary, truth commissions play a vital role in fixing memory and institutionalising a view of the past conflict. This process of construction is not simply an exercise in recounting facts, but also involves developing an underlying ethical narrative of wrongdoing, linked to an imperative to prevent such wrongdoing from happening again.

A truth commission may contribute to the creation of a new, redeemed national identity by symbolising a moment of transition. A transition entails a process of ‘unmaking, or dismantling’ the past, while simultaneously ‘remaking and rebuilding’ the future. Truth commissions are particularly adept at symbolising this process of transition – both the unmaking of the past, and the remaking of the future – since their time-bound mandate splits history into separated periods: what happened before, and what came after, the period of transition. This creates an impression of the transitional period as a ‘rupture,’ separating the wrongful past from the reformed present, and thus allowing a nation to transform its identity. By explicitly condemning past behaviours and by publicly addressing the systematic violence conducted by the old regime, the new government can demonstrate its efforts to guarantee that similar events do not recur in the future, and thus restore the faith of the society in the state.

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99 Deborah Posel, above n 92.
100 Priscilla Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (Routledge, 2001) 24.
One critique scholars make of the idea of transition constituting a ‘break’ with the past is that it often hides the way that violence and exclusion continue into the present. Violence against women, for example, is a continuing issue in many ‘post-conflict’ societies, which may be a product, in part, of the sense of dislocation, powerlessness and unemployment experienced by male combatants when they return home.° 104 However, since truth commissions only describe instances of violence associated with the period of historical conflict, the ongoing experience of violence against women is concealed. In the transitional narrative of a truth commission, past and present are no longer relatable, since, as Robert Meister puts it, ‘the cost of achieving a moral consensus that the past was evil, is to reach a political consensus that the evil is past.’° 105

An important function of the Liberian TRC was to create a national narrative concerning the past, as well as the country’s transition to a peaceful future. By the end of its 14-year civil war, the country lacked a strong national identity, and held few symbols of unity that could appeal to all citizens or unite the strong divide between ethnic and class-based subgroups.° 106 Within this context, the TRC was established and bestowed with a mandate to foster truth, justice and reconciliation amongst the divided and traumatised population. It was mandated to look both backwards, in order to understand how Liberia descended into conflict, and forwards, in order to make recommendations that could ensure the country averted a repetition of the past.° 107 The TRC hoped to both trigger and support a transition within Liberia by providing a mechanism through which the country could

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107 Truth and Reconciliation Commission of Liberia, above n 6, vol 2, xxiii.
confront its ‘bitter past,’ learn from its past mistakes, and move towards peace, reconciliation and the rebuilding of the Liberian state.\textsuperscript{108}

The TRC was instructed to carry out its mandate in two specific ways. Firstly, it was to identify the root causes of the conflict.\textsuperscript{109} The TRC was directed to examine events taking place in ‘the recent, difficult chapter in our national history,’ which was specified to span from the rice riots of January 1979, until the official end of hostilities in October 2003.\textsuperscript{110} In addition to this 34-year period, the TRC was also instructed to conduct a critical review of Liberia’s ‘historical past,’ in order to acknowledge and understand the historical antecedents to the conflict, and correct historical falsehoods associated with the disunity of Liberia.\textsuperscript{111}

The TRC determined that at the root of the war was Liberia’s ‘as yet unresolved historical problem of political identity and legitimacy,’ brought about by the political decision of the early Americo-Liberian leadership to build a separatist state that discriminated against indigenous Liberians.\textsuperscript{112} An array of factors stemmed from this history and contributed to the civil war, including poverty, limited access to education, economic, social, civil and political inequalities, identity conflict, land tenure and distribution, and the lack of reliable and appropriate mechanisms for the settlement of disputes.\textsuperscript{113} Having established the root causes of the conflict, the TRC proceeded to paint a highly detailed, factual picture of abuse and inequality that began with the arrival of the American Colonization Society in 1822, and culminated in the fourteen-year civil war. In this way, it created a

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\textsuperscript{108} Ibid, Acknowledgements, xxi, 208.
\textsuperscript{109} Liberia: An Act to Establish the Truth and Reconciliation Commission of Liberia 2005 (Liberia) 10 June 2005, art IV, s 4.
\textsuperscript{110} Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 420.
\textsuperscript{111} Ibid, 13.
\textsuperscript{112} Ibid, 300.
\textsuperscript{113} Ibid, 361.
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clear narrative linking the past to the recent conflict, and identified a range of discriminatory practices that would have to change in order for Liberia to transition into a more peaceful future.

However, while the TRC described past abuses in detail, it made no mention of ongoing violations or discrimination taking place in Liberia. In fact, it commended the ‘peace-building aspirations of the (present) government,’ and phrased the recommendations it made towards the new government in very general terms, or in a way that indicated some level of reform was already taking place. For instance, the TRC recommended that the government strengthen the judiciary and expedite reforms ‘already underway’ to promote a culture of respect for human rights. Similarly, the TRC referred to the ‘poor governance and maladministration’ of past governments, naming numerous successive governments in power both during and prior to the civil war. There was no mention on ongoing maladministration, even though at the time the TRC published its Report, corruption remained pervasive through all levels of government and prevented ordinary Liberians from achieving an adequate standard of living. By only referencing the unethical administration of past governments, the TRC created a narrative that inferred the present government was exempt from those same criticisms, thus suggesting a transition had, in fact, taken place.

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114 Ibid, 90.
116 Ibid, 323.
The second way the TRC was required to carry out its mandate was to determine those who were responsible for committing domestic and international crimes against the Liberian people.\footnote{Liberia: An Act to Establish the Truth and Reconciliation Commission of Liberia 2005 (Liberia) 10 June 2005, art IV, s 4.} In 2006, when President Ellen Johnson-Sirleaf inaugurated the TRC, she asserted that:

Our country cannot continue to evade justice and the protection of human rights … Our government will ensure that those culpable of the commission of crimes against humanity will face up to their crimes no matter when, where, or how.\footnote{Truth and Reconciliation Commission of Liberia, Consolidated Final Report (2009) vol 2, 1.}

In the same way that the TRC suggested reconciliation was only possible with the prosecution of war criminal, then, it also built a conception of transition around the idea of ‘settling accounts.’\footnote{Andrew Schaap, Political Reconciliation (Routledge, 2005) 18.}

The TRC took a retributive approach to transition not only in the way the it looked backward to condemn past violations, but also in the way it looked forward and envisaged a transformed Liberia. In order to further strengthen ‘national integration and unity with a view to establishing a common identity,’ the TRC recommended that the Liberian government enact legislation to outlaw all symbols and cleavages of disunity and segregation, and to make it an offense to request the ethnic identity of any individual ‘in a derisive manner.’ The end result, the TRC declared, was that in the new Liberia, the ethnicity or tribal affiliation of each Liberian citizen would be ‘protected by law.’\footnote{Truth and Reconciliation Commission of Liberia, above n 6, vol 2, 401.}
3.6 Conclusion

The practices of the Liberian TRC demonstrate how it constructed its ideas of truth, reconciliation, and national transition. The existing scholarship on the Liberian TRC obscures this process of construction by focusing on the technical aspects of the TRC, such as the legal standards that informed the TRC’s methodology for data collection, or the number and type of violations the TRC recorded. This approach overlooks how the TRC’s methodology was informed by, or contributed towards, a particular understanding of truth, reconciliation and transition. In fact, the TRC’s methodological choices had a direct impact upon the type of truth it generated, and on the way it understood reconciliation. The TRC took a forensic approach to truth, which meant that it equated truth with the provision of objective facts, rather than entailing social dialogue or unstructured personal stories. It also framed reconciliation in terms of retribution, which meant that it pursued justice through legal prosecution, rather than dialogue or forgetting.\(^{122}\)

If truth, reconciliation and transition are constructed concepts, then it is possible – likely, even – that more than one construction exists. In the existing scholarship, the focus on the technical elements of the TRC’s proceedings means that scholars do not consider the possibility that Liberian nationals might contest the TRC’s equation of truth with objective facts, or of reconciliation with retribution. There is a failure to ask how, and for whom, the TRC generated what kind of truth, and what kind of reconciliation. The need to engage in this deeper reflection is supported by scholars like Catherine Cole, who suggests that in relation to the South African TRC, it is in the disjunctions between how

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\(^{122}\) Ibid, 18, 19.
participants wished to perform their truth, versus the public iteration of truth the TRC itself performed, that we can perceive the complexity of knowledge the TRC brought into being.\textsuperscript{123}

The following two chapters address this issue in the Liberian context. They examine the ways in which refugees engaged with the TRC’s constructions of truth, reconciliation and transition, how they contested those ideas, and what the TRC’s constructions meant for their own perceptions of justice.

CHAPTER 4: ENGAGING REFUGEES IN THE LIBERIAN TRC

4.1 Introduction

The Liberian TRC asserted that its proceedings generated a national perspective concerning both the conflict and the aspirations of the Liberian people for a better future.\(^1\) This claim was based in part on its inclusion of a diverse range of Liberian nationals in its proceedings. Two groups to benefit from this inclusive approach were Liberian refugees resident in West Africa, and the Liberian diaspora resident in the United States (US). The TRC used their inclusion to acknowledge displacement as a violation of human rights and investigate the lived experience of displacement, which constituted a unique contribution to the practice of truth commissions. At the very least, by extending the activities of the TRC to refugees, the Liberian government indicated that external displacement does not preclude political involvement in domestic matters. At best, by including refugees in the national reconciliation process, the Liberian government recognised that displaced Liberian constituted a valued part of the Liberian nation, and made efforts to understand their perspectives on the past conflict and the future rebuilding of the nation.\(^2\)

The TRC suggested that it had managed to unite the varied experiences and perspectives of individual Liberians under a collective memory, and common vision forward. The problem with this idea, and the idea of collective memory generally, is that it implies a

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consensus.\footnote{Iwona Irwin Zarecka, \textit{Frames of Remembrance: The Dynamics of Collective Memory} (Transaction Publishers, 1994) 67.} However, memory, both individual and collective, is a contested terrain, and claims about the past are very often met with counter-claims.\footnote{David Thelen, ‘Memory and American History’ (1989) 75(4) \textit{The Journal of American History} 1117, 1127.} As the previous chapter demonstrates, ideas of truth, reconciliation and transition are constructed concepts, and are open to alternate conceptions. This chapter seeks to understand how refugees both contributed towards, and contested, the TRC’s concepts of truth, reconciliation and transition. Then, by understanding the spaces of convergence and divergence, we can understand the relationship between Liberian refugees and the collective memory and common vision the TRC claimed to have created.

The chapter begins by describing the basis for refugee involvement in the Liberian TRC, and how the TRC structured its engagement with displaced persons. I examine the terms on which refugees were able to give testimony, and how they contested these terms, as well as the TRC’s interpretation of truth and reconciliation. I then examine how refugee testimony was used to contribute to the TRC’s narrative concerning transition, and how refugees challenged this narrative.

4.2 Engaging Displaced Liberians

The Liberian TRC’s engagement with displaced Liberians began not with refugees, but with the US-based diaspora. Liberia’s history is deeply intertwined with that of the US, beginning most visibly with the establishment of the American Colonization Society in 1822. It was this intervention, and the resulting subjugation of the indigenous Liberian population to the minority Americo-Liberians, that provided the foundation for the civil
war some 170 years later. The colonial relationship between the US and Liberia also created and sustained a large diaspora population of Liberians resident in the US. Since the military coup of 1980 and the outbreak of civil war in 1989, the US had hosted over 100,000 Liberian nationals, including most of the country’s educated elite and former political officials.

There is a widely held belief amongst Liberians that the US-based diaspora was responsible for the civil war, due to their active transnational influence. In order to address this, the TRC established a Diaspora Committee and gave it a mandate to take evidence from Liberians resident abroad. It appointed Commissioner Massa Washington, a Liberian national who had fled the conflict and was residing in the US, as the Committee’s chair. According to Commissioner Washington, the reason that the TRC was vitally concerned with US-based Liberians was that:

Elements in the US diaspora put Taylor’s invasion together. And once the war began, the same diaspora kept it going with funding for ammunition and food … This involvement remained right up to the end. When the peace talks convened in Accra, and news of Charles Taylor’s indictment reached the US, many people rushed to airports … to get on a flight to Ghana. They wanted to arrive in time to get cabinet posts. In the light of this history…a truth commission that did not go to America would have been a joke.

In order to manage the practical aspects of its engagement with the US diaspora, the TRC partnered with an American organisation known as The Advocates for Human Rights (The Advocates.) The Advocates is a non-profit, volunteer-based legal organisation,
whose work includes representing immigrants and refugees resident in the US, training groups that protect human rights, and conducting human rights education for the public, policy-makers, and children. The TRC chose The Advocates as a partner due to its close ties with the US-based Liberian population. At the time of its partnership with the TRC, The Advocates had provided legal assistance to hundreds of Liberians resident in the US, and trained dozens of volunteer attorneys to handle Liberian asylum cases.⁹ Importantly, The Advocates was also able to draw upon its existing donor base of philanthropic foundations and private donors in order to fund its activities, since the TRC had no available resources.¹⁰

In the beginning, the TRC took the position that refugees who wished to take part in the TRC should return home to Liberia, and it distributed materials to this effect within refugee communities.¹¹ It was The Advocates, and not the TRC, that pushed for the TRC’s activities to be extended to the refugee population resident in West Africa. The Advocates asserted that engaging Liberian refugees living in West Africa was essential for obtaining an accurate picture of the conflict and its effects, as well as in order to ensure justice for victims.¹² The TRC concurred, and agreed to extend its activities to the refugee population.¹³ In subsequent media statements, the TRC explained that refugee participation was essential since at least 25 per cent of the Liberian population was forced to flee the country during the civil war, making displacement one of the most widely experienced violations of that period.¹⁴

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¹⁰ Ibid, 37.
¹² Johnny Steinberg, above n 8, 35.
¹³ The Advocates for Human Rights, above n 9, 35.
The TRC chose Buduburam refugee settlement as the site for its refugee engagement. Buduburam refugee settlement is located approximately 35km from Accra, Ghana’s capital. The Ghanaian government provided the space at the start of Liberia’s war in early 1990, anticipating that it would accommodate 5,000 refugees. However, the prolonged nature of the conflict, combined with the instability in nearby asylum countries Côte d’Ivoire and Sierra Leone, caused a rapid expansion of the refugee population, and at the height of its population, in 2003, UNHCR estimated that the settlement accommodated some 42,000 Liberian refugees. Recent population figures are more difficult to verify, since there is no regular census and only irregular monitoring by UNHCR or other actors. According to UNHCR, in 2009 Buduburam settlement hosted some 14,000 refugees registered with UNHCR, plus some thousands of unregistered refugees. Population estimates from refugee community leaders covering the same period are considerably higher, at approximately 30,000 refugees total, including those both registered and unregistered with UNHCR. By the time the TRC arrived to gather testimony, most refugees had been living in Buduburam for at least ten years, and many had been there since the start of the conflict in 1990.

During fieldwork discussions, refugees often referred to Buduburam settlement as a ‘mini Liberia,’ since virtually all of the 16 indigenous tribes, as well as those of Americo-Liberian descent, are present in Buduburam settlement. In a number of respects, refugees and non-refugees share similar experiences as deprivation and experiences of trauma are common across all Liberians. One returned refugee pointed out in an interview with me: ‘People here in Liberia also live like refugees: there’s no security, no jobs, people’s minds

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15 Colloquially, the settlement is referred to as a camp, and this terminology appears throughout my interviews. However, in the body of the text, I retain the official name of the settlement.
17 The Advocates for Human Rights, above n 9, 327.
are not straight, they are also struggling.” However, the specific social context of Buduburam refugee settlement, the impact of protracted displacement, and the ongoing physical and political estrangement from their home government had a number of distinct effects on refugee engagement with the TRC, as well as on the way in which the Liberian government engaged with the refugee population.

Notwithstanding these similarities between Buduburam settlement and Liberia, there were also a number of significant differences. The residential layout of the settlement is extremely dense, and there are only very limited shared social spaces. Numerous interviewees explained that having all tribes living together, in cramped conditions, with many people suffering psychological stress, resulted in unavoidable and volatile ethnic tensions. The cramped conditions and inability to find (or afford) alternative accommodation also meant that people could not avoid running into other residents, and often had to live alongside others who had harmed them or their family during the war. In the view of refugees, this situation was markedly different from Liberia, where ‘at least you could choose where to live, you could move, you could live in Monrovia and avoid people you didn’t want to see.”

Before traveling to Buduburam refugee settlement, The Advocates spent several months training statement-takers. Trainers were drawn from a wide range of disciplines, including The Advocates staff, psychologists, Liberian professionals and community leaders, academics, and even the TRC Commissioners who made periodic visits to the US. Training was structured around a legal framework. Of the six hundred volunteers

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18 Interview with Richardson, Liberian returned refugee (Monrovia, 14 May 2013).
19 Interview with Morris, returned Liberian refugee (Monrovia, 13 May 2013); Interview with Richardson, Liberian returned refugee (Monrovia, 14 May 2013).
20 Interview with Morris, returned Liberian refugee (Monrovia, 13 May 2013).
21 The Advocates for Human Rights, above n 9, 42.
The Advocates identified and trained, almost all were American lawyers. Each statement-taker completed a training program that focused on the legal framework supporting the TRC, including the TRC’s mandate, international human rights and humanitarian law, and the statement taking protocols and policies. 22 Non-legal topics covered included psychology, dealing with traumatised people, and interviewing techniques.

Refugee participation in the TRC was unexpectedly high. On the first day of statement taking, thousands of refugees lined up to give testimony, exceeding all predictions and overwhelming the capacity of staff from the TRC and The Advocates to receive them. To meet the demand, The Advocates trained ten refugee statement-takers, who then worked alongside TRC staff and The Advocates to take statements.23 In total, 1377 refugees in Buduburam settlement gave statements to the TRC. This figure is particular large when compared to the number of Liberians resident in the US who agreed to give statements to the TRC. Although the population of Liberians resident in the US is higher than the number resident in Buduburam settlement, only 237 Liberians across the US agreed to participate in the TRC.24

Statement-giving mirrored the domestic process, with small amendments made for the refugee context. One such amendment was that prior to receiving testimony, The Advocates used a detailed disclosure form to advise the statement-giver of the risks they faced by testifying. This was particularly important for perpetrators, since the immunity provisions established by the TRC Act did not apply outside of Liberia. Perpetrators who confessed to crimes could potentially face negative immigration consequences, since most visa conditions excluded those who had committed crimes. The Advocates offered

22 Ibid.
23 Ibid, 38.
to refer each statement-giver to a pro bono immigration or criminal law lawyer prior to giving a statement if they wished to obtain legal advice about testifying. Testifiers were also offered the option of giving an anonymous statement, and could opt to testify in camera before the TRC Commissioners.

The statement-giving process also mirrored the TRC’s domestic process. According to practitioners from The Advocates, the refugee directed the interview process according to whatever information they felt it was important for the TRC to know, although interviewers had a guide for questions and had received extensive training on how to conduct an interview.25 During this process, refugees were directly asked about their experience of displacement.26 Most refugees met individually with a statement-taker, although The Advocates also held interviews with groups who wished to provide specific information to the TRC, such as a group representing disabled refugees, and an organisation of former child soldiers.27

Originally, the TRC planned to hold public hearings in the settlement. According to the TRC Report, the TRC cancelled the hearings due to confrontations between Liberian refugees and the Ghanaian authorities.28 However, a TRC official offered an alternate account, explaining that the TRC was worried that it would not be able to provide adequate security for its staff, or for refugees who wished to testify:

The TRC didn’t hold public hearings in the camp because of security concerns. The difference between Liberia and Ghana is that in Liberia, people would publicly name the perpetrator, and then if something happened to [the person who

25 Laura Young and Jennifer Prestholdt, above n 2, 122.
26 The Advocates for Human Rights, above n 9, 42.
27 Laura Young and Jennifer Prestholdt, above n 2, 123.
had testified], everyone would suspect the perpetrator [as the person who committed the harm]. And then, because the National Police and Army are here in Liberia, action would be taken. There was still risk [in testifying] in Liberia, but at least it was safer than in the camp. In the camp, there was no security. The Liberian government was concerned with its own security and also they couldn’t protect anyone in the camp. There was also a lack of funding. So they opted out of public hearings in the camp.29

In lieu of full-scale public hearings, the TRC invited two refugees from Buduburam settlement to testify in Liberia, symbolically representing the West African refugee community.30

The lack of public hearings meant that for most refugees the only way they interacted with the TRC was through providing a narrative statement. It is worth noting that this is likely to have had an impact upon the way in which refugees experienced the TRC, and understood its objectives and outcomes, since the public hearings and statement-taking were designed to value a different kind of ‘truth.’ Parallels can be drawn with the case of South Africa, where scholars describe the disparity between the quantitative social science methodologies that predominated in the statement-taking process, and the qualitative methods that were operated in the public hearings.31 In its statement-taking, the South African TRC’s notion of factual/forensic truth demanded a positivist approach, one that sought to combat a past record of lies and half-truths with ‘hard,’ authenticated, accurate and comprehensive data, or ‘cold facts.’ By contrast, it treated the personal/narrative truth emerging through public hearings as innately expressive of complex emotions, multiple layers of experience, and a way of conveying the dignity of

[29] Interview with TRC official, (Monrovia, 27 March 2013).
the individual giving testimony.\textsuperscript{32} Had Liberian refugees been given the opportunity to engage in public hearings, they might have held different perspectives concerning the type of truth, and reconciliation, the TRC generated.

4.3 Contesting Truth and Reconciliation

The Liberian TRC aimed to generate a ‘national perspective’ reflective of ‘the people of Liberia.’\textsuperscript{33} This claim encompassed displaced Liberians, including the refugee population in West Africa, who were invited to participate in the TRC on the same basis as other Liberians. In the words of TRC Chairman, Counselor Jerome Verdier, the TRC wanted ‘to hear from Liberians in the diaspora as a way of affording all Liberians the opportunity to be heard, to be listened to, to be acknowledged, and to be validated.’\textsuperscript{34} This section considers this assertion from the perspective of Liberian refugees living in Buduburam settlement, Ghana. In particular, it examines how refugees both embraced and contested the TRC’s construction of both truth, and reconciliation, and the way that those constructions and conflicts affected their engagement with the TRC’s formal proceedings.

The Advocates asserted that the TRC gave refugees the opportunity to relay to the Liberian government ‘whatever information they felt was important.’\textsuperscript{35} In practice, however, the type of testimony refugees were able to give was constrained by the procedural requirements the TRC put in place concerning the type of testimony it was willing to receive. The TRC’s mandate specified that only violations occurring between 1989 and 2003 could be the subject of its proceedings; nothing taking place after the official end of hostilities would be considered. In addition, the TRC set a controlled

\textsuperscript{32} Ibid, 164.
\textsuperscript{33} Truth and Reconciliation Commission of Liberia, above n 1, vol 2, xxi.
\textsuperscript{34} Patricia Minikon and Susan Shepler, above n 2, 147.
\textsuperscript{35} Laura Young and Jennifer Prestholdt, above n 2, 130.
vocabulary of 23 human rights violations regarding which it would take testimony.\textsuperscript{36} Violations falling outside these 23 categories could not be recorded, and thus could not contribute towards the TRC’s findings. Furthermore, each statement was required to identify an individual victim and an individual perpetrator.\textsuperscript{37} Overall, this meant that in order to be recognised by the TRC, a refugee had to describe their experience from an individualised perspective, in terms of a recognised violation of their human rights, committed by a perpetrator, taking place before 2003. These terms were encapsulated by the ‘who did what to whom’ methodology that structured the TRC’s data collection.

The ‘who did what to whom’ methodology had two distinct repercussions for refugee participants: firstly, it affected who was willing to testify, and secondly, it affected the type of testimony refugees provided. The first way it did so was by setting the individual as the basic unit of testimony. Only an individual could give testimony, which testimony had to concern their own personal experiences. This was problematic for many refugees, who were reluctant to talk about what happened to them personally.\textsuperscript{38} For some, this was because they believed that doing so would result in their being re-traumatised.\textsuperscript{39} For others, it was because they didn’t want to publically broadcast their experience of the war.\textsuperscript{40} For many who held these convictions, the problem was not in recalling atrocities \textit{per se}, but rather in the extent and type of detail that the TRC demanded they give.\textsuperscript{41} This reduced the willingness of some people to testify. In the words of one interviewee:

\begin{itemize}
\item \textsuperscript{36} Kristen Cibelli, Jule Kruger and Amelia Hoover, \textit{Descriptive Statistics from Statements to the Liberian Truth and Reconciliation Commission} (Report, Human Rights Data Analysis Group, June 2009) 24.
\item \textsuperscript{37} Truth and Reconciliation Commission of Liberia, above n 1, vol 2, 87.
\item \textsuperscript{38} Interview with Isaac, Liberian returned refugee (Monrovia, 15 May 2013). See also: Interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 May 2013); Interview with Peter Doe, Liberian returned refugee (Monrovia, 26 April 2013).
\item \textsuperscript{39} Interview with Kaba, Liberian returned refugee (Monrovia, 13 May 2013); Interview with Isaac, Liberian returned refugee (Monrovia, 15 May 2013).
\item \textsuperscript{40} Interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
\item \textsuperscript{41} Interview with Joe Myers, Liberian refugee (Buduburam refugee settlement, 10 June 2013).
\end{itemize}
Some [TRC] questions were very direct, very harsh, and I didn’t want to answer them. They would ask you ‘Did you know Mr X did so and so?’ Most of the questions were closed, they weren’t flexible. It’s better to ask: ‘How was it?’ because then the person can be flexible and tell the whole story.42

The focus on the individual also constrained the type of information that statement-givers were able to provide. Refugees were not able to speak about experiences in the abstract, but had to relate everything back to their own individual experience. As one interviewee explained:

At the TRC, people were only allowed to answer strict questions about what happened directly to them. But this is a problem. If you ask the big question: ‘What happened, during the war?’ then it gives a totally different answer to asking someone ‘What happened to you during the war?’ The first one lets you describe what you saw, what you heard, what the general situation was. But instead, the TRC wanted to do a very narrow thing, it wanted your testimony only in order to indict someone, not to understand what had happened.43

Refugees criticised not only the requirement that they speak from an individualised perspective, but also the requirement that they relate their testimony to an individual perpetrator. Some linked their unwillingness to identify a perpetrator to the particular context of living in a refugee camp. A number of refugees felt that naming perpetrators living in the community would have the effect of expelling them from the community, something that was both practically unfeasible and ethically unwarranted. As one interviewee noted:

We have a saying in Liberia, ‘There’s no bad bush for a bad child.’ This means that you cannot cast a child into the bush and abandon them there when they do

42 Interview with Peter Doe, Liberian returned refugee (Monrovia, 26 April 2013).
43 Interview with Madison, Liberian returned refugees (Monrovia, 11 April 2013).
something bad. It’s the same for adults or children, it’s the same for all people, you have to keep them around, you cannot banish them away.44

Others argued that to accuse someone of a crime while living in such close proximity amounted to a serious security risk. With people living so closely to each other, and no option to move elsewhere, it was impossible to avoid running into other residents. As a result, testifying against perpetrators who were living in the settlement raised significant security issues. Refugees were often afraid that the people against whom they had testified would find out, and seek revenge.45 This fear was compounded by the lack, or perceived lack, of protection from the Ghanaian authorities.46 Refugees were also worried to testify about perpetrators living in Liberia, as they were afraid that the accused would find out and take revenge against them.47

Other refugees did not want to allude to a perpetrator at all, even if that perpetrator remained without a specific identity. One reason for this was that in the view of some refugees, the war was ‘chaos, nobody knew what they were doing,’ and in such a context it would be meaningless to assign responsibility to anybody at all.48 The difficulty in enacting this approach when giving testimony was that the TRC statement-taking was structured in such a way that it was impossible to speak of a violation without inferring the existence of a perpetrator. This is a feature of the criminal law tradition generally: when victims speak in the voice of the victim, they must speak as if there were an agent responsible for their loss.49 One cannot conceive of the victim of an atrocity or injustice without being able first to image, and then to project onto another, the intention of

44 Interview with Isaac, Liberian returned refugee (Monrovia, 15 May 2013).
45 Interview with Richardson, Liberian returned refugee (Monrovia, 14 May 2013); Interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
46 Interview with David, Liberian returned refugee (Monrovia, 3 May 2013).
47 Interview with Peter Doe, Liberian returned refugee (Monrovia, 26 April 2013).
48 Interview with Ebenezer, Liberian refugee (Buduburam refugee settlement, 1 June 2013).
committing the harmful act. A number of refugees lamented that they while they wished to talk about the harm they suffered, the legal, human rights approach of the TRC meant that there was no possibility to reflect upon past harm in an abstract, unembodied way.\textsuperscript{50}

It was not only refugee victims who critiqued the individualised approach of the TRC, but also refugees who fell into the category of perpetrator. Like victims, perpetrators also had to speak about violations they had personally committed. They were required to provide the information necessary for a criminal trial: the details of what, who, where, when the crime occurred – but not their motivations. In this way, as with other truth commissions, the Liberian TRC shied away from ‘making sense of’ those who commit atrocities, and ‘the social conditions eliciting such conduct from them,’ choosing to focus instead on the gathering of factual evidence.\textsuperscript{51} This functioned to ‘demonis[e] the demonisers,’ and shut down the possibility for dialogue.\textsuperscript{52} As one refugee explained:

Knowing the history and making reconciliation are completely different aims and you can’t do both at the same time. People should explain why they were in the war, rather than exactly what they did. We are more interested in the root cause. People can say they killed, but there’s no need to say how they did it. That’s not a good strategy for peacebuilding.\textsuperscript{53}

Structuring the statement-giving process around an individualised, fact-based account led to a strong perception amongst refugees that the point of the TRC’s activities, and the act

\textsuperscript{50} Interview with Mr Suah, Liberian refugee (Buduburam refugee settlement, 12 June 2013); Interview with Rita, Liberian returned refugee (Gbarnga, 29 June 2013) Interview with Pastor Zulu, Liberian returned refugee (Ganta, 27 June 2013); Interview with Rancy, Liberian refugee (Buduburam refugee settlement, 7 June 2013); Interview with Isaac, Liberian returned refugee (Monrovia, 15 May 2013); Interview with Peter Doe, Liberian returned refugee (Monrovia, 26 April 2013).


\textsuperscript{52} Robert Meister, above n 49, 103.

\textsuperscript{53} Interview with Rancy, Liberian refugee (Buduburam refugee settlement, 7 June 2013). See also interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
of providing a statement, was to ‘make perpetrators pay for what they did.’

This perception was compounded when, on numerous instances, TRC officials would arrive with photos of a specific perpetrator, or information about a large-scale violation. The statement-taker would then seek out people from the area where the alleged violation(s) had taken place, and ask the statement-giver what they knew about the perpetrator, or event. This generated a view amongst refugees that any information they provided was ‘like taking evidence against the perpetrator,’ rather than about hearing the full story of the statement-giver, or creating dialogue to understanding the full history of what happened during the war.

A number of refugees reported that they tried to speak in a way that fell outside of the ‘who did what to whom’ methodology. For instance, they would speak in general terms of harm they suffered without attributing it to a specific incident, or violation, or perpetrator. However, whenever a statement-giver spoke in this general way, then the interviewer would direct them to be more specific, to identify a particular incident, who the perpetrator was, exactly what happened, and to whom the violation occurred. The frustration at not being able to speak in the way they wished led some to argue that the TRC was just about ‘demanding people speak in the same way … it is about the TRC and the government, not about the people.’

Other refugees argued that the TRC would better achieve its objective of social reconciliation by creating a forum for ‘daily talking, knowing each other, understanding

54 Interview with Evon, Liberian refugee (Monrovia, 7 May 2013).
55 Interview with Peter Doe, Liberian returned refugee (Monrovia, 26 April 2013).
56 Interview with Madison, Liberian returned refugee (Monrovia, 11 April 2013).
57 Interview with Mr Suah, Liberian refugee (Buduburam refugee settlement, 12 June 2013); Interview with Rita, Liberian returned refugee (Gbarnga, 29 June 2013); Interview with Pastor Zulu, Liberian returned refugee (Ganta, 27 June 2013); Interview with Rancy, Liberian refugee (Buduburam refugee settlement, 7 June 2013); Interview with Isaac, Liberian returned refugee (Monrovia, 15 May 2013); Interview with Peter Doe, Liberian returned refugee (Monrovia, 26 April 2013).
58 Interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 April 2013).
each other,’ rather than focusing on individualised, fact-based statement-taking.\textsuperscript{59} A number of refugees tried to push the TRC in this direction, and approached TRC members with requests to generate dialogue between those living in the settlement. For example, one refugee asked the TRC to help him initiate dialogue with an in-law from a different tribe, who held a deep grudge against him due to his tribal affiliation. However, the TRC took no action, other than to refer him to the statement-takers.\textsuperscript{60}

In a range of ways, then, refugees contested the TRC’s construction of both truth and reconciliation. The Liberian TRC aimed to generate a forensic version of truth, aimed at quantifying the scale and extent of past violence, and capable of sustaining recommendations for criminal prosecution. This meant it was focused on explaining which regions experienced the most deaths, for instance, or which rebel groups or individuals committed the most egregious crimes during a particular time period. Refugees, on the other hand, preferred a narrative, or social version of truth. Narrative truth, in this context, refers to storytelling by victims and perpetrators, and communicating personal truths and multi-layered experiences. Social or dialogical truth, on the other hand, refers to the truth of experience that is established by interaction, discussion and debate.\textsuperscript{61}

In the view of a number of refugees, the ability to speak freely, in general terms, and in dialogue with others – that is, in a way that reflected narrative or social truth – was a much more effective way of capturing the complexity of the war, and the refugee experience. When they had to speak in terms of violations they had personally

\textsuperscript{59} Interview with Mr. Doe, Liberian refugee (Buduburam refugee settlement, 30 May 2013).
\textsuperscript{60} Interview with Joe Myers, Liberian refugee (Buduburam refugee settlement, 10 June 2013).
experienced or witnessed, numerous refugees asserted that the TRC reduced their identity to that of a victim, and nothing more. This suggested they were both passive and helpless, and silenced the many ways that people had negotiated their loss, rebuilt their lives, and created a new existence quite apart from that of victimhood. Instead, people wanted to talk about ‘how we found a new way, how we recovered, how we built something out of our lives that isn’t just about being a victim.’

The focus on generating forensic truth, rather than narrative or social truth, had a number of significant repercussions for the way in which the TRC engaged with refugees. When the TRC came to Buduburam settlement it had two priorities: to make sure that procedures in Buduburam camp were consistent with those taking place in Liberia and amongst the US diaspora, and, secondly, to enable as many refugees as possible to give statements.

In order to carry out these priorities, it focused on ensuring that the formal statement-taking process was consistent between each refugee, following almost precisely the same format. It also gave statement-givers a set quota to reach each day, in order to ensure that all those who wished to give statements would have the opportunity to speak to a statement-taker. While prioritising a formal statement-taking process was essential in order to generate a consistent dataset, by focusing on these technical goals, the TRC failed to engage with the way in which context – namely, living in a refugee camp – affects people’s way of thinking and behaving.

While there is no single refugee ‘experience,’ there is a well-established convention regarding how refugees interact with UNHCR and Western government while in asylum. When registering with UNHCR and applying for refugee status, the refugee must explain

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62 Interview with Antonio, Liberian returned refugee (Ganta, 28 June 2013).
63 Interview with TRC official (Monrovia, 9 April 2013).
64 Interview with Evon, Liberian returned refugee (Monrovia, 7 May 2013).
who they are, testify about the reasons for their displacement, justify why they cannot go back to their own country, and describe the problems they are facing in asylum. The UNHCR officer then has the power to believe or disbelieve this testimony, and subsequently grant or decline refugee status. Sometime later, if the refugee is considered eligible for resettlement to a third (usually Western) country, they will meet with an immigration officer and once again provide what is essentially a narrative victim statement, concerning why they fled, why they cannot go back, and what dangers they currently face. This context means that refugees are accustomed to their testimony being put to a specific use: that of convincing a judge that they meet the definition of a refugee, or the definition of resettlement eligibility. This system also turns the refugee’s story into a type of currency, which, if used correctly, can result in significant benefits. As a result of this context, when a person in a position of power asks: “Why did you leave your country?” the responding refugee cannot help but interpret that question with a range of expectations and assumptions.

Among refugees living in Buduburam settlement, the context of living in a refugee camp led to a widespread belief that one purpose of the TRC’s activities was to pursue resettlement solutions for refugees.65 As one TRC official recalled:

When we [the TRC staff] first arrived in Ghana, there were thousands of people wanting to give statements, because they thought that the TRC was going to resettle them all to the US. When the TRC explained more about their processes

65 Interview with Zinnah Fawson, Liberian returned refugee (Monrovia, 25 April 2013); Interview with Peter Doe, Liberian returned refugee (Monrovia, 26 April 2013); Interview with Liona, Liberian returned refugee (Monrovia, 1 May 2013); Interview with Flomo, Liberian returned refugee (Monrovia, 3 May 2013); Interview with Richardson, Liberian returned refugee (Monrovia, 14 May 2013); Interview with Moses, Liberian refugee (Buduburam refugee settlement, 29 May 2013); Interview with Fitz, Liberian refugee (Buduburam refugee settlement, 6 June 2013); Interview with Joe Myers, Liberian refugee (Buduburam refugee settlement, 10 June 2013).
and that it had nothing to do with resettlement, many people declined to be involved, and were no longer interested.\textsuperscript{66}

Refugee interviewees gave several reasons for the misunderstanding. UNHCR’s resettlement program was active at the time the TRC was taking testimony in the camp, and several refugees recalled that a number of families had been successful in their resettlement endeavours only a few months before the TRC’s arrival, raising the collective hopes of others that resettlement possibilities were still on the horizon.\textsuperscript{67} Unwittingly, the TRC then propped up this hope through its own program design and method of statement-taking. The first way it did so was through the use of The Advocates as statement-takers. Several refugees explained that: ‘People were excited to talk because they see outsiders [i.e. Western visitors] as always related to resettlement.’\textsuperscript{68} The fact that the TRC outsourced its activities to an American organisation, whose staff consisted almost entirely of Caucasian lawyers, undermined the claim that the TRC was a national process.

Moreover, the questions asked by statement-takers mirrored almost precisely the questions UNHCR would ask during refugee status determination and resettlement interviews. Firstly, the TRC asked a statement-giver for their biodata information, then their reasons for leaving Liberia, the troubles they faced in Buduburam settlement, and finally why they could not return to Liberia.\textsuperscript{69} The similarity in format to refugee status determination interviews with UNHCR, or resettlement interviews with immigration

\textsuperscript{66} Interview with TRC official (Monrovia, 27 March 2013).
\textsuperscript{67} Interview with Richardson, Liberian returned refugee (Monrovia, 14 May 2013).
\textsuperscript{68} Interview with Liona, Liberian returned refugee (Monrovia, 1 May 2013). See also interview with Fitz, Liberian refugee (Buduburam refugee settlement, 6 June 2013); Interview with Joe Myers, Liberian refugee (Buduburam refugee settlement, 10 June 2013).
\textsuperscript{69} Interview with Zinnah Fawson, Liberian returned refugee (Monrovia, 25 April 2013).
officials, led many refugees to believe that the TRC interviews were in some way related to those two processes.

The belief that giving testimony to the TRC was related to resettlement directly affected the type of testimony refugees provided. Refugees in the settlement were very familiar with UNHCR’s criteria for resettlement eligibility. One interviewee explained that ‘UNHCR puts refugees into groups according to their story: there is women-at-risk, or torture, or other vulnerable groups. So you have to show you belong to one of these groups [if you want to be resettled.]’

The perceived link between resettlement and the TRC led some refugees to believe that if you framed your testimony in a way that met the UNHCR criteria for resettlement, this would increase your chances of the TRC pursuing a resettlement solution on your behalf. This encouraged people to tell a particular kind of story, or focus on particular elements of their experiences. Some refugees and TRC staff complained that this undermined the statement-taking process as it caused refugees to exaggerate their testimony: “People told [the TRC] what they thought they wanted to hear in order to get resettlement. They made life seem much worse, made things up, because they were thinking about resettlement.” This does not mean that refugees did not have traumatic experiences. However, testimony was framed in order to meet demands quite outside those with which the TRC was concerned.

Once the TRC became aware of this widespread misconception, staff from the TRC and The Advocates attempted to address the issue directly. Together, they held public information sessions and spoke personally to each testifier to explain that giving testimony was in no way linked to resettlement. This is in line with a standard theme

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70 Interview with Richardson, Liberian returned refugee (Monrovia, 14 May 2013).
71 Interview with Morris, Liberian returned refugee (Monrovia, 7 April 2013).
72 Interview with TRC official (Monrovia, 27 March 2013).
throughout the literature on transitional justice, that practitioners must communicate clearly the purpose and limitation of mechanisms to those participating, in order to manage their expectations.\textsuperscript{73} The shortcoming of this approach is that it provides a technocratic solution to a problem that is rooted in social context, without addressing why the misbelief and expectations arise. In the case of the TRC, even though the TRC told them that providing testimony had no connection to resettlement, refugees explained that this message was not convincing, because the process of giving a statement remained nearly identical to the UNHCR process for resettlement.\textsuperscript{74} As one refugee explained, ‘Why would the TRC act like UNHCR if they’re not doing something for resettlement? It doesn’t make sense.’\textsuperscript{75} Faced with a contradiction between the experience of testifying and the public statements made by the TRC, many refugees were persuaded by what the TRC actually did, rather than what the TRC claimed it was doing.

The TRC’s data-driven process determined the framework for almost all its interactions with refugees. The TRC used a structured, formal method of interacting with participants, relying predominantly upon standardised interviews and official information sessions. It placed value on abiding by the rules of a set process and ensuring each individual had a consistent experience, rather than developing individualised relationships. With their interactions with the TRC confined to a single interview, many refugees complained that it was difficult for them to engage in its proceedings, since there was no sense of dialogue, and no possibility to develop rapport with TRC officials. One refugee expressed a commonly held sentiment that the TRC staff simply arrived, ‘got people’s stories, and then left,’ with no ongoing communication regarding what had happened to the testimony refugees provided, or the recommendations they made regarding government reforms or

\textsuperscript{73} Megan Bradley, ‘Displacement, Transitional Justice and Reconciliation’ (Forced Migration Policy Briefing No. 9, Refugee Studies Centre, April 2012) 3.
\textsuperscript{74} Interview with Morris, Liberian returned refugee (Monrovia, 7 April 2013).
\textsuperscript{75} Interview with Zinnah Fawson, Liberian returned refugee (Monrovia, 25 April 2013).
social reconciliation. It was ‘like you write a letter and send it and then there’s no response.’

One area where refugees pushed for more engaged involvement with the TRC was in relation to their repatriation. Many refugees had a genuine desire to engage with the TRC in the hope that doing so would affect government policies and improve their prospects for return. As one refugee explained:

People talked to the TRC because they are fed up with being in exile and want to go home, so they want to talk about why they can’t return, to see if the TRC could change some of those reasons, improve them, convince them that it was okay to return.

One TRC official reported that some refugees were suspicious that the TRC would try to force them to return to Liberia. Realising that this perception was detrimental to TRC proceedings, TRC staff addressed the issue in a number of way. The first was through formal outreach meetings, where officials explained that the TRC was only interested in gathering testimony and not in forcing refugees to return. During the interactions, some TRC officials suggest that return might be possible because Liberia was now more secure. When these suggestions came from those resident in the US (as was the case for many of the TRC staff and all of The Advocates staff), refugees often reacted with hostility. One refugee spoke of the antagonism, explaining: ‘Some of the TRC staff were telling us that we should go back ‘home’ to Liberia. So we told them “Why don’t you leave the USA and come and live at ‘home’ in Liberia?”’

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76 Interview with Gus, Liberian returned refugee (Monrovia, 13 May 2013).
77 Interview with Oliver, Liberian refugee (Buduburam refugee settlement, 11 June 2013).
78 Interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
79 Interview with TRC official (Monrovia, 27 March 2013).
80 Interview with Sylvester, Liberian returned refugee (Monrovia, 14 May 2013).
However, other refugees reported having informal discussions about the possibility of return with TRC officials who were domiciled Liberian nationals. In these cases, refugees often embraced the opportunity to obtain informal, first-hand information about the current situation in Liberia for returned refugees.81 One Liberian TRC official who was resident in Liberia recalled:

Many people asked me personally about security in Liberia, and what life would be like after they return. I would say I used to be here [in Buduburam settlement] as a refugee before, and now I’ve gone back and I have a job, so it is possible. I would talk about the circumstances and the general security situation, and people were very interested to know about this.82

4.4 Challenging the Transition Narrative

In its Final Report, the Liberian TRC constructed a narrative concerning Liberia’s history of conflict, one implication of which was to suggest that a transition had taken place in Liberia. It did this by breaking the history of Liberia into separate, disconnected parts, speaking of violations in exclusively past terms and in contrast to the imagined future. This narrative had specific implications for refugees. It undermined their claims that Liberia remained an unsafe place, and concealed the fact that upon return, it was highly likely that they would continue to face the violation of their economic and social rights, and would struggle to achieve an adequate standard of living. Throughout their engagement with the TRC, refugees attempted to contest this narrative concerning transition, and to generate an alternate understanding of the conflict and ongoing reality of existence in Liberia. This section examines how these issues materialised.

81 Interview with Kaba, Liberian returned refugee (Monrovia, 13 May 2013).
82 Interview with TRC official (Monrovia, 27 March 2013).
Refugees featured in only minor ways in the TRC’s official narrative. Overall, approximately 6 per cent of TRC statements came from refugees, including those living in Ghana (1300 statements), Nigeria (31 statements) and the UK (8 statements). An additional 1 per cent (227 statements) came from Liberians resident in the US. The TRC Report did acknowledge that a large part of the Liberian population experienced forced displacement. However, the main Report did not provide any details of these experiences, other than to note that Liberians ‘faced major challenges’ in their countries of asylum. Instead, refugee statements were treated in the same way as statements made by non-displaced Liberians: namely, they were coded and then compiled into a statistical dataset concerning experiences that took place during the war, in Liberia. Data from refugee statements was used to understand the demographic profile of refugee victims, the types of violations refugees experienced in Liberia during the conflict, and the groups or persons responsible for committing those violations.

The TRC provided details of the lived experience of displacement in an Annex to its main Report, entitled ‘A House with Two Rooms’. Here, refugee statements were used to produce a narrative describing the trauma of fleeing to another country. In order to understand the different phases that make up the refugee experience, the TRC used what is known as the ‘triple trauma paradigm.’ This concept was developed by refugee service providers in Western countries of asylum, and posits that refugees experience trauma in three specific instances: in the country of origin, during flight, and in the

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83 Truth and Reconciliation Commission of Liberia, above n 1, vol 2, 187.
85 Ibid, 321,322.
86 Kristen Cibelli, Jule Kruger and Amelia Hoover, above n 36, 45-50.
87 Ibid, 46-49.
89 Ibid, 303.
country of asylum.⁹⁰ The TRC Report structured its description of the refugee experience accordingly, describing the violent experiences refugees had during the war and which triggered displacement; the difficulties they faced when fleeing Liberia for a safer place; and the discrimination and violations they continued to experience while living in asylum.⁹¹

In describing refugee experiences during the war, the TRC used a framework of human rights to demarcate which experiences it would recognise, and those it would not. So, for instance, the TRC Report described the triggering events leading to displacement in terms of violations such as murder, torture, or abduction of family members of refugees; it described flight from Liberia in terms of the inability to find food, water, medical care, and safety;⁹² and it characterised the experience of living in Buduburam refugee camp in terms of inadequate access to water, sanitation, medical care, and education.⁹³

The triple trauma paradigm fails to acknowledge a fourth instance of trauma in the refugee experience: that of repatriation. This is likely because the refuge service providers in Western countries who developed the triple trauma paradigm would rarely have to deal with this fourth phase, since the refugees to whom they provide treatment do not generally face the imminent prospect of return; and, even if they do, those service providers are not responsible for responding to the trauma associated with repatriation. As a result, the triple trauma paradigm misses an essential part of many refugee experiences: that of returning to a country wrecked by war, with few resources and limited support, after an

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⁹⁰ Ibid, 303.
⁹² Ibid, 283.
⁹³ Ibid, 284.
absence of many years. In such a situation, return is not a victorious or even comfortable home-coming, but rather the start of a new cycle in a new and challenging environment.  

While the TRC documented the trauma experienced by refugees throughout the war, during flight, and in asylum, it barely acknowledged the trauma of return. There is no description at all in the TRC Report, or in the Annex dealing with specifically with displacement, concerning the experience of returned refugees. One resource that dealt briefly with the trauma of return was a 600-page report produced by The Advocates, separately to the TRC Report, dedicated to documenting the experience of displaced Liberians. The Advocates’ report references the unwillingness of refugees to return very briefly, suggesting that refugees were concerned about security, livelihoods, a lack of savings, having nobody and no place to return to, psychological trauma, and a fear of former perpetrators now in power. However, The Advocates did not provide any objective information to support these concerns, or any evidence concerning how refugees fared once they had returned. Instead, The Advocates’ report glosses its discussion of refugee return with optimism, stating, for instance, that: “Many people in Liberia lost everything they had: possessions, homes, families, security and employment. Nevertheless, many Liberians repeatedly told the TRC of their desire to return home and aid their country in its recovery.”

For many refugees, the reasons for their continued displacement related specifically to the deprivations they were likely to experience on return. Although virtually all Liberian refugees traced their initial flight from Liberia to the violence of the civil war, most

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95 The Advocates for Human Rights, above n 9, 335.
96 Ibid, 16.
refugees remained unwilling to return to Liberia due to the challenges they would face in achieving an adequate standing of living. These included a lack of assets and income-generating activities in Liberia, a lack of support structures in terms of food, education and health, and weak community links especially for the younger population who had left Liberia when they were children.97 During my fieldwork interviews, refugees repeatedly explained that since they had fled Liberia at the start of the war in 1990, fourteen years in exile meant that they had no home in Liberia, nobody there to help them, and no way to make a living, rendering return unfeasible.98 People in Liberia stigmatised those who had left, and would refer to them as people who had ‘wasted’ their years living in exile and who were therefore returning to a life with ‘nothing, and nothing to build on.’99

These sentiments are reflected in the work of Nao Omata, who describes the many challenges Liberian refugees experienced upon return. Many Liberian refugees survived their years in Buduburam settlement by mobilising resources and connections they had built through relational networks. Since these networks were associated with the settlement, they were not readily transferable to Liberia. As a result, many repatriating Liberians found themselves without a means of livelihood and no personal linkages, and thus in much poorer living conditions in Liberia than in Buduburam.100 Each returnee had different adjustment capacities, dependent largely on their degree of access to livelihood assets and networks in Liberia: returnees with a meagre asset base confronted more challenges upon their repatriation compared with those with a stronger asset profile.101 For the majority of returnees who were unable to access effective connections in their

97 Veronique Genaille et al, above n 16, 13.
98 Interview with Franklin, Liberian refugee (Buduburam refugee settlement, 3 June 2013).
99 Interview with Gus, Liberian returned refugee (Monrovia, 13 May 2013).
country of origin, their vulnerability was generated, or exacerbated, as a consequence of their repatriation. Therefore, Omata concludes, it is inaccurate to say that the refugee plight ended with their physical return to their country of origin.  

From the perspective of refugees, then, the TRC’s narrative concerning transition appeared in sharp contrast to their lived experience. While the extreme violence associated with the violation of their civil and political rights had largely ceased with the war’s end, a different kind of violence continued: that of severe economic deprivation. The TRC’s narrative that the past was bitter and difficult, but that a transition had taken place and Liberia’s future would now be different silenced the voices of refugees who were ‘worried about accommodation, jobs, food.’ Since the TRC did not address ongoing violations of economic and social rights, refugees felt that that the TRC offered little of practical value to their lives, and did not address their concerns around return.

As one refugee explained:

\[\text{The TRC didn’t help people because it was focused on courts, not on social needs. It would have been better if it changed its focus to social development, part of which would be helping refugees when the returned, for example with shelter, school, medical help. Something to help them have a home.} \]

Refugees also contested the role that The Advocates and the TRC implied the Liberian government had to play in the transition. When discussing the unwillingness of refugees to return to Liberia, the TRC suggested that it related to individual inadequacies specific to each refugee, such as their fear of seeing perpetrators; their lack of skills to make a living in Liberia; and their lack of family or other connection. This located

\[\text{102 Ibid., 24.}\]
\[\text{103 Interview with Evon, Liberian returned refugee (Monrovia, 7 May 2013).}\]
\[\text{104 Interview with Soweto, Liberian refugee (Buduburam refugee settlement, 5 June 2013).}\]
\[\text{105 Interview with Evon, Liberian returned refugee (Monrovia, 7 May 2013).}\]
\[\text{106 The Advocates for Human Rights, above n 9, 335.}\]
responsibility for the unwillingness to return with the individual refugee, and their individual fear and trauma. The TRC did not link the fear refugees held towards perpetrators to the state’s inability to provide adequate security to its citizens, for instance, or to the endemic corruption that had allowed perpetrators to obtain positions of power in the new government. As a result, there appeared to be little onus on the new government to respond to the individualised concerns of refugees regarding return.

In numerous ways, then, refugees contested the TRC’s use of their testimony in its construction of a national narrative. While the TRC used refugee testimony to demonstrate how destructive the past was, many refugees wished to use their testimony to justify their displacement, and why they could not return to Liberia. Refugee perspectives implied that a transition is a process, not a single moment, and that different actors can hold considerably different views as to the extent and content of the change that has taken place, and what it means for people’s lives. This, in turn, undermines the very notion that a transition has, in fact, taken place.

4.5 Conclusion

Scholars claim that truth-telling processes may acknowledge and affirm displaced persons’ narratives and experiences, and help reposition refugees as full, rights-bearing members of the political community.107 The Liberian refugee experience with the Liberian TRC offers a more nuanced understanding of this claim, by demonstrating importance of asking whose narrative and experiences truth-telling acknowledges and affirms, and for which people – and to what extent – citizenship offers as a solution. For some Liberian refugees, the opportunity to provide testimony to the TRC did affirm their

narratives and experiences. Those who wished to testify on an individual basis about physical violence that occurred to them or their family during the war, for instance, likely found the TRC a supportive forum. Equally, refugees who supported the criminal prosecution of perpetrators and wished to give testimony to further this end are likely to have found affirmation in the TRC’s proceedings (although prosecutions ultimately failed to materialise.)

However, other refugees found that the TRC was unable to provide a platform to support the narrative they wished their government and Liberian society to recognise. The TRC’s ‘who did what to whom methodology’, which required each person to speak on an individual basis, about a past violation of a civil or political right committed by an identifiable perpetrator, provided terms too narrow to incorporate the experiences many refugees wished to recount. They were unable to speak of ongoing violations of their economic and social rights, for instance, and were prevented from speaking about their suffering in general terms, or in ways that fell outside the canon of human rights. The inability to speak on their own terms ultimately prevented many refugees from achieving the justice outcomes they desired.

For the majority of refugees, the TRC failed to reinstate their status as full, rights-bearing members of the political community. While the TRC formally included refugees on the basis of their membership in the Liberian polity, it took a restrictive view of their political rights as Liberian citizens. While Liberians living in the US were recognised as full political beings entitled to dual citizenship and external voting rights, those living in West Africa found the political aspects of their citizenship ignored by the TRC. Instead, the TRC appeared to assume that the full citizenship of refugees would be fulfilled only upon return. This assumption aligned with the TRC’s narrative concerning the ‘transition’ it
claimed had taken place in Liberia; however, it was disputed by Liberian refugees who wished to be recognised as political actors even while living in Buduburam refugee settlement.

The Liberian case study demonstrated that when scholars claim that transitional justice mechanisms can give a voice to the voiceless, they typically assume a model of voice in which victims can both speak and be heard, but fail to recognise the unevenness of social fields and their saturation with power. Refugees had little ability to change the terms on which they could engage with the TRC, or to expand the kind of narratives and experiences it would recognise. However, this is not to suggest that refugees passively accepted the mode of truth-telling the TRC offered. In fact, alongside the TRC refugees worked to create their own forums for truth-telling and accountability, through which they could also express their interpretation of what it means to be a Liberian citizen. The following chapter explores these spaces, in order to understand how refugees generated their own practices of transitional justice.

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CHAPTER 5: GRASSROOTS TRANSITIONAL JUSTICE
IN BUDUBURAM REFUGEE SETTLEMENT

5.1 Introduction

From its inception, the stable and accessible conditions found in Buduburam refugee settlement attracted international humanitarian organisations and donors. This led to a consistent presence of what are broadly termed peace programs, aimed at educating participants about conflict resolution techniques, nonviolence, cooperation, moral sensitivity, self-esteem, social rehabilitation and critical thinking.¹ In Buduburam settlement, these programs drew on a range of techniques to carry out their goals, including education, forums for dialogue, and counseling. The Initiative for the Development of Former Child Soldiers, for instance, provided counseling services and training on conflict resolution, while the Centre for Youth Empowerment conducted school programs on peacebuilding.

Through the auspices of peace programs, refugees living in Buduburam settlement began to engage with the ideas of transitional justice. This chapter focuses on the activities of one particular community-based organisation active in the settlement, the Population Caring Organisation (PCO), which created two programs to deal with reconciliation at the community level. The first, known as Peace Cells, consisted of weekly meetings designed to promote dialogue within the refugee community. The second, the Tribal Leaders’ Peace and Reconciliation Forum, brought together elders, tribal leaders and religious leaders in order to discuss the role of the tribes in the war, and to pursue

reconciliation at the leadership level. PCO did not refer to either of these programs as transitional justice. However, both programs engaged with ideas of truth-telling, accountability, reconciliation and collective memory. As such, the objectives of the two PCO forums often mirrored those of transitional justice, even if the methodology employed by the refugee-led forums differed considerably from that of conventional transitional justice.

This chapter examines the way in which refugees pursued the objectives of transitional justice through the two PCO forums. It describes how the refugee-led forums prioritised relationships over law, and dialogue over prosecution. This approach led to conceptions of truth, reconciliation and transition that differed markedly from those of the Liberian TRC. The different methodological approach, as well as the varied understandings of truth, reconciliation and transition, meant that the refugee-led forums generated narratives about the conflict, and the repair of past harm, which different markedly from those of the Liberian TRC.

5.2 Grassroots Reconciliation in Buduburam Refugee Settlement

PCO was established in 2003 by a Liberian refugee who lived in Buduburam settlement, Emmanuel Dolo. His primary motivations were to facilitate open discussion amongst the Buduburam refugee community, and, through this dialogue, generate reconciliation amongst Liberians resident in Buduburam. One of the founding members of PCO explained:

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3 Interview with Moses, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
If you look at the organisations that encourage peacebuilding, they all focus on training. They all try to train people but they don’t actually get people to do something to solve their own problems. … The cause of the previous conflict was that people were not consulted, they were just forced to do things and they didn’t get to talk and decide for themselves. So we tried to help people to talk and find their own solutions.\(^4\)

In early 2004, PCO established its Peace Cells. Peace Cells were community groups focused on generating dialogue about the causes of the Liberian conflict, its consequences, and to identify solutions to problems that were caused by, or related to, the conflict.\(^5\) Over the course of five years, Peace Cells addressed a range of topics including tribal prejudice and hatred, forgiveness and reconciliation, mediation and negotiation strategies, and transitional justice.\(^6\)

From February until May each year, PCO spent time designing the curriculum for Peace Cell meetings, in conjunction with the refugee community. In the early months, Peace Cell leaders and other PCO staff would talk to refugees in their respective zones, often utilising questionnaires, in order to find out what challenges refugees were facing that might make an appropriate topic for discussion. They also considered political events likely to affect refugee interests, such as the TRC’s planned visit to Buduburam settlement. On the basis of community views and broader context, PCO staff would generate a number of topics for discussion at that year’s meetings, held between June and December. Each topic was associated with a set of five or six discussion questions, intended to stimulate dialogue among participants.

\(^4\) Interview with Morris, Liberian returned refugee (Monrovia, 7 May 2013).
From June until November, Peace Cells met on a weekly basis. A Peace Cell was set up in each of the 10 zones of Buduburam settlement, and refugees were encouraged to attend the same Cell regularly, ideally in the zone where they resided. Prior to each meeting PCO would disseminate leaflets to those in the area in order to inform them about that evening’s topic, and invite them to come along. Most meetings saw at least 20 persons attend, and many topics drew crowds of 50 to 60 persons per Peace Cell. By encouraging consistent attendance at the same Peace Cell, PCO aimed to generate a desire amongst participants to contribute to the shared goals of the Peace Cell community. A Peace Cell leader was responsible for facilitating the discussion that ensued, and all those in attendance were actively encouraged to participate in discussions.

The Tribal Leaders’ Forum was established in September 2004. It was created in response to a perceived deficit of the Peace Cells: namely, their failure to engage the tribal leadership present in the camp. PCO aimed to create a forum that could pursue reconciliation between tribal leaders, in the hope that their influence amongst their own tribes might enhance prospects for reconciliation amongst the refugee community. By targeting the tribal leadership, the Forum aimed to enhance prospects for reconciliation amongst the refugee community more generally, due to the strong influence tribal leadership held within their respective communities. Moreover, the Tribal Leaders’ Forum was expected to ‘fill the reconciliation gap’ that existed between ‘high-level reconciliation activities’ such as the TRC which focused on ‘top political actors in Monrovia,’ and grassroots peacebuilding initiatives which tended to target only victims.

7 Interview with Liona, Liberian returned refugee (Monrovia, 1 May 2013).
8 Interview with Esther, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
9 Interview with Moses, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
10 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
11 Tribal Leaders’ Peace and Reconciliation Forum (Tribal Leaders’ Forum), Letter dated 3 November 2004 from Emanuel Dolo of PCO to Mr. Thomas Albrecht, UNHCR Representative, Ghana (PCO, 3 November 2004) 1.
The Tribal Leaders’ Forum met twice a month, engaging on alternate week in discussion groups and capacity-building activities. The Forum brought together leaders from each of Liberia’s 16 tribes (each of which was present in Buduburam settlement) as well as religious groups (namely the Buduburam Imam Council and the Buduburam Christian Council). Like the Peace Cells, discussions were structured around set topics. Each topic raised an issue specific to tribal reconciliation, such as participant views on the obstacles to peace and reconciliation between the tribes, and different strategies to overcome those obstacles with the refugee community in Buduburam settlement.

In a number of respects, Peace Cell meetings and the Tribal Leaders’ Forum worked in tandem. The PCO leadership would set the curriculum for the Peace Cells, which would then be used to structure both the discussion and capacity-building activities carried out in the Tribal Leaders’ Forum. By targeting different segments of the refugee community, they hoped to increase their reach to both ordinary Liberians and the tribal, religious and community leaders within the settlement. In doing so, both forums struggled to achieve equal participation across genders and ethnicities: Peace Cells were usually attended by more women than men, whereas the Tribal Leaders’ Forum struggled to achieve more than 25% female representation, and both forums involved a majority of Christians and a spread of ethnicities commensurate with the settlement’s demographics overall.

The following section addresses a number of themes common to the way in which the Peace Cells and the Tribal Leaders’ Forums structured their activities.

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13 PCO, above n 6, 17.
14 Interview with Esther, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
5.3 Reconciliation through Relationships, not Prosecution

Both Peace Cells and the Tribal Leaders’ Forum were structured around relationships, rather than legal processes. A large reason for this stemmed from the seeming absence of law’s protective cover in the settlement. The Ghanaian authorities were responsible for law and order in Buduburam settlement. However, the relationship between Liberian refugees and the Ghanaian authorities – as well as between refugees and the Ghanaian population more broadly – was strained, and refugees raised fears of ill-treatment from both groups.  

This reinforced the importance of tribal leadership for the refugee community:

The police should have the job to enforce the law. But here, whoever the police like becomes right, and that is injustice. You have to pay for everything, including the hospital slip the police give you to evidence you’ve been assaulted. Because of such corrupt practices, people prefer to go to the tribal elders, they think they are better than the courts or police.  

This context meant that Liberian refugees often looked to each other, and their tribal leadership, in order to solve their daily problems. This, in turn, placed importance on the strength of good intra-community relationships.

For Peace Cells, the focus on creating reconciliation through relationships began with the choice of leadership. PCO identified Peace Cell leaders on the basis that they resided in the community where the Cell was located, enjoyed good relations with other members of their zone, and exhibited strong interpersonal and communication skills. They were

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16 Interview with Moses, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
17 PCO, above n 6, 12.
expected to lead by example, by ‘demonstrating peaceful ways of life in [their] community: non-tribalistic, impartial, friendly.’ There was an expectation that Peace Cell leaders were not just conduits of teaching material; but rather, they had to be able to generate an atmosphere where those in the meeting feel comfortable to discuss sensitive and complex subjects. To aid this goal, PCO provided Peace Cell leaders with training to enable them to effectively facilitate discussions, mediate conflict, and respond to traumatised participants.

PCO structured its Peace Cell meetings in a way that cultivated a collegial atmosphere. They took place in the early evening when refugees had finished their day’s work and would habitually gather to talk and share news, and were held in a communal space within each zone. PCO staff stressed that choosing an appropriate physical space was paramount, since creating a safe environment where participants felt comfortable would encourage people to talk, rather than act as mere spectators. Each meeting began with an opportunity for informal greetings. Then, participants would sit in a circle, in order to demonstrate that the input of all participants was equally welcome. The Peace Cell Leader would welcome participants and encourage people to talk openly throughout the meeting, rather than ‘feeling that they had to bottle up their anger or bitterness.’ Each person would then formally introduce him or herself, in order to encourage people in the community to build relationships, and to discourage people from claiming anonymity or setting themselves outside the group. Finally, the substantive aspects of the meeting would begin.

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18 PCO, above n 5, 1.
19 Interview with Evon, Liberian returned refugee (Monrovia, 7 May 2013).
20 PCO, above n 5, 2.
21 Ibid, 3.
22 Interview with Albert Pennue, Liberian refugee (Buduburam refugee settlement, 31 May 2013).
Similarly, the primary focus of the Tribal Leaders’ Forum was to build personal relationships between different tribal leaders. As one tribal leader described, the aim was ‘to learn how to trust each other again.’ Given Liberia’s history of animosity between tribes, culminating in civil war, PCO considered the issue of trust key to the possibility for reconciliation. The way in which the Tribal Leaders’ Forum aimed to build trust, and relationships between tribal leaders more generally, was by facilitating regular contact between the tribal leaders. As people ate together and started to interact together in the meetings, it became more natural for a relationship to continue outside the Forum. Then, if one tribe had an event or meeting, they would invite people from some of the other tribes. In this way, relations between different tribes started to improve, which made it easier to discuss the difficult topic of how tribes had committed atrocities against each other during the war, and how people might be able to overcome that history.

Liberian refugees placed high value on witnessing examples of trust between tribal leaders. At the end of the first year of Forum meetings, the Tribal Leader’s Forum held a reconciliation ceremony, where they brought a cow, killed it, and everyone ate together. Participants considered this as an essential element of the reconciliation process, as it symbolised that the elders had achieved a level of reconciliation, and gave them an opportunity to celebrate together the progress that they had made both personally, and on behalf of their tribes. Interviewees stressed that witnessing this symbolic act demonstrated that relationships can change over time, as the result of sustained interaction, and that it was this ‘knowing each other, and doing things together’ that formed the basis of reconciliation.

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23 Interview with Samuel Kollie, Liberian returned refugee (Monrovia, 25 April 2013).
24 Interview with Fitz, Liberian refugee (Buduburam refugee settlement, 6 June 2013).
25 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
26 Ibid.
27 Interview with Franklin, Liberian refugee (Buduburam refugee settlement, 3 June 2013).
In addition to building relationships between tribal leaders, the Tribal Leaders’ Forum relied upon the relationship between each leader and their respective tribal group to pursue the goal of reconciliation. In the view of PCO staff, ‘leaders have a very big influence on their people, so if the leaders were reconciled, then this could also influence their people [to reconcile].’

5.4 Creating Social Truth through Dialogue

Both Peace Cells and the Tribal Leaders’ Forum assumed that reconciliation is a gradual process, best pursued through dialogue. They involved people sitting down and talking together, discovering the root cause of the conflict, and then coming up with their own solutions. Although neither the Peace Cells nor the Tribal Leaders’ Forum explicitly aimed to construct a particular ‘truth’ about the past conflict, both engaged in regular discussions concerning what had happened during the war. In doing so, they generated a form of social truth, being the ‘truth of experience that is established through interaction, discussion and debate.’ While forensic truth, such as that pursued by the Liberian TRC, aims to establish the minutiae of what happened, when and how, social truth takes the personalised truth of an individual and places it within a broader social context. This, in turn, highlights the way in which truth is generated not only by a single person, but in response to the perspectives and actions of a group.

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28 Interview with Fred Barlue, Liberian returned refugee (Monrovia, 27 March 2013).
29 PCO, above n 5, 1.
30 Interview with Fitz, Liberian refugee (Buduburam refugee settlement, 6 June 2013).
The most essential aspect of social truth is the process by which it is generated. According to the South African TRC, the fundamental properties of social truth are ‘participation,’ and ‘transparency.’ Its Report stated:

The process whereby the truth was reached was itself important because it was through this process that the essential norms of social relations between people were reflected. It was, furthermore, through dialogue and respect that a means of promoting transparency, democracy, and participation in society was suggested as a basis for affirming human dignity and integrity.\(^{33}\)

This conception of social truth, then, recognises that testimony and recording are part of a process of re-establishing social reality. The arbiter of social truth – being the TRC, in the case of South Africa, or the PCO forums in the case of refugees in Buduburam refugee settlement – aims to weave these various group perspectives together through an open and public process of negotiation, with the aim of generating a healing truth explicitly directed towards the process of national reconciliation.\(^{34}\) In view of this, this section examines the process of the Peace Cells and Tribal Leaders’ Forum, in order to understand the way in which they constructed a version of social truth.

The dialogue generated in Peace Cell meetings was structured according to a number of conventions put in place by PCO. Peace Cell leaders would pose a discussion question but provided no ‘answers,’ since the purpose was not to educate people about a specific view or elicit a particular response, but rather to generate discussion regarding past events and then allow participants to negotiate the outcome themselves.\(^{35}\) Members were encouraged to engage in ‘open communication,’ which meant they were free to express

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\(^{33}\) Truth and Reconciliation Commission of South Africa, above n 31, vol 1, 114.
\(^{34}\) Claire Moon, above n 32, 110.
\(^{35}\) Interview with Morris, Liberian returned refugee (Monrovia, 16 April 2013).
anger, for instance, or to speak about past events on terms that reflected their own needs. However, the corollary was that participants were expected to hear things from others that were difficult to accept, such as grievances between tribes, for instance, or justification for why someone might have committed crimes.  

Equally, open communication was not limitless, and participants were censured if they attempted to provide details deemed counterproductive to the goal of generating dialogue.

The way in which Peace Cells generated social truth by way of dialogue is best demonstrated through its engagement with perpetrators. All kinds of people attended Peace Cells. There were those who self-identified as victims, and others who admitted to having taken part in atrocities during the war through their membership in rebel groups. However, many refugees stressed that the difference between ‘victim’ and ‘perpetrator’ was far from clear-cut. Refugees frequently recognised that those who had, in fact, committed atrocities often had their own stories of victimhood. In addition, refugees often held competing views regarding the idea of collective guilt and innocent. Some camp residents would define all persons from the Krahn tribe as perpetrators, for instance, attributing committed by others in that tribe to all its members, regardless that the individual Krahn person had not personally committed any violent act or was in fact a victim of violence themselves. As a result, and quite unlike the TRC, Peace Cell participants explained that they avoided labelling people as either victim or perpetrator, allowing people to identify in whichever way they preferred.

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37 Interview with Gus, Liberian returned refugee (Monrovia, 13 May 2013); Interview with Kaba, Liberian returned refugee (Monrovia, 13 May 2013); Interview with Moses, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
38 Interview with Zinnah Fawson, Liberian returned refugee (Monrovia, 25 April 2013).
One key objective of Peace Cell meetings was to provide a forum for those who had committed atrocities during the war to disclose their experiences. This did not take place in the form of a confession or public statement, but as dialogue, the intention being to involve ex-combatants in the conversation about Liberia’s history rather than simply accusing or judging them for their past crimes. It was during these discussions that a kind of social truth emerged, mediated by the participants and conventions of the Peace Cells. Perpetrators were supported to talk in general terms about atrocities they had committed and, even more importantly, why they had done so. Those who had been affected by violence during the civil war often questioned perpetrators as to their motives, to which those who had committed the atrocities then had the opportunity to respond. Perpetrators were not allowed to give explicit details of the acts they committed, and Peace Cell members would censor people who tried to explain how they killed somebody, or even on occasion from revealing the exact identity of the person they had killed, on the basis that this was detrimental to ongoing dialogue.

One refugee compared how the Peace Cells and TRC would deal with the same scenario:

At the TRC, the perpetrator stands up and speaks. But in the Peace Cells what was important was dialogue. Plus the ex-combatants can explain their actions. For example, there was a boy who attended a Peace Cell meeting and explained that he had killed some people. He said I’m sorry, I was under the influence, I was forced, it was not my willing mind. People got angry. But then the way we dealt with it, later, is that we were able to take the issue and make it into a topic. We would talk about this issue in general terms, and we asked people in the community: If you come across a perpetrator, how should you deal with it? Then together we brainstorm how to solve it, and the difficulties with the situation. But

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39 Interview with Morris, Liberian returned refugee (Monrovia, 16 April 2013); Interview with Esther, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
40 Interview with Zinnah Fawson, Liberian returned refugee (Monrovia, 25 April 2013).
the TRC would have stopped with the perpetrator saying I killed these people, I did it like this.  

The convention of speaking in general terms, rather than about specific details of past atrocities, was also appealing to many who identified as victims. One Peace Cell leader observed that many people wished to speak about ‘their own hurt and bitterness, without accusing others of crimes.’ One refugee explained why this perspective meant he was willing to participate in the Peace Cells but not in the TRC:

I didn’t want to participate in the TRC because I don’t want to know who killed my brother. If I see exactly who killed him, then I will jump on him, I couldn’t stop myself. And I never want to hear someone explain why they killed my brother, there is no reason that he should have been killed. But if I went to the Peace Cells, we would talk more generally about what perpetrators did, and hear what they say. Someone would say I burned this village, but they wouldn’t talk about specific people, or how they killed them. And so for me this was fine.

Set discussion questions both stimulated and structured dialogue between those who had committed atrocities, and those who identified as victims. Questions were framed in a way that permitted the expression of a range of different views, and encouraged debate between participants. So, for instance, rather than asking ‘What happened to you during the war?’ questions would more typically ask: ‘What causes people to commit crimes against each other?’ and ‘Can people who committed crimes change?’ Peace Cell leaders would encourage people to build upon each other’s views, or challenge views they disagreed with, on the basis that ‘people could learn the history of Liberia by learning

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41 Interview with Pastor Zulu, Liberian returned refugee (Ganta, 27 June 2013).
42 Interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
43 Interview with Morris, Liberian returned refugee (Monrovia, 7 May 2013).
44 Interview with Morris, Liberian returned refugee (Monrovia, 16 April 2013).
45 PCO, above n 6, 12-13.
about each other’s experiences,’ and ‘understand this person as your brother or sister.’

The understanding of ‘truth’ in this context, then, was not singular, but rather reflected a range of different personal experiences, each of which the other participants were free to accept or reject.

The Tribal Leaders’ Forum was also focused on generating dialogue. The aim was to provide an open space for tribal leaders resident in Buduburam settlement to talk about the causes of the war, how Liberia’s history and recent conflict had created disunity between the different tribes, and how tribal leaders should respond. This was not an easy task. In their daily lives the different tribal leaders rarely had extended personal contact, and often held strong views against each other for their tribe’s (perceived) actions during the conflict. At the first meeting of the Tribal Leaders’ Forum, a physical fight broke out between the leaders of two tribes that opposed each other during the war, who accused other’s tribe of having committed atrocities during the war. This interaction indicated the depth of animosity that continued to exist between a number of the tribal leaders.

The response of the Tribal Leaders’ Forum was gradual. One Forum leader explained that for the first several months, it was difficult to talk about the causes and history of the war since emotions between the participants remained high. As such, at first the Forum meetings focused on simply providing a space for tribal leaders to be together, in order to gradually build rapport. As developed a sense of familiarity and trust between each other, and an increased commitment to the objectives of the Forum, they became able to speak more calmly. Only then did PCO introduce discussions regarding what the different

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46 Interview with Evon, Liberian returned refugee (Monrovia, 7 May 2013).
47 Interview with Fred Barlue, Liberian returned refugee (Monrovia, 26 March 2013).
48 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
49 Ibid.
tribes experienced during the war, and the tribal leaders’ views on the causes, and responsibilities.50

As with the Peace Cells, these discussions were constrained by a number of conventions. PCO actively steered discussions away from determining a factual account regarding the war, particularly one that would indicate that a particular tribe was ‘right or wrong, or innocent or guilty.’51 Tribal leaders were discouraged from providing specific details regarding how, or exactly who from their tribe was killed, as this tended to fuel accusations between tribes regarding their responsibility. Instead, PCO urged tribal leaders to talk in more general terms about what had happened, and what they believed were the causes.52 If a tribal leader made a comment apportioning blame upon another tribe, the rest of the group would signal its disapproval, thus reducing the frequency of inflammatory remarks.53

One subject discussed at length at the Tribal Leaders’ Forum was that of cultural practices and ethnic identity. This was directly linked to the perceived causes of the conflict, since, as one refugee explained:

[i]t’s generally thought the war came from tribal marginalisation and nepotism. There was an element of stereotypes, that some [tribes] are violent and warlike, while others were traitors. These stereotypes mean that in [Buduburam] camp, refugees did not feel free to say the tribe they’re from, because they didn’t want to be linked to the conflict through their tribe.54

50 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
51 Interview with Samuel Kollie, Liberian returned refugee (Monrovia, 25 April 2013); Interview with Pastor Zulu, Liberian returned refugee (Ganta, 27 June 2013).
52 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
54 Interview with Ebenezer, Liberian refugee (Buduburam refugee settlement, 1 June 2013).
The TRC’s approach to this issue was to criminalise the act of identifying someone as belonging to a particular tribe or ethnicity. It asserted that outlawing ‘all symbols and cleavages of disunity and segregation’ would strengthen national unity and help to establish a ‘common identity.’\textsuperscript{55} The Tribal Leaders’ Forum and Peace Cells, on the other hand, tackled the issue of tribal reconciliation by building relationships between tribal members who retained their respective ethnic identities. Through structured discussion questions, tribal leaders discussed subjects such as the origins of stereotypes, negotiating what constitutes ‘Liberian culture,’ and what tribal identity should look like after an ethnic-based civil war.\textsuperscript{56} There were no ‘correct answers’ to these questions, but rather tribal leaders presented a range of views that were debated and mediated by other participants. In doing so, the intention in the Tribal Leaders’ Forum was not to rid each person of their tribal affiliation, but rather to encourage people from one tribe to include people from other tribes in their own ethnic celebrations or events. Rather than stopping people from talking about ethnicity, the meetings encouraged people to talk about ethnic identity, and different cultural practices, based on the belief that gradual interaction would build friendships, and understanding, and that this might slowly create understanding (and, eventually, reconciliation) both on a personal and tribal level.

By considering these issues, refugees described the Tribal Leaders’ Forum as taking a more ‘holistic’ approach to truth-telling. Rather than focusing on creating a forensic account of ‘who did what to whom’ during the war, the Forum – and, equally, the Peace Cells – took a much broader approach to what happened during the war. Looking beyond a purely factual account, they attempted to address the full human experience: an individual’s ethnic identity, cultural practices, the social and relationship aspects of their personhood, why or how they came to find themselves in the position of a victim or

\textsuperscript{56} Interview with Ebenezer, Liberian refugee (Buduburam refugee settlement, 1 June 2013).
perpetrator, and how they might move forward.\textsuperscript{57} Through the use of dialogue, they created an understanding of ‘truth,’ or, more appropriately, ‘truths’ as multivarious and personalised and which, even when accumulated, did not constitute a grand account of the war.

Truth commissions frequently fall short of creating the type of social dialogue necessary to restore social relations, due to the structural framework of the narrative process. They typically shy away from exploring the motivations behind violent actions, they essentialise victims’ and perpetrators’ voices in order to fit the collective narrative the commission is attempting to construct, and they elevate the voice of victims over those of perpetrators.\textsuperscript{58} This was the case with the Liberian TRC, whose focus on creating ‘forensic truth’ capable of upholding recommendations for prosecution created a highly structured narrative process that many refugees found exclusionary.

An alternative to the structured narrative process of a truth commission is to focus on personal narratives over grand narratives, de-essentialise the victim and the perpetrator, and place victims’ and perpetrators’ narratives on equal footing with respect to the collective memory project.\textsuperscript{59} The Peace Cells and Tribal Leaders’ Forum demonstrated one way this might be embodied. By providing a platform to create dialogue between individuals, divesting people of the need to identify as either perpetrator or victim, and providing a framework for a more holistic conception of what happened in the past, the refugee-led, PCO forums generated a distinct kind of social truth.

\footnotesize{\textsuperscript{57} Interview with Morris, Liberian returned refugee (Monrovia, 7 April 2014). \textsuperscript{58} Nneoma Nwogu, ‘When and Why It Started: Deconstructing Victim-Centred Truth Commission in the Context of Ethnicity-Based Conflict’ (2010) 4 International Journal of Transitional Justice 275, 276. \textsuperscript{59} Ibid, 284.}
5.5 Different Concepts of Accountability and Reconciliation

From beginning to end, the TRC and refugee-led forums employed markedly different methodologies. One refugee who participated in both the TRC and Peace Cells provided a vivid comparison:

The TRC sent people from Liberia and America. They put up posters and had questionnaires. You had to sign a document and show your ID card. For the Peace Cells, we did not put up posters, it was only word of mouth, and we did not require people to sign anything, or to record what they said. It didn’t matter if you had an ID card or no ID card. We just discussed issues. The TRC was not sharing cookies or juice with people, but the Peace Cells did. Eating and drinking together was about cultivating friendship. For the TRC, people would tell stories in order to get a benefit like resettlement. But there was no benefit to telling stories at the Peace Cells. Peace Cells were there to talk about what happened and what that meant to your life, and how to overcome it. This was the benefit, being able to talk and learning how to heal, and get over your past strife.60

Underpinning these methodologies were very different conceptions of accountability and reconciliation. These, in turn, were grounded in diverse cultural and social practices. While it is beyond the scope of this thesis to examine in detail the cultural framework informing Liberians conceptions of accountability and reconciliation, an instructive comparison is found in Tim Kelsell’s ethnographic study of the interaction between the Special Court for Sierra Leone and the local Sierra Leonean community. Kelsell demonstrates that because Sierra Leoneans held different ideas of ‘social space and time, causation, agency, responsibility, evidence and truth telling’ from those employed by the international Special Court, misunderstandings between the two groups were common.

60 Interview with Moses, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
and as a result the application of international justice became ‘a fraught affair.’\textsuperscript{61} This suggests that a difference in methodology is not simply a technical matter, but is often driven by a particular cultural framework that informs the understanding of justice. With this in mind, this section examines how the different forums understood the concepts of accountability, and reconciliation, and the effect this had on the respective methodologies.

According to the TRC Report, reconciliation ‘begins with individual forgiveness, and requires the involvement of all Liberians.’ It is to be achieved, according to the TRC, through the pursuit of ‘justice,’ which the TRC equates with the full implementation of its recommendations for the prosecution of accused war criminals.\textsuperscript{62} In the TRC’s conception, then, criminal accountability was fundamental to reconciliation. If the Liberian government were to eschew the TRC’s recommendations for prosecution, then the society would not be able to reconcile. This vision of reconciliation depended upon formalised institutions such as criminal courts, and was encapsulated by a single event: that of a criminal trial.

The refugee-led forums, by contrast, understood reconciliation as a gradual process, concerned foremost with the rebuilding of individual relationships.\textsuperscript{63} It depended upon recurrent interaction between people, involving ‘daily talking, knowing each other, understanding each other.’\textsuperscript{64} As opposed to the institutionalised format of the TRC, which focused on asking questions and ‘didn’t allow people to interact,’\textsuperscript{65} Peace Cells and the


\textsuperscript{62} Truth and Reconciliation Commission of Liberia, above n 55, vol 2, 22.

\textsuperscript{63} Interview with Ebenezer, Liberian refugee (Buduburam refugee settlement, 1 June 2013); Interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 May 2013); Interview with Evon, Liberian returned refugee (Monrovia, 7 May 2013); Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 4 June 2013).

\textsuperscript{64} Interview with Mr. Doe, Liberian refugee (Buduburam refugee settlement, 30 May 2013).

\textsuperscript{65} Interview with Esther, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
Tribal Leaders’ Forum were designed to bring people together and ‘find common ground, build relationships, [allow people to] laugh and joke together.’ In this way, the PCO forums reflect what feminist scholars have argued truth commissions might ordinarily provide, that is, a space ‘to move beyond the rather masculine discourse of crime and punishment towards a notion of repairing relationships.’

While the TRC implied that reconciliation concerned individual perpetrators and their victims, the refugee-led forums held a much broader understanding of those involved in reconciliation. For instance, the Tribal Leaders’ Forum highlighted the need for reconciliation not only between the different tribes, but also between the tribal leaders and their own members. During the war, the traditional leadership had lost credibility with a large portion of the population for their perceived failure to stop, or, in some cases, their perceived contributions towards, the civil war. Furthermore, for the younger generation that had grown up in exile, traditional leadership structures had lost much of their strength. The younger generations had little exposure to engaging elders to mediate conflict, for instance, and as a result they often perceived the traditional way of responding to social problems as irrelevant.

Understanding reconciliation in terms of the relationship between tribal leaders and their membership generated an alternative understanding of both harm, and the affected parties. While the TRC defined harm according to a catalogue of human rights violations, the refugee-led forums recognised a collective, social form of harm: that of the loss of trust in tribal leadership, and a breakdown in social relations. This harm was suffered not

66 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
68 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
69 Interview with Ebenezer, Liberian refugee (Buduburam refugee settlement, 1 June 2013).
only by individual tribal leaders and individual tribal members, but also by the community as a whole. By recognising harm in community terms, the PCO forums moved away from the dichotomy of victim and perpetrator employed by the TRC, and implicated both tribal leaders and ordinary Liberians in the need for reconciliation without assigning them an essentialised identity.

PCO also conceived of the process of reconciliation between tribal leaders and their membership quite differently from the prosecutorial approach of the TRC. Rather than focusing on admissions of past wrongs, PCO focused on repairing social relations by increasing the relevance of the tribal leadership to the everyday lives of refugees in Buduburam settlement. One primary way it pursued this aim was by contracting Mediators Without Borders to provide training to the tribal leaders. Mediators Without Borders is a private organisation, based in the US, which provides training in mediation, arbitration and conflict resolution. PCO employed the organisation on the assumption that by combining traditional structures and methods of reconciliation with the ‘more modern, Western methods’ of Mediators Without Borders, they could create ‘a middle way’ of forging reconciliation in the context of Buduburam settlement. Training focused not on highly visible moments of conflict such as protests or personal attacks, but on the minutiae that formed the lived reality of life in Buduburam: neighbourhood disputes, for instance, which would habitually start over small matters but then descend into fights that vilified each person’s ethnic identity.

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70 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
71 Interview with Ebenezer, Liberian refugee (Buduburam refugee settlement, 1 June 2013).
72 Interview with Morris, Liberian returned refugee (Monrovia, 10 May 2013).
The need for reconciliation, from the perspective of Peace Cell practice, also extended to the Ghanaian host community. The relationship between refugees and their Ghanaian neighbours had grown increasingly strained over years of unresolved displacement, and trust between the two communities was low. PCO staff encouraged Peace Cell members to discuss the problems they experienced with local Ghanaians in meetings, on the basis that ‘reconciliation affects everyone around you, it’s not just about [highly visible perpetrators such as] Prince Johnson, the conflict affects all your relationships.’ In discussing these issues, PCO attempted to dispel the idea of refugees as victims, and, equally, of Ghanaians as perpetrators. Instead, the focus was on rebuilding social relationships on a personal, daily level. In support of this conception of reconciliation, PCO staff kept records of Peace Cell and Tribal Leaders’ Forum meetings and periodically shared them with the government-led Ghana Refugee Board.

The TRC and PCO forums not only held different conceptions of reconciliation, but also of accountability. The TRC was mandated to ‘ensure accountability, political or otherwise’ for violations committed during the war. It was instructed to pursue accountability according to a framework of international human rights law, international humanitarian law, international criminal law and Liberian domestic criminal statutes, and then recommend individuals to face prosecution through the Extraordinary Criminal Court For Liberia. In the TRC’s view, then, the concept of accountability was limited to criminal accountability. It depended upon an institutionalised mechanism, the court, and associated accountability with a single judgment made by the court.

73 Interview with Liona, Liberian returned refugee (Monrovia, 1 May 2013).
75 Truth and Reconciliation Commission of Liberia, above n 55, vol 2, 19.
76 Ibid, 349.
The refugee-led forums, by contrast, relied on sustained dialogue to create accountability. Peace Cells did not proactively seek out individuals who had committed atrocities, as did the TRC, but nonetheless they regularly dealt with individuals who readily admitted to the commission of crimes during the civil war. When this happened, Peace Cells did not attempt to judge the individual for their act, but rather to create dialogue around why they had acted in a certain way, and what were the long-lasting repercussions for the community.\[77\] In the view of many who attended Peace Cells, this functioned as a system of accountability, in that it allowed people who had suffered during the war to express anger or bitterness, and emphasise the far-reaching implications of the harm caused by those who committed atrocities.\[78\] Rather than the institutionalised format of the TRC that focused on achieving accountability of an individual perpetrator for identifiable atrocities, Peace Cells were about generating social dialogue concerning harm, and personal responsibility. Rarely were the victims of an individual perpetrator’s acts present in the same meeting; but rather, those who spoke did so on a general level, highlighting the implications of all violent acts taking place during the war.

Similarly, the Tribal Leaders’ Forum used dialogue to generate tribal accountability for the war. Tribal leaders were invited to reflect on the role their own tribe played in advancing the war and committing atrocities. By requiring each individual to reflect on their own tribe’s responsibility, PCO aimed to create a space where tribal leaders could discuss the war without getting stuck in a cycle of blaming each other’s tribe.\[79\]

These reflections are not intended to suggest that the conception of reconciliation and accountability practiced by the TRC or the PCO forums was superior to the other. Instead,\[77\] Interview with John Travers, Liberian refugee (Buduburam refugee settlement, 11 June 2013); Interview with Zinnah Fawson, Liberian returned refugee (Monrovia, 25 April 2013).\[78\] Ibid.\[79\] Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 4 June 2013).
they reflect what Das and Kleinman describe as a ‘double movement,’ a two-tiered approach to transitional justice essential to meet the whole needs of a community. According to Das and Kleinman, what is required at the macro level is the creation of a public space that gives recognition to the suffering of survivors and restores some faith in a state’s legitimacy, while at the micro levels of community what is required is opportunities for everyday life to be resumed.\(^{80}\) The TRC, with its emphases on institutionalised, state-led reconciliation and accountability offered a way for the new Liberian government to demonstrate its commitment to ‘peace, security, unity and reconciliation.’\(^{81}\)

The Peace Cells and Tribal Leaders’ Forum, on the other hand, offered an embodiment of localised and ordinary practices that allow a community to recover from collective violence. This process of rebuilding ‘everyday’ relationships and social ties occurs at the levels of the family, friends, neighbourhood and community, and focuses on how the every day work of survival takes place. As opposed to the ‘grand narrative of forgiveness and redemption’ the TRC produced, the refugee-led forums offer example of ‘small local stories’ which illuminate how communities are ‘experimenting with ways of inhabiting the world together.’\(^{82}\)

5.6 Contesting ‘Transition’

The Peace Cells and Tribal Leaders’ Forum did not aim to create a national narrative about the war, or Liberia’s transition to peace. Nonetheless, within the practices of both forums an understanding of transition emerged. Transition was generally understood as a

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\(^{81}\) Truth and Reconciliation Commission of Liberia, above n 55, vol 2, xxiii.

\(^{82}\) Veena Das and Arthur Kleinman, above n 80, 16.
long and gradual process, and one that always retained an element of the past in the present. This had both negative and positive connotations: some refugees contested the suggestion that Liberia had gone through a transition since they continued to live the affects of the war in their daily lives in Buduburam, and also faced challenging conditions should they return to Liberia. For others, the interaction between past and present was more positive, and they argued that the experience of asylum could contribute positively to their reintegration to Liberia. This section examines these perspectives, and how they compared to the conventional transitional justice understanding of transition.

While the TRC divided history into time-bound segments – what happened, before, during, and after the war – Peace Cells treated history as fluid and interconnected. Instead of suggesting that the conflict was past, refugees frequently spoke of its ongoing presence in people’s daily lives. As one Peace Cell leader noted:

Problems from before would spill over and the conflict would continue in people’s daily lives. It looks like it’s a problem from today, but actually it’s related to ethnicity and stereotypes, and that relates to the war. So this became a focus of the Peace Cells: how the past relates to our lives now.  

As a result, in both refugee-led forums violations were not spoken of in exclusively past terms, but frequently engaged the language of the present.

Repatriation to Liberia presented the clearest challenge to the idea of transition. The TRC focused on violations of a civil and political nature, most of which were related to the conflict and, therefore, situated clearly in the past. The refugee-led forums, by contrast, focused on the ongoing violation of economic and social rights, since it was these

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83 Interview with Moses, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
violations that were of highest concern to refugees considering repatriation. Peace Cells structured their discussions about violations of economic and social rights, and conditions in the ‘new’ Liberia, around what they termed ‘structural violence.’ Structural violence was conceived as a social institution or practice that harms people, and was conceived in terms of four different strands: bureaucracy, class, gender, and financial status. The concept of structural violence provided a way to recognise and discuss violations that were not as obvious as killing or rape, but which prevented Liberians from achieving an adequate standard of living.

The framework of structural violence provided a way for refugees to discuss how discrimination that took place before the war related to violence that continued to take place in post-civil war Liberia. On the subject of access to education, for instance, refugees discussed the way that Americo-Liberians had historically restricted the access of indigenous Liberians to education, and how, although the new government had overturned the historic laws and practices, in reality many indigenous Liberians continued to be denied access to both primary and secondary education. This led to the recognition of other injustices: the way girls were still educated to a lower level than boys, for example, and the difficulty for people living in rural areas to access education (as well as employment, health services and justice) compared to those living in urban areas of Liberia.

Peace Cells also drew on existing experiences in Buduburam settlement to reduce the sense of transition being a ‘break with the past.’ In discussing the lived experience of reconciliation between Liberians, people spoke of the unique situation of Buduburam,
where all tribes lived in very close proximity to each other and mixed marriages were far more common than in Liberia.87 People from different tribes often sent their children to the same small schools, and drew water from the same community well, whereas in Liberia – at least in the provinces – the tribes lived much more separately, since each province was populated by one, or on a rare occasion two tribes.88

In a study concerning peace programs in refugee camps including Buduburam settlement, Lawson found that refugees considered the most valuable element of peace programs the opportunity it gave them to organise themselves, and build groups reflecting their interests. While most refugees asserted that training regarding livelihoods did not assist their reintegration, the ability to organise politically enabled them to become active civil society participants and advocate their interests on return.89 According to one of my interviewees, this type of program allows refugees to contribute to the reconstruction of Liberia even while they remained displaced, by developing the skills they will need after return.90

According to conventional practice, transitional justice is justice that arises within a bounded period spanning two regimes, and is both constituted by, and constitutive of, the transition.91 Transitional justice discourse implies a ‘break with the past’, creates a definitive sense of ‘now’ and ‘then’, and assumes a liberal, rights-respecting future.92 As the perspective of refugees living in Buduburam settlement demonstrates, this raises the question of transition to what? When does a transition begin and when does it end?

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87 Interview with Samuel Kollie, Liberian returned refugee (Monrovia, 25 April 2013); Interview with Abednego, Liberian refugee (Buduburam refugee settlement, 11 June 2013).
88 Interview with Abednego, Liberian refugee (Buduburam refugee settlement, 11 June 2013).
90 Interview with Elder Gee, Liberian refugee (Buduburam refugee settlement, 30 May 2013).
Scholars recognise that constructing transition as a ‘break’ with the past conceals the ongoing violence and exclusion that many victims experience, especially that of an economic and social nature.93 This has significant repercussions for refugees, since it undermines their claims that it is safe to return, and can conceal the many challenges they face following return. The practices of Peace Cells and Tribal Leaders’ Forum also suggested that transition was understood not only in terms of the political context and something that happened to refugees, but rather something that people had to create themselves.94

5.7 Conclusion

The existing scholarship on transitional justice and displacement tends to treat refugees as submissive recipients of transitional justice ideas and methodologies. Refugees are described as victims of human rights violations, for instance, or beneficiaries of property restitution processes, with little discussion of how they themselves engage in the ideas of truth, accountability or reconciliation. This not only creates a perception of refugees as passive victims, but also of transitional justice mechanisms and ideas as static and inflexible. There is little discussion of the ways in which refugees contest, adapt and remake the principles and practices of transitional justice; or, equally, of the ways that transitional justice principles are themselves malleable.

The activities of Liberian refugees in Buduburam refugee camp destabilised the conventional understanding of the relationship between transitional justice and refugees. The PCO forums revealed how refugees designed their own forums to address reconciliation, as well as diverse methodologies to pursue truth and accountability that

93 Ibid, 280.
94 Interview with Esther, Liberian refugee (Buduburam refugee settlement, 29 May 2013).
better reflected their own values and context. This suggested that transitional justice is not an inflexible set of principles delivered by states or international organisations to victims and communities, but a living, contested set of ideas. Through the PCO forums, refugees disputed both the conceptual framework and methodology of the Liberian TRC, and their actions challenged the idea of the state as the only actor responsible for defining the conceptual and practical framework for truth-telling, accountability and reconciliation after a civil war.

The PCO forums negotiated truth through dialogue, and relied upon individual relationships in order to pursue accountability. This meant that unlike the TRC, which fashioned truth out of facts and accountability from legal rules, the PCO forums understood both truth and accountability as long-term processes that were firmly embedded in the community’s social structures. This was not simply a methodological choice, but a reflection of the very ends that refugees wished to achieve: the rebuilding of relationships, the recreation of social dialogue, and the expression of respect for each other.

The Liberian case study as a whole, then, offered a range of alternate manifestations of transitional justice principles and processes. It demonstrated that a forum’s conception of accountability or reconciliation determines who gets to speak, and which accounts will be recognised. This is not to suggest that either the TRC or the PCO forums resulted in a more ‘accurate’ truth or a ‘better’ kind of reconciliation. Instead, it is to acknowledge that each forum’s distinct conceptual framework and methodology supported a different understanding of harm and repair, and thus a different set of justice outcomes.
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CHAPTER 6: TRANSITIONAL JUSTICE IN AFGHANISTAN

6.1 Introduction

Afghanistan may seem an anomalous choice for a case study in transitional justice. Following the 2001 American-led invasion, the political transition provided an opportunity for the Afghan government to address the country’s history of conflict. Despite this, the transitional Afghan government did not engage with conventional mechanisms of transitional justice. It attempted to introduce a disarmament program and a system for electoral vetting, but these were undermined by impunity and a lack of accountability.¹ A politics of accommodation and a focus on short-term security took priority, and those in power dismissed even the least contentious transitional justice measures, especially those associated with truth-telling or accountability.² In light of this, scholars generally consider transitional justice in Afghanistan a failure.

This chapter analyses how scholars reached such an adverse assessment, by interrogating the boundaries of transitional justice in Afghanistan. It examines who defined the mechanisms considered to constitute transitional justice, and what types of activities were included or excluded. It identifies the limitations that exist in the conventional conception of transitional justice, and how this can exclude particular understandings of accountability, reparations and reconciliation. This forms the basis for subsequent chapters, which assess these boundaries of transitional justice.

The chapter begins by providing a brief description of the history of conflict and displacement in Afghanistan. It describes how the imperatives of state-building came to dominate attempts to implement mechanisms of transitional justice measures. It then turns to what most scholars have dubbed Afghanistan’s largest success in terms of transitional justice: the Afghan Independent Human Rights Commission’s report into national perceptions of transitional justice, *A Call For Justice*. This offered a more nuanced approach to accountability and reconciliation than the peace-versus-justice rhetoric of the state-building mission, and also incorporated the views of Afghan refugees.

### 6.2 Afghanistan and its Cycles of Conflict

The modern state of Afghanistan was formed in 1747, when Ahmad Shah Abdali established a monarchical kingdom, replacing shifting interventions by different regional empires. The monarchy prevailed from 1747 until 1973, when the last king, Mohammad Zahir Shah, was overthrown by his cousin, Mohammad Daoud, who declared Afghanistan a republic and himself its first president. During Mohammad Daoud’s presidency, divisions emerged amongst the political elite in Kabul in response to the educational and social reforms he implemented, all of which were aimed at modernising Afghanistan. These divisions paved the way for a communist coup in April 1978, which marked the beginning of Afghanistan’s continuous years of conflict. This conflict took place in four phases: the 1978 coup and subsequent Soviet occupation (1979-1989), the *mujahedin* civil wars (1992-1996), the period of the Taliban (1996-2001) and the current conflict, which began with US military attacks against the Taliban in 2001. Each period is characterised by its own set of human rights abuses, and a shifting set of actors responsible for those atrocities.
The 1978 coup brought to power the Marxist-Leninist People’s Democratic Party of Afghanistan, which pursued radical land and social reforms and then suppressed the widespread popular dissent that arose in response. The Marxist-Leninist Party was responsible for the executions, torture and enforced disappearances of intellectuals, competing leftists, royalists, religious elites, landowners and anyone else perceived to be a potential opponent of the new regime. During the 20 months it was in power, as many as 100 000 people disappeared, one of the largest instances of forced disappearance in the twentieth century.

As the Afghan resistance to the Marxist-Leninist Party grew, the Soviet Union became anxious that the Party – and, by extension, the Soviet Union’s proxy government – would lose power. Aiming to safeguard a communist government in Afghanistan, in late December 1979 the Soviet Union army invaded and occupied the major cities across Afghanistan. Over the next ten years, the Soviet Union spent the equivalent of billions of (US) dollars in military action, and at the peak of the conflict, more than 100 000 Soviet soldiers were fighting in the country. In the countryside, Soviet aerial bombardments became routine and indiscriminate, leading to mass refugee flows into Pakistan and Iran. In Pakistan, a militarised resistance developed, organised into political groups known as the mujahedin. Domiciled Afghans who supported the mujahedin were targeted by the secret police, and were subject to summary executions, detentions and torture.

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7 Ibid, 130.
The Soviet Union withdrew its occupying force from Afghanistan in 1989, leaving in place its ally, Dr. Mohammad Najibullah Ahmadzai, as President. Under President Najibullah, arrests of dissidents and the bombing of resistance strongholds in the countryside decreased, but did not stop. In an attempt to shore up his power base, he expanded the *mujahedin* forces that were active in Afghanistan, and allowed them to operate with virtual autonomy throughout the countryside.\(^8\) By 1991, when Soviet financial assistance to President Najibullah’s government ended, the *mujahedin* leaders had become de facto authorities in the areas they operated, undermining the authority of the central government.\(^9\)

In April 1992, the Najibullah government collapsed, and Kabul became engulfed in civil war between the different *mujahedin* factions. This period of *mujahedin* fighting was to last four years, during which time all major factions engaged in widespread atrocities against civilians. Conflict between different *mujahedin* parties led to Kabul being bombarded with rockets and shelling, causing the deaths of at least 50,000 civilians. During this period, mass rape also emerged as a tactic of conflict.\(^10\) Despite this violence, the end of the Soviet occupation triggered large-scale refugee repatriation, and in 1992 alone approximately 1.57 million Afghan refugees returned to Afghanistan from Pakistan and Iran.\(^11\)

The period of anarchy caused by *mujahedin* fighting provided the opportunity for military intervention by a group known as the Taliban. In 1994 the Taliban entered Afghanistan, taking control of Kabul by September 1996 and capturing most of the remainder of Afghanistan by late 2001. During its time in power the Taliban was responsible for

\(^8\) Patricia Gossman and Sari Kouvo, above n 2, 8.  
\(^9\) Ibid.  
\(^10\) Ibid.  
\(^11\) UNHCR, ‘UNHCR Afghan Refugee Statistics’ (Report, UNHCR 10 September 2001.)
indiscriminate shelling, massacres of local civilians who opposed its rule, the destruction of rural areas, rendering them uninhabitable, and the imposition of repressive restrictions on women and girls.\textsuperscript{12}

The final phase of conflict, which continues until the present day, began in October 2001. Following the terrorist attacks upon the US on 11 September 2001, US President George W. Bush demanded that the Taliban hand over Osama bin Laden, who had claimed responsibility for the attacks. The Taliban asked bin Laden to leave the country, but declined to extradite him without evidence of his involvement in those attacks. As a result, on 1 October 2001, President Bush announced that the US would carry out military action against Afghanistan. Military attacks commenced on 7 October 2001. The immediate result was the collapse of the Taliban regime and its retreat from Kabul and other urban centres. However, the Taliban continued to wage an active insurgency that persists today. Throughout this period, violations of human rights took place with regularity, with the Taliban, Afghan intelligence and military services, militia groups and US forces perpetrating, to different degrees, arbitrary arrests, deaths in custody, torture and summary executions.\textsuperscript{13}

On 27 November 2001, the UN opened talks in Bonn, Germany, aimed at reconstituting the state of Afghanistan. Four Afghan parties took part in the negotiations in Bonn. This included one Afghan-based group, known as the Northern Alliance, a Rome-based delegation of the former King Zahir Shah, a Cyprus grouping of exiled intellectuals supported by Iran, and a Pakistan-based group, which had its base among the Pashtun refugees living in Peshawar.\textsuperscript{14} On 5 December 2001, the four parties signed the

\textsuperscript{12} Patricia Gossman and Sari Kouvo, above n 2, 9.
\textsuperscript{13} Ibid.
‘Agreement on Provisional Arrangement in Afghanistan Pending the Re-establishment of Permanent Government Institutions,’ known as the Bonn Agreement. It stated that the goal of the transition was to ‘end the tragic conflict in Afghanistan,’ and create a ‘political future in accordance with the principles of Islam, democracy, pluralism and social justice.’\(^{15}\) The Bonn Agreement also provided for an Interim Authority to govern Afghanistan,\(^{16}\) headed by Hamid Karzai.

Decades of conflict have destroyed much of Afghanistan’s infrastructure and resources, as well as the economy. As at 2014, the World Bank estimates that Afghanistan had a per capita GDP of approximately USD1946, ranking it 160 of the 185 countries in its ranking system.\(^{17}\) Other indicators suggest an even bleaker reality for Afghans: 36 per cent of the population lives below the poverty line, and unemployment is at 35 per cent,\(^{18}\) and the average life expectancy of an Afghan citizen is 59 years.\(^{19}\) Corruption and ethnic tensions remain high. Conflict is still active, with the main reported drivers of conflict or insecurity assessed as poor governance, corruption and predatory officials.\(^{20}\) According to UNHCR’s most recent statistics, as at 31 December 2014 there were approximately 1.5 million Afghan refugees resident in Pakistan, and almost 1 million Afghan refugees resident in Iran.\(^{21}\)


\(^{16}\) Ibid, Annex 4.


6.3 Refugees and ‘Dealing With The Past’

The history of conflict in Afghanistan, as well as the country’s recovery from that conflict, is in large part a story about migration and refugees. Migration has long been, and continues to be, an integral part of the Afghan social and cultural landscape. Scholars have identified a wide range of causes to explain the extremely high rates of Afghan migration, including seasonal movements, coping strategies during instability, state failure, medical need, economic necessity and war.\(^{22}\) Although the motivation for migration varies, three decades of conflict in Afghanistan did dramatically increase movements within and out of the country. The highest period of migration was during the 1980s, when approximately 6.2 million Afghan nationals fled to neighbouring countries, out of a pre-war population of barely 13 million.\(^{23}\)

Refugees have been implicated in each phase of the conflict in Afghanistan. Following the communist coup in 1973, about 1000 politically radical Afghan refugees, who had established links with the Muslim Brotherhood, fled the coup for Pakistan. The Pakistani government welcomed them, seeking a potential asset against what they deemed a troublesome neighbour in Afghanistan.\(^{24}\) The group was still in Pakistan in the 1980’s, when the Soviet invasion led to the displacement of millions of Afghans to Pakistan. Resistance to the Soviet occupation quickly arose amongst the refugee population in Pakistan, and by 1980, over twenty resistance parties were active in Peshawar and Quetta. The Pakistani government recognised seven of these, each of which consisted of a political party with an associated armed militia. These seven groups, and specifically their

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\(^{24}\) Oliver Roy, above n 4, 74-79.
leaders, became known as the *mujahedin*.²⁵

In order to counter the Soviet occupation, the US provided assistance to the *mujahedin* resistance groups resident in Pakistan through the form of ‘refugee relief,’ consisting of aid, weapons and training.²⁶ Thirty million dollars was allocated to the *mujahedin* in 1980, and by this sum grew to 630 million by 1987.²⁷ Funds from Saudi Arabic to the Afghan resistance closely matched those given by the US, such that, by the late 1980s, combined aid from the US and Saudi Arabia had reached about one billion dollars a year.²⁸ In order to maximise its influence over this international assistance, the Pakistani government required refugees to live in designated camps, each of which was controlled by one of the seven *mujahedin* political parties. For their part, each of the parties tried to register as many members among the refugees as possible, to increase their power and their basis of negotiation for more supplies from the Pakistani authorities and the Western powers,²⁹ thus turning camp structures into important tools of influence over the refugees.³⁰

Not only did the refugee camps in Pakistan produce the *mujahedin* parties, but they also provided an environment in which the Taliban could develop and grow. Throughout the 1980s and early 1990s, many Afghan refugees living in camps in Pakistan attended the Islamic-run *madrassah* education system, which allegedly received financial backing from Saudi Arabia. Some of these refugee-scholars became radicalised and formed the

²⁸ Ibid.
fundamentalist Taliban movement. The Pakistani government played a pivotal role in the emergence of the Taliban, providing its support and access to sanctuary. Even after the American military intervention, post-2001 Taliban mobilisation was firmly grounded in communities of refugees living in Pakistan.

As a result of these experiences in the camps in Pakistan, Afghan refugees have become known as the archetypal ‘refugee warriors.’ Refugee warriors are those who possess a political leadership structure and armed sections engaged in warfare for a political objective, be it to recapture the homeland, change the regime, or secure a separate state. Refugee warriors subvert traditional accounts of refugees as non-political. At the same time, their use of violent political agency usually causes them to be either not classified, or declassified, as refugees by UNHCR and other organisations. The refugee warrior is a confusing concept because it eschews the division between refugee and activist and confers upon the refugee warrior community a bimodal status as both victim and perpetrator.

The host state is a key actor in the creation and continuation of the idea of the refugee warrior. In order to exist, refugee warrior communities require sanctuary in a neighbouring country permitting military operations from its territory. With a sanctuary for the warriors and relief assistance for refugees, refugee-warrior communities can develop. In the case of Afghan refugees, both conditions were fulfilled by Pakistan.

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31 Sarah Lischer, above n 25, 72.
35 Ibid.
38 Peter Nyers, above n 36, 99.
39 Aristide Zolberg, Astri Suhrke and Sergio Aguayo, above n 34, 276.
throughout the 1990s. The relationship between refugee warriors and the host state is not always positive, however, since hosting refugee warrior communities is a political act, and one which may have serious repercussions for the inter-state relations between the host and sending governments. As a result, host states may be reluctant to facilitate refugee political expression, due to the perceived link with militarisation and the emergence of refugee warrior factions.\footnote{Aristide Zolberg, Astri Suhrke and Sergio Aguayo, above n 34, 275; Peter Nyers, ‘Abject Cosmopolitanism: the Politics of Protection in the Anti-deportation Movement’ (2003) 24(6) Third World Quarterly 1069, 1070.}

Refugees in Iran historically have been less connected to the conflict in Afghanistan than refugees in Pakistan. Less than 10 per cent of Afghan refugees living in Iran resided in refugee camps, having been given the option to live amongst the local Iranian population. This meant that they were more difficult to identify and engage in political activities.\footnote{Bahram Rajaee, ‘The Politics of Refugee Policy in Post-Revolutionary Iran’ (2000) 54(1) The Middle East Journal 44, 50-51.}

Refugees in Iran received considerably lower levels of aid: between 1979 and 1997, refugees in Iran received only USD150 million in aid, as opposed to the billions provided to refugees in Pakistan, in part because Iran did not allow humanitarian aid programs except for those provided directly by the UN.\footnote{David Turton and Peter Marsden, ‘Taking Refugees for a Ride? The Politics of Refugee Return to Afghanistan’ (Issues Paper, Afghanistan Research and Evaluation Unit, December 2002) 11.}

Since Afghanistan’s conflict forced such a large percentage of the country’s population to seek safety abroad, the repatriation of those refugees became an essential factor in the country’s recovery from conflict. After the American-led invasion of 2001, there was cautious optimism among the international community that the collapse of the Taliban would trigger mass refugee repatriation, due to the anticipated peace. The initial scale of refugee return appeared to justify this optimism, with more than four million refugees
returning to Afghanistan between 2001 and 2005. A report by the US Congressional Research Service to the 110th Congress summed up the feeling of the international community, stating that:

The safe and voluntary return of refugees to Afghanistan is not only a major part of the US reconstruction effort in Afghanistan, but also an important indicator of its success. To the extent that refugees continue to return, it can be seen that Afghans are taking part in the future of their country.43

The Afghan government supported this narrative, and in June 2002 the Government issued a Decree on Dignified Return, which stated that the Government of Afghanistan ‘warmly welcomes Afghan nationals who were compelled to leave the country and assures them of non-discrimination, freedom from persecution and protection by the state.’44 In addition, asylum countries in the West began pushing for the return of Afghan refugees from their territory, on the basis that the grounds for refugee status no longer existed.45

However, significant questions have been raised about the voluntary nature of refugee repatriation. Scholars have argued that the need to legitimise the military intervention, the subsequent peace process and the fledgling Afghan government outweighed more careful considerations of the feasibility of return.46 Moreover, return from neighbouring Pakistan and Iran often took place in less than ideal conditions. Both Pakistan and Iran went through periods of relative openness to Afghan refugees when it was domestically expedient to do so, but both subsequently turned on their refugee populations as social

45 David Turton and Peter Marsden, above n 42, 42.
46 Ibid, 43.
opinion towards refugees soured and the political landscape therefore changed.\textsuperscript{47} This is demonstrated most clearly by the changing social and linguistic articulation of the Afghan in Pakistan and Iran, which, between 1979 and 2009, transformed from ‘refugee’ to ‘migrant,’ and finally to ‘terrorist.’\textsuperscript{48} Afghan refugees went from being welcomed, to being reviled as something to be excised from the national body, blamed for introducing a host of ills into society: terrorism, arms proliferation, drugs, environmental degradation, polio, high unemployment, and conflict.\textsuperscript{49} A drop in international assistance for refugees compounded the hostility towards refugees, and led to increasing pressure from the governments of both Pakistan and Iran towards Afghan refugees to repatriate.\textsuperscript{50}

The imperative to integrate refugees into a national program for reconciliation and reparation is underscored by the challenging conditions to which most refugees return. Many returned refugees have found it extremely difficult to survive in their home areas, and a combination of insecurity, lack of resources and widespread poverty has forced many refugees to move to urban areas.\textsuperscript{51} Largely as the result of refugee return, Kabul doubled in size between 2001 and 2010, contributing to widespread inflation, homelessness and crime.\textsuperscript{52} This, in turn, has damaged the relationship between the receiving communities and their returning compatriots. Struggling to cope in Afghanistan, a number of former refugees have returned back to their country of asylum or became internally displaced.\textsuperscript{53}


\textsuperscript{48} Ibid, 593.

\textsuperscript{49} Ibid, 599.

\textsuperscript{50} David Turton and Peter Marsden, above n 42, 15-16.


\textsuperscript{53} David Turton and Peter Marsden, above n 42, 5.


6.4 Defining the Boundaries of Transitional Justice in Afghanistan

The mainstream account of transitional justice in Afghanistan declares it a failed venture. This section seeks to understand this claim. Rather than focusing on how or why mechanisms for accountability or truth-telling were unsuccessful, I examine which mechanisms were included within the ambit of transitional justice, who defined these boundaries, and what the boundaries excluded. I aim to bring a more nuanced understanding to the state of transitional justice in Afghanistan, and the role of ordinary Afghans – and particularly Afghan refugees – played in determining what the field entails.

The 2001 Bonn Agreement provided a clear moment to address Afghanistan’s history of conflict through transitional justice. The Agreement itself claimed that the goal of the transition was to ‘promote national reconciliation, lasting peace, stability and respect for human rights in the country.’ This language suggested that the new government was positioned – or perhaps even obligated – to take steps to deal with the decades of violations committed against citizens. However, in practice, this did not materialise.

Scholars generally understand the government’s failure to address the history of conflict through a framework of ‘peace versus justice.’ At the time of the Bonn Agreement, the international community was foremost concerned with establishing a secure, pro-Western state. As a result, it turned a blind eye to the presence of former mujahedin leaders, many of whom had committed gross violations of human rights during the previous conflict, on the basis that their support was important to US efforts to eliminate Al Qaeda. The result

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that mujahedin leaders were ‘lionized after Bonn, made into heroes…Nothing was done to punish them for past atrocities.’\(^{56}\) President Karzai summed up the widely held conviction that accountability and stability were incompatible by explaining that: ‘Justice becomes a luxury for now. We must not lose peace for that.’\(^{57}\) Civil society did little to dispute this position, with Special Advisor to the UN, Barnett Rubin, recalling that during negotiations for the Bonn Agreement, not one major human rights organisation called for the establishment of a tribunal to try war criminals. It appeared that all organisations ‘accept that the situation is too complex and currently too fragile for such measures.’\(^{58}\)

The failure of transitional justice, then, is both attributed to, and understood from the perspective of, the state. The aim of those negotiating the Bonn Agreement was to create external security, with little regard to the question of domestic legitimacy.\(^{59}\) The understanding of transitional justice reflects this bias, with scholars confining their discussions to the Afghan government’s failure to implement the visible markers recognised by the international community as mechanisms of accountability and truth-telling, such as criminal trials or a truth commission. There is little scholarship discussing grassroots reconciliation activities, for instance, or ways that ordinary Afghans engaged in truth-telling or reparative action outside of a state-sanctioned forum.

The 2001 Bonn Agreement set out a ‘Roadmap’ concerning how the Interim Authority, headed by President Karzai, was to reestablish permanent institutions of government. The first step in the Roadmap required the Interim Authority to hold an Emergency Loya Jirga within six months. The Jirga tradition, understood through its roots as a Pashto practice,
is about solving a problem through the direct participation of parties on different sides of a conflict, and then restoring relationships among those parties through reparation and reconciliation.\textsuperscript{60} A Loya Jirga is a particular type of Jirga, one that operates at the national level and is chaired by the Head of State. It comprises a national assembly of Afghan tribal leaders, elders, and elected representatives, called in order to discuss an issue vital to the nation, and to reach a collective decision.\textsuperscript{61}

The Emergency Loya Jirga was mandated to establish a Transitional Authority that would lead Afghanistan until the Afghan people elected a representative government. It was responsible for electing a Head of State for the Transitional Administration and approving the structure for and key personnel of the Transitional Administration.\textsuperscript{62} In theory, then, it should have provided a way for the Afghan people to choose their new leaders in a representative manner. Moreover, it could have provided a way to implement a conventional process associated with transitional justice: the vetting of war criminals.

In reality, however, the Emergency Loya Jirga was significantly undermined by the presence of warlords. Officially, those who had been involved in the abuse of human rights and war crimes were banned from attending.\textsuperscript{63} However, numerous mujahedin leaders coerced their constituencies into electing them as representatives, and the Government was unable to enforce the eligibility standards that would have disqualified them from participating.\textsuperscript{64} In addition, shortly before the start of official proceedings, the

\textsuperscript{62} Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, UN Doc S/2001/1154 (5 December 2001) s 4(5).
Emergency Loya Jirga Commission granted an additional fifty seats specifically to *mujahedin* leaders, outside the standard election procedures.\(^{65}\)

The inclusion of *mujahedin* leaders in the Emergency Loya Jirga had far-reaching implications for transitional justice. Firstly, it allowed the *mujahedin* leaders to claim the political legitimisation of the international community.\(^{66}\) Secondly, it institutionalised the presence of former war criminals in the new government, thus undermining attempts at vetting or institutional reform. Several *mujahedin* leaders known for their involvement in war crimes and other violent acts received cabinet posts in the Transitional Administration appointed through the Loya Jirga process.\(^{67}\) These *mujahedin* leaders were then able to select their own people for senior positions within the municipality and police at the provincial and local levels.\(^{68}\)

While the co-optation of *mujahedin* leaders through offers of cabinet positions or other government appointments replaced the outright violence of previous periods, the avoidance of violence also meant forgoing any discussion of accountability for the human-rights violations that took place during the civil war.\(^{69}\) This demonstrated the ongoing conviction of the Afghan government and international community that accountability of war criminals constituted a threat to national security, rather than a necessary component of dealing with insecurity.\(^{70}\) The Special Representative of the


\(^{70}\) Rama Mani, ‘Ending Impunity and Building Justice in Afghanistan’ (Issues Paper, Afghanistan Research and Evaluation Unit, December 2003) 1,2.
Secretary General of the United Nations, Lakhdar Brahimi, for instance, asserted that the inclusion of the unelected mujahedin leaders had been necessary in order for ‘peace’ to be able to take precedence over ‘justice.’\(^\text{71}\)

Notwithstanding the value of this critique, it demonstrates the narrow view taken by scholars concerning the boundaries of transitional justice. Scholars interpret its impact solely in terms of a failure to achieve criminal accountability or to adequately vet future government officials. However, by focusing only on the visible instances of transitional justice (and, by corollary, their absences) scholars obscure the less obvious ways that the government and society have engaged with issues of justice, accountability and reparation. This includes, for instance, different aspects of institutional reform, as well as community engagement with the discourse and ideas of transitional justice.

### 6.5 Beyond Peace Versus Justice

The government of Afghanistan took a limited number of steps to address the country’s past history of violence and human rights abuse. The 2001 Bonn Agreement created three institutions to oversee legal reform: the Constitution Commission, the Judicial Reform Commission, and the Afghan Independent Human Rights Commission (AIHRC).\(^\text{72}\) The Bonn Agreement mandated the AIHRC to investigate human rights violations throughout Afghanistan, and develop a national strategy for transitional justice.\(^\text{73}\) Subsequently, the AIHRC declared that it would pursue its mandate by investigating, recording and publishing the ‘truth’ about Afghanistan’s history of conflict, and by pursuing

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\(^{72}\) Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, UN Doc S/2001/1154 (5 December 2001) arts I(6), II(2), III(C)(6).

\(^{73}\) Ibid, section 3C(6).
accountability for past crimes in accordance with international law, Islamic principles and Afghan tradition.\textsuperscript{74}

In March 2002, a Presidential decree mandated the AIHRC to undertake national consultations concerning popular attitudes towards accountability and reconciliation, and propose a national strategy for ‘transitional justice and for addressing the abuses of the past.’\textsuperscript{75} The AIHRC’s mandate covered only those violations taking place from 1979 until 2001, which means that it could not undertake investigations or discussion of abuse or violence taking place during the US-led intervention. Nonetheless, from January 2004 until August 2004, the AIHRC carried out consultations with Afghans in 32 of Afghanistan’s 34 provinces, as well as with refugee populations living in Pakistan and Iran. The AIHRC published the results of its public consultations in a report, \textit{A Call For Justice}. This report demonstrated a range of views held by Afghans that extended beyond the peace versus justice dichotomy expressed by political leaders.

Community consultations for \textit{A Call For Justice} followed a two-step process. First, the AIHRC distributed a survey in order to capture quantitative data and test for preferences with respect to transitional justice. 4,151 surveys were completed, of which approximately 10 per cent came from the refugee populations in Pakistan and Iran. Secondly, the AIHRC convened a series of focus group discussions in order to capture qualitative data, and test for perceptions of transitional justice. It held over 200 focus groups with over 2,000 participants,\textsuperscript{76} including some 400 Afghan refugees in Pakistan.


resident in Pesahwar and Quetta, and some 330 refugees in Iran, resident in Mashad and Tehran.\footnote{Ibid.} Throughout the consultation process, the AIHRC made no distinction between displaced and non-displaced Afghan nationals, using exactly the same survey form and focus group discussion format for both the domiciled and displaced populations.

\textit{A Call For Justice} demonstrated that most Afghans consider that reconciliation and justice are interconnected. The majority of Afghans indicated that they are victims of human rights violations or war crimes, and that they expect perpetrators to be prosecuted or removed from power.\footnote{Ibid, 8, 18.} Contrary to the beliefs of many policymakers, an overwhelming 79.1 per cent of the Afghan population felt that by bringing war criminals to justice, security would be substantially improved. Only 10 per cent felt that stability and security would decrease as a result.\footnote{Ibid, 17.} The desire for criminal justice outweighed all other transitional justice options, with almost 40 per cent of all respondents suggesting that criminal prosecution was an integral part of justice,\footnote{Ibid, 18.} and 85 per cent asserting that a judicial process would help reconciliation. These views stand in sharp contrast to those of the political leaders of the new government and broader international community, who consistently asserted that peace and justice were incompatible.

\textit{A Call For Justice} produced few findings specific to displacement. This is despite the fact that the scale of conflict-related displacement in Afghanistan is extremely high: more Afghans have lived as refugees than any other population in the world’s recent history.\footnote{Daniel Kronenfeld, ‘Afghan Refugees in Pakistan: Not All Refugees, Not Always in Pakistan, Not Necessarily Afghan?’ (2008) 21(1) \textit{Journal of Refugee Studies} 43, 57.} \textit{A Call For Justice} recognises the scale of displacement in its introduction, noting that, due to conflict, more then seven million Afghans were forced to leave their villages and
towns and take refuge in Iran and Pakistan due to conflict. Moreover, displacement is listed as the fourth most reported violation experienced by Afghans during the mandated period. However, there is no description of the lived experience of displacement, or any discussion of the violations refugees experienced while in asylum. One reason for this shortcoming was that the AIHRC incorporated refugees as if they were part of the non-displaced population. That is, the report categorises domiciled Afghans by province of residence, and then adds two additional places of residence: Pakistan and Iran. In this way, it as if Pakistan and Iran are simply two additional provinces of Afghanistan.

One clear finding to come out of *A Call for Justice* is that it is not possible to make generalisations concerning ‘refugee views on transitional justice.’ There are almost no consistencies between the views of refugees resident in Pakistan, and those resident in Iran. Instead, on almost every issue, the two refugee populations hold divergent views that sometimes align with those of non-displaced Afghan nationals, and sometimes do not. Equally, there is little consistency between the province of origin of Afghan refugees, and their views on transitional justice. For instance, most Afghans resident in Eastern Afghanistan fled to Pakistan. However, the findings of *A Call for Justice* show that Afghan refugees living in Pakistan do not hold views that are consistent with Afghans living in Eastern Afghanistan. This highlights the multi-faceted and complex views held by refugee populations towards transitional justice, and the danger in making generalisations regarding how refugees wish to engage with, and what they hope to obtain from, transitional justice mechanisms.

*A Call For Justice* also suggests that the experience of asylum has a tangible affect on refugee views towards transitional justice. The experience of asylum was markedly

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82 Afghanistan Independent Human Rights Commission, above n 76, 4.
different for refugees living in Pakistan versus those living in Iran. In the 1980s, refugee camps in Pakistan were active grounds for the development of mujahedin forces, supported by Pakistan, the US and Saudi Arabia. This was in sharp contrast to Iran, where refugees were largely integrated into Iranian communities, received little international attention and did not become militarised. These different experiences are reflected in refugee perceptions of the conflict documented in *A Call For Justice*. The majority of Afghan refugees residing in Pakistan believed that other countries were responsible for war in Afghanistan, a perspective that aligns with the highly politicised refugee context in that country of asylum. Refugees in Iran, by contrast, were much less likely to characterise the decades of conflict as an imported war, with 60 per cent of Afghan refugees suggesting the conflict resembled a civil war.

Afghan refugees in Pakistan and Iran also held noticeably different views about accountability and reconciliation. Afghan refugees residing in Iran showed a higher preference than the national average towards punishing former war criminal, while Afghan refugees residing in Pakistan showed a higher than average support for amnesties. AIHRC did not explore the reasons for these discrepancies. However, it seems plausible that the presence and influence of mujahedin parties and fighters amongst the refugee community in Pakistan – but not Iran – may account for the difference in opinion towards accountability. In terms of reparations, too, Afghan refugees in Pakistan and Iran held markedly different views. Refugees living in Pakistan were against reparations for those who had been victims of war crimes at a much higher

83 Peter Nyers, above n 36, 101.
85 Ibid, 20. Other provinces that indicated a preference for punishment included three of the four provinces of the southern region (Kandahar, Zabul and Uruzgan) as well as the provinces of Paktika and Ghazni.
86 Ibid, 21. A higher than average support for amnesties was also expressed in Wardak, Nimroz and Laghman provinces.
rate than the national average,\footnote{Ibid, 3. Respondents from three provinces (Jawzjan, Faryab and Helmand) also answered at a significantly higher rate than the national average that reparations should not be the preferred justice measure. Exact rate not specified.} while refugees in Iran were heavily in favour of reparations for victims, at more than twice the national average.\footnote{Ibid, 33. Respondents from the provinces of Kandahar, Zabul and Bamiyan also indicated their support for compensation at more than double the national average: 46 per cent versus 20 per cent.}

After publishing \textit{A Call To Justice}, the AIHRC, together with the UN and the government of Afghanistan, drafted an Action Plan to implement its recommendations concerning transitional justice processes.\footnote{Afghanistan Independent Human Rights Commission, above n 76, 4-11.} Despite the high level of support for accountability, the Action Plan did not specify that the government pursue prosecution as a strategy for accountability. Instead, the AIHRC recommended five key actions, including that the Afghan government acknowledge the suffering of the Afghan people; ensure credible and accountable state institutions; undertake truth seeking and documentation; promote reconciliation and the improvement of national unity; and establish effective and reasonable accountability mechanisms.\footnote{Patricia Gossman and Sari Kouvo, above n 2, 2.}

The Action Plan received a mixed response from the Afghan government. In December 2005, it went before Cabinet, which approved with relative ease the measures for acknowledging the suffering of victims, truth seeking and institutional reform, but nearly rejected the plan’s emphasis on accountability.\footnote{Sari Kouvo and Dallas Mazoori, ‘Reconciliation, Justice and Mobilization of War Victims in Afghanistan’ (2011) 5 \textit{The International Journal of Transitional Justice} 492, 494.} Subsequently, and despite the formal acceptance of the Action Plan by Cabinet, the Government has taken virtually no steps to implement any of its recommendations. Cabinet approved the Action Plan for only four years, and since its expiration in 2009, it has not been resurrected. A further blow to the goals of transitional justice came in March 2007, when the Afghan Parliament adopted the \textit{National Reconciliation, General Amnesty and National Stability Law}, which
provided a broad amnesty, without any reciprocal obligations, for those who have committed war crimes or crimes against humanity. The Amnesty became law with its publication in the Official Gazette in December 2008, bringing an end to the possibility of legal accountability for war criminals within the Afghan legal system.

The Action Plan begins with a discussion of the category of transitional justice.\textsuperscript{92} It explains that the term ‘transitional justice’ is often misunderstood as addressing only questions of criminal responsibility, and clarifies that, in fact, transitional justice encompasses a much broader range of measures that extends beyond the ideas of ‘the court, prison and revenge.’\textsuperscript{93} The Action Plan asserts that the aim of transitional justice in Afghanistan is ‘to realise peace and national reconciliation, restore co-existence and co-operation, heal the wounds and pains of victims, and reintegrate citizens peacefully into society.’\textsuperscript{94} On the one hand, drawing attention away from criminal prosecution suited the Afghan government’s decisions to prioritise ‘peace over justice,’ and its failure to enact measures of accountability for former mujahedin leaders. However, at the same time, this description of transitional justice raises a question around the boundaries of transitional justice, and who defines those boundaries.

6.6 Conclusion

Theoretically, transitional justice encompasses all judicial and non-judicial measures aimed at redressing a past legacy of human rights violations.\textsuperscript{95} However, there are certain measures that transitional justice routinely recognises, and others it does not. The

\textsuperscript{92} Afghanistan Independent Human Rights Commission, above n 76, 2.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
emphasis within both scholarship and practice falls upon the highly visible mechanisms of criminal prosecutions, truth commissions and reparations programs. On the other hand, very little attention is given to the reform of institutions, particularly when those institutions are not directly related to security or justice. It is also rare for scholars to consider ways of repairing past damage that do not involve financial or material compensation.

In making their assessments of transitional justice in Afghanistan, scholars and practitioners focused on its most visible, institutionalised embodiment. This meant that they directed their attention to the lack of criminal accountability, the failure to establish a truth commission or other investigative machinery, and the Government’s abandonment of the Action Plan. As a result, they assess transitional justice as an almost complete failure. What each of these mechanisms had in common is that they were all state-driven processes. By focusing on these mechanisms, then, scholars suggested that the state is the actor primarily responsible for defining what constitutes transitional justice. Moreover, the success or failure of transitional justice is placed in the hands of the state, since it is only by the state’s own actions that a recognised mechanism, and thus a recognised practice of transitional justice, can materialise.

There is a growing call from critical scholars to question the boundaries of transitional justice, and who defines those boundaries. Sharp, for instance, argues that transitional justice needs to democratise and pluralise its approaches, beginning with a ‘rigorous interrogation of those items traditionally placed at the periphery of mainstream transitional justice concern.’[^96] Gready and Robins, also, advocate for a more holistic approach.

approach to transitional justice, one which seeks to understand the broader justice priorities among the target population, and which extends to include societal and social responses. This suggests that it is not sufficient to limit concept of transitional justice to the standard mechanisms of criminal trials, truth commissions and reparations. Instead, there are also rich expressions of transitional justice principles to be found in local, traditional or simply non-conventional social practices.

The need to expand the boundaries of transitional justice is even more essential if we are to seek and recognise refugee voices. One significant constraint I faced in doing so in my thesis was my inability to interview Afghan refugees directly. However, while my position as a UNHCR Protection Officer prevented me from engaging with refugees directly as a PhD student, it did provide me with regular contact with Afghan refugee representatives, and exposure to their advocacy strategies and priorities. Through this contact, I came to understand the importance of mechanisms such as the Loya Jirga, out-of-country voting, and the National Solidarity Program to the Afghan refugee community. The following two chapters attempt to discover and understand refugee perspectives on transitional justice by examining these mechanisms. Although this approach is in no way a substitute for the direct inclusion of Afghan voices, it aims to expand the boundaries of transitional justice and open up spaces that might align more closely with the justice preferences of refugees.

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CHAPTER 7: DRAFTING A NEW CONSTITUTION IN AFGHANISTAN

7.1 Introduction

This chapter aims to understand how Afghan refugees used forums other than those conventionally associated with transitional justice to repair the harm they had suffered as a result of the conflict. It considers a mechanism on the fringe of conventional practice: that of drafting a constitution. Scholarship concerning the process of drafting a constitution during a political transition is most commonly located within the broader rubric of state-building, or peace-building. However, there is a small body of work acknowledging that a constitution and the process of its drafting can, in certain circumstances, function as a mechanism of transitional justice. This chapter discusses what those circumstances might be, whether they existed in Afghanistan, and how refugees responded to them. It also considers whether there are other, alternate ways that a constitution and its drafting might further the objectives ordinarily associated with transitional justice.

For Afghanistan, drafting a constitution was not a straightforward venture. By the time of the 2001 Bonn Agreement, Afghanistan had five previous constitutions, each of which had failed to take hold due to a combined lack of state enforcement and domestic legitimacy.\(^1\) Nonetheless, the drafters of the Bonn Agreement remained optimistic, and envisioned that the constitution, coupled with elections, might slowly draw sovereign authority back to the government and people, and diminish the rule of the gun.\(^2\) Further complicating the drafting process was the continued exile of some 2 million Afghan

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refugees, resident mainly in neighbouring Pakistan and Iran. Although the Bonn Agreement did not require it, the Transitional Government took steps to ensure that refugees living in Pakistan and Iran were able to participate in the process of drafting the constitution, incorporating them into the pre-drafting consultations as well as the Constitutional Loya Jirga.

This chapter examines refugee involvement in the constitution drafting process. It begins by considering how refugee involvement in drafting a constitution can contribute to the aims of transitional justice. It argues that by employing an inclusive drafting process, incorporating substantive provisions to protect refugee rights, and constructing refugees as equal citizens, a constitution can support the objectives of transitional justice. It considers the two dominant models of citizenship: liberal, and civic republican, and how each conception frames the interaction between state and citizens. Rather than advocating one model of citizenship over the other, the chapter aims to understand the different way each model interprets and values the process of drafting a constitution.

The chapter then applies this framework to the ways in which the Afghan government engaged refugees in the drafting of the 2004 Constitution. It analyses the inclusivity of the process, the way that it constructed citizenship, and whether the substantive provisions of the Constitution contributed to the protection of refugee rights. Overall, it concludes that the constitution and its drafting did contribute to the objectives of transitional justice, including in some unexpected ways.

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### 7.2 Addressing the Past through a National Constitution

During a period of political transition, a national constitution and the mechanisms of transitional justice provide alternate techniques for a new government to symbolise a break with its discredited past, and a commitment to govern without abuse or discrimination. They do this in different ways. Typically, the process of drafting a constitution is expected to develop a document that creates the foundation of the state, by developing a framework for governance.\(^4\) As such, the emphasis is usually on developing the rule of law, and establishing strong institutions that will uphold the principles of good governance.\(^5\) Transitional justice, by contrast, aims to assist a society to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.\(^6\) This requires the state to look backwards, in order to acknowledge the past harms committed against its citizens, and forwards, in order to prevent future violations of their rights.\(^7\)

Constitutions are conventionally thought of as forward-looking documents, responsible for establishing founding ideals to govern future behaviour. However, drafting a constitution after a period of widespread violence or discrimination can provide the impetus for their engagement with the past. Ruti Teitel argues that during a period of transition, constitutions become ‘simultaneously backward- and forward-looking’ documents that address both past behaviour and future aspirations.\(^8\) They need to do this in order to establish an ideal foundation for the state that permits the population to ‘put

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the past behind and move to a brighter future.’ In transitional justice terms, then, the significance of a constitution lies in its ability to address former patterns of discrimination and abuse, and put in place guarantees to ensure such violations do not take place again.

The primary way a constitution can pursue the goals of transitional justice is through the use of an inclusive drafting process. Without an inclusive process, the voices of victims and marginalised citizens – such as refugees – will not have the chance to be heard at all, undermining their ability to achieve the justice outcomes they desire. By contrast, if victims are empowered with an influential voice in the crafting of remedies aimed at meeting their unique needs, then ‘justice choices might be more justice enhancing.’ For refugees, this becomes particularly important when it comes to their return. A participatory process of constitution drafting can provide a forum through which refugees can engage their state in dialogue concerning questions about governmental and societal discrimination, restrictions on freedom of movement, denial of property rights, access to justice, and exclusion from governance. Such discussions not only contribute to the willingness and success of refugee repatriation, but may also contribute to social reconciliation by ensuring that refugees communities feel that new rules have emerged through a participatory process, rather than being imposed by the main power holders.

The drafting of a constitution can also support the goals of transitional justice by recognising marginalised nationals as citizens. In this context, two of the most common ways to frame citizenship are the liberal model and the civic republican model. These

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9 Ruti Teitel, above n 4, 2056.
12 Aeyal Gross, above n 7, 54.
two models accentuate the value of different elements of the constitution-drafting process. The liberal model, with its emphasis on the formal protection of human rights, highlights the importance of a comprehensive legal framework to generating a strong state-citizen relationship. As such, the liberal model draws attentions to the substantive elements of a constitution, and whether these adequately protect the rights of marginalised citizens. By contrast, the republican model is concerned with the ability of citizens to participate in the institutions that govern them, and therefore emphasises the process by which the constitution comes into being. Under the republican model, then, an inclusive drafting process is essential to restoring the state-citizen relationship.

A new constitution offers the opportunity not only to engage marginalised citizens in the drafting process, but also to establish citizenship criteria based on, and reflective of, equal membership in the polity. 14 This is particularly important for refugees, since discriminatory state practices, or discriminatory state protection against abusive practices are often responsible for forcing refugees into displacement in the first place. By creating a new relationship of rights and duties between the state and its returning citizens, a constitution can contribute towards better refugee integration, whereby returned refugees are placed on equal footing with their non-displaced compatriots and receive equal, effective protection of their human rights, and accountability for any abuses of these rights.

One final way that drafting a constitution can pursue the aims of transitional justice is through the substantive content of the final document. The process of rewriting a constitution provides the opportunity to give constitutional status to the protection of key issues such as women’s and men’s equal access to land, property, education, health care,

14 Aeyal Gross, above n 7, 64.
work, and politics.\textsuperscript{15} Potentially, a constitution can pursue the goals of transitional justice by formally protecting social and economic rights, and facilitating a more egalitarian distribution of resources.\textsuperscript{16} Moreover, by enacting provisions concerning such rights, the drafting process and resulting document can de-legitimise past injustices and draw new boundaries for what behavior is permissible.\textsuperscript{17}

7.3 Refugees, the Constitution and the Goals of Transitional Justice

The 2001 Bonn Agreement set out a process of reconstruction, rather than a detailed settlement of major political issues. This was an unusual approach to a postwar agreement, and reflected the time pressure under which it was forged.\textsuperscript{18} The Bonn Agreement set out a two-step process for the drafting of a new constitution. The first step was for the Constitution Commission to prepare a draft constitution, in consultation with the Afghan people, which would then be debated, amended and agreed upon by what constituted the second step, a Constitutional Loya Jirga.\textsuperscript{19} Both steps involved the inclusion of a wide range of marginalised groups, including refugees. This section examines the engagement of refugees in light of the synergies with transitional justice objectives discussed above.

The language of the Constitution evoked a strong sense of citizenship. Its Preamble opened with ‘We the people of Afghanistan,’ followed by an articulation of the document’s objective to ‘establish an order based on the peoples’ will and democracy.’\textsuperscript{20}

\begin{thebibliography}{00}
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\item Ruti Teitel, above n 4, 2053.
\item Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, UN Doc S/2001/1154 (5 December 2001) s 1.
\item The Constitution of Afghanistan 2004 (Islamic Republic of Afghanistan) Preamble.
\end{thebibliography}
The new Afghan government reinforced the national legitimacy of the Constitution through its public assertions that the document was agreed upon by delegates ‘representing Afghan men and women’. By including refugees in the drafting process, then, the government of Afghanistan acknowledged their status as citizens of Afghanistan, and equal members in the national polity.

Before examining how, exactly, Afghans were recognised as citizens, it is important to note that Afghan refugees were not seeking a collective right to self-governance, or recognition from the state of their identity as a stand-alone collective. Unlike some refugee populations, Afghan refugees are not characterized by a single, shared ethnic, religious or political identity that has caused their state to cut them out of the polity. Rather, Afghan refugees fled for a range of different reasons over the last three decades of conflict, and their prolonged displacement – and consequent exclusion from the national polity – was usually due to a mix of conflict, poverty and the pursuit of livelihoods. As a result, they were not seeking constitutional recognition of their difference, but rather equal recognition of their rights.

The first step in the constitution-drafting process was public outreach. A Presidential decree tasked the Constitution Commission with an assertive program of public education and consultation that covered both the domiciled and displaced populations. The Commission established teams in eight regions of Afghanistan, as well as in Islamabad, Quetta and Peshawar in Pakistan, and Tehran and Mashad in Iran. In early 2003, the Commission distributed approximately 460,000 questionnaires across Afghanistan,

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21 Ibid.
Pakistan and Iran, designed to obtain the views of the Afghan population in relation to Constitutional reform. An identical questionnaire was used for the domiciled and displaced populations, comprised of 33 questions split into ten different themes: religion, the rights and duties of the people, system of governance, structure of Parliament, the use of the Loya Jirga, the structure of government administration, the judiciary, citizenship, and national language. The Secretariat received between 80 000 and 100 000 completed questionnaires back, which were then placed in an electronic data system.

After the surveys were completed, the Constitution Commission opened a period of public consultations. The Commission spent several months travelling around the different refugee communities in Pakistan and Iran. In Pakistan, Commission staff held discussion groups in refugee settlements and urban areas in Islamabad, as well as camps and urban areas in Peshawar, Quetta and throughout Balochistan and the North-West Frontier Province. In Iran, Commission staff held discussion groups in twelve major Iranian cities where refugee communities lived, as well as in the five main refugee camps. In total, approximately 1 500 refugees gave suggestions in person at consultation meetings, constituting 10 per cent of the total respondents. A range of security concerns meant that the teams could not hold meetings that were open to the public at large. However, they tried to make the consultations as inclusive as possible by targeting a wide demographic, including women, religious leaders, farmers, youth, and village elders. In order to understand the perspective of refugees they also interviewed

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27 Ibid.
staff of the Afghan Embassies and representatives who had attended the 2002 Emergency Loya Jirga on behalf of the refugee population. 28

The consultation process provided a platform through which Afghan refugees could engage in dialogue with their government, as citizens. Refugees appeared to hold high levels of interest in participating in this dialogue. The Commission received back many more surveys than it had anticipated, particularly in light of the low rate of literacy among Afghan refugees. 29 For some, there was a sense that the Commission was genuinely committed to including refugee voices. Members of the Afghan Teachers Association in Pakistan, for instance, noted that the Constitution Commission had consulted them while preparing the questionnaire. When the Association provided feedback as to how a number of questions should be amended, the Commission accepted their advice and adjusted the questions. 30

At the same time, dialogue between refugee citizens and their government was impeded by a number of factors. The first was the complicated language the Constitution Commission employed in its surveys. The AIHRC asserted that the high-level of language used in the surveys rendered them ill-designed and inadequate for collecting popular input. 31 This criticism was reinforced by another civil society group, the ‘Kandahar Women’s Law Group,’ which argued that few ordinary Afghans could understanding the questions, and fewer still were able to provide the Commission with substantive feedback. 32 Both the AIHRC and the Kandahar Women’s Law Group complained that

30 Ibid,12.
the questionnaire and consultations only discussed vague principles, and lacked the specificity required to create a definition of the precise duties and responsibilities of the various branches of government.

A second impediment to dialogue between refugee citizens and their government was the way that the incumbent government hindered citizenship engagement with the document. Although it originally promised to release a copy of the draft constitution in time for the public consultations, the Afghan government failed to do this in time, making it difficult for Afghan citizens to engage with its provisions. Moreover, the feedback the public did provide appears to have been discarded by the President and his office. After the Constitution Commission finished its public consultations in late July 2003, it spent three months incorporating the feedback it received through the questionnaire and public consultations into the draft constitution. It submitted the draft constitution to President Karzai in late September 2003. After receiving the document, the President and his office made extensive textual revisions. While the original draft proposed a semi-Presidential system, designed to promote ethnic power-sharing, and a constitutional court, designed to limit the power of the President, the revised version created a completely centralised state with no political or administrative authority devolved to the provinces, and a much greater concentration of power in the presidency.
The draft’s unchecked concentration of power in the presidency prompted wide criticism in Afghanistan from across the political spectrum. Civil society representatives complained that many Afghans felt that the views they expressed during the consultations held by the Constitution Commission were not taken seriously, while scholars argued that while the public consultations and Constitutional Loya Jirga gave the illusion of inclusivity, in fact the public had no ability to affect the substance of the Constitution. President Karzai only released the draft to the public five weeks before the Constitutional Loya Jirga that was mandated to debate and authorise its final form. This further limited the extent to which the Afghan public was able to engage with its provisions.

The Constitutional Loya Jirga provided the second platform through which Afghan refugee citizens could engage in dialogue with their government. The Loya Jirga featured prominently in the crafting of each of Afghanistan’s five previous constitutions, in 1923, 1931, 1964, 1977, and 1987 respectively. In the case of the 2004 constitution, the Afghan government framed the Constitutional Loya Jirga as a mechanism to obtain the views of the Afghan people, and make decisions in a collective way. It aimed to build consensus on vital national issues related to the constitution, and address any controversies that had arisen during the public consultations. In order to facilitate more intensive dialogue and debate, the government took the additional step of breaking the Loya Jirga delegates into ten sub-committees, each of which elected a representative to attend the central committee where they shared the views of their own sub-committee, debated with other representatives, and decided upon the final text of the constitution.

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39 Ibid, 4.
40 Afghanistan Independent Human Rights Commission, above n 31, 11.
41 J. Alexander Thier, above n 33, 546.
42 International Crisis Group, above n 1, 2.
The Afghan government sought the participation of refugee representatives from Pakistan and Iran at each of the five Loya Jirga between 2002 and 2014. The first of these, the Emergency Loya Jirga, established the formal framework for refugee inclusion. The Procedures for the Election of the Members of the Emergency Loya Jirga mandated the Special Independent Commission to adopt measures to include refugees and internally displaced persons in the Emergency Loya Jirga, and to appoint their own representatives.\textsuperscript{44} This prompted the Special Independent Commission to send two staff members to refugee camps in Pakistan and Iran, in order to meet with Afghan refugees. During the consultations, which were attended by thousands of refugees, the Special Independent Commission explained the process of the Emergency Loya Jirga, and established a mechanism for refugees to elect their own representatives.\textsuperscript{45}

For the Constitutional Loya Jirga, a similar process was followed. Refugees in Iran and Pakistan elected 24 representatives to attend the Constitutional Loya Jirga,\textsuperscript{46} 15 per cent of which were required to be women.\textsuperscript{47} Again, members of the Constitution Commission travelled to refugee communities in Pakistan and Iran to hold elections for refugee representatives. In Pakistan, UNHCR assisted the Constitution Commission by providing information regarding the distribution of refugees throughout more than 200 camps.\textsuperscript{48} On the basis of population figures provided by UNHCR, the Constitution Commission then divided Pakistan into 13 electorates, each of which was to elect one refugee representative from within their own community. Of the 13 representatives from Pakistan, seven were elected from the North West Frontier Province and Federally Administered Tribal Areas,

\begin{footnotesize}
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\item[47] Ibid, art 2.
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four from Balochistan, and one each from the provinces of Sind and Punjab. In the end, only one position was reserved for a woman, falling well below the mandated 15 per cent.49

On 14 December 2003, the Constitutional Loya Jirga opened. It was a much more orderly affair than the Emergency Loya Jirga, due to a much lower number of delegates, and an emphasis on literacy in the selection process.50 Of the 500 invited delegates, 24 were refugees from Iran and Pakistan. The Loya Jirga debated the various provisions of the constitution for 37 days. Finally, on 4 January 2004, the Loya Jirga put the constitution to the delegates for a vote. In the absence of clear rules of procedure on ratification, the Loya Jirga Chairperson asked the delegates to stand if they supported the new constitution. Most in the tent stood, and the Chairperson declared the document ratified.51 President Karzai then signed the constitution into law on 26 January 2004.

Although the Loya Jirga aimed to create dialogue between the state and citizens, it was hampered by a number of factors, dominant amongst which was the inclusion of mujahedin leaders. While those who were guilty of human rights violations were officially barred from becoming delegates, mujahedin leaders managed to retain their status as participants through their previous involvement in the Emergency Loya Jirga. During the Loya Jirga, mujahedin leaders exerted significant influence over the debates and decisions of each sub-committee,52 and other delegates complained that the influence exerted by mujahedin leaders prevented them from making their proposals and

50 J. Alexander Thier, above n 33, 547.
52 J. Alexander Thier, above n 33, 547.
advocating for their amendments.\textsuperscript{53} In addition, the American and UN envoys were both frequently seen negotiating with former mujahedin leaders in the VIP tents outside of the official Loya Jirga. These side negotiations perpetuated the dominance of Afghan politics by a few (usually armed) power holders, rather than by a majority of the Afghan population, or even a majority of the Constitutional Loya Jirga delegates.\textsuperscript{54} A widely held perspective was that the Loya Jirga is ‘in reality, nothing but going through the motions. Everything is dictated, whatever anyone says is of no consequence, and the voice of the people is not heard.’\textsuperscript{55}

In practice, then, the Loya Jirga functioned as a tool to bolster the government’s legitimacy rather than to generate dialogue between the state and its citizens. This reflects a broader historical habit on the part of the Afghan state to use the Loya Jirga as an attempt to bridge the perceived gap between ‘state and tribe, between periphery and centre.’\textsuperscript{56}

Throughout the twentieth century, when the state has found itself unable to resolve political or social problems, it has fallen back on the concept of the Loya Jirga in order to manufacture the semblance of a nationwide consensus, when no such consensus in fact exists.\textsuperscript{57} Acknowledging the limitations of the Loya Jirga challenges the idea of the Loya Jirga as a historical practice aimed at solving a political crisis through public engagement.\textsuperscript{58}

The consultation process and Constitutional Loya Jirga generated a level of dialogue between the state and refugee citizens. Traveling to the camps in Pakistan and Iran in

\textsuperscript{54} J. Alexander Thier, above n 33, 550.
\textsuperscript{55} Afghanistan Independent Human Rights Commission, above n 31, 10.
\textsuperscript{58} Christine Noelle-Karimi, above n 56, 48.
order to carry out outreach activities in person gave Constitution Commission staff the opportunity to see firsthand the conditions in which refugees lived in Pakistan and Iran. Concerned that the central office of the Constitution Commission should hear refugee voices directly, Commission staff members also recorded some of the discussions and sent the recordings to the Commission’s headquarters in Kabul.\(^{59}\) Participants were eager to meet with the Commissioners and often traveled great distances to give their views, at significant personal risk. In addition, for the first time in 24 years, the Loya Jirga opened up a channel of communication between the different segments of Afghan society, and provided a forum where the previously silent victims of the conflict were able to express themselves.\(^{60}\) Another scholar noted that the consultations exposed the Commissioners and other staff of the Constitution Commission, most of whom consisted of the Kabul and foreign-based Afghan elite, to the opinions of ordinary Afghans around the country and in refugee communities in Pakistan and Iran. Several Commission members acknowledged the benefit of these meetings, explaining with surprise that ordinary Afghans living in the provinces were more inclined towards accommodation and tolerance than were Afghans in elite political circles in Kabul.\(^{61}\)

One major factor that constrained dialogue between Afghan refugees and the Afghan government was that throughout the constitution-drafting process refugees were treated in exactly the same way as non-displaced citizens. In part, this reflected the fact that displacement was an incredibly common experience of conflict: up to two-thirds of the Afghan population became refugees during the Soviet occupation alone.\(^{62}\) At the same


\(^{61}\) J. Alexander Thier, above n 33, 546.

time, in Afghanistan in particular being a refugee does not equate with being a victim, or a greater level of vulnerability compared to the rest of the population. Migration has historically functioned as an essential survival tool, and amongst certain (privileged) segments of the refugee population, the experience of displacement has resulted in significant advantages. Of the 30-member cabinet selected at the Emergency Loya Jirga, for instance, three-quarters were members of the Afghan diaspora, including President Hamid Karzai, who had lived and been active in Pakistan and the US at different times over the preceding years. Overall, this means that treating refugees as an anomaly, or equating the experience of displacement with victimhood is inaccurate.

Nonetheless, there are a number of issues specific to refugees that warranted discussion during both the constitution-drafting process and the Loya Jirga. Foremost of these was the issue of repatriation. The Afghan government explicitly linked refugee participation in the constitution drafting process with the anticipated return of refugees, suggesting that: ‘refugees should play their role in the reconstruction and rehabilitation process of Afghanistan.’63 Despite this, refugees were given virtually no opportunities to discuss their concerns regarding return. Approximately 40 per cent of refugees returning to Afghanistan experience difficulties reintegrating into their communities of origin, due to insecurity, lack of resources of livelihoods, or the isolated nature of their village of origin.64 Compounding these problems is the fact that most refugees spent their decades in asylum in an urban area, and approximately half of all returning refugees were born and raised outside of Afghanistan. After living for several decades outside of Afghanistan

in an urban environment, returning to a rural village where they have few if any connections poses significant problems for citizen formation.\footnote{Maliha Safri, ‘The Transformation of the Afghan Refugee 1979-2009’ (2011) 65(4) The Middle East Journal 587, 594.}

UNHCR also actively supported the Constitution Commission’s activities among the refugee populations in Pakistan and Iran. It provided refugees living in Pakistan and Iran with information on the Loya Jirga process through its bi-monthly ‘Return Information Update,’ a newsletter created in order to assist refugees to make an informed decision whether or not to return to Afghanistan. In July 2003, for instance, the Return Update provided detailed information, broken down by each region of Afghanistan, of the responses by the Afghan population to the questions asked by the Constitution Commission. It also provided information on the Constitutional Loya Jirga, describing for each region of Afghanistan, Pakistan and Iran, the number of representatives elected, the kind of public awareness activities that the Constitution Commission had undertaken, the problems faced by the Constitution Commission, and the views held by the Afghan public towards the new constitution and the Constitution Commission’s activities.\footnote{UNHCR, ‘Return Information Update: 15-31 July 2003’ (Return Information Update, Issue No. 38, UNHCR 1 August 2003).}

One specific issue that merited discussion was access to land and property. In 2003, UNHCR figures indicate that large numbers of returnees were homeless and landless (up to 86 per cent in some provinces).\footnote{Reem Asalem, ‘Land Issues Within the Repatriation Process of Afghan Refugees’ (Policy Paper, UNHCR Kabul, 2003) 1.} A primary reason for the lack of access to land and property was the high levels of land grabbing that took place in the years before and after the Bonn Agreement. The new government took no action to curb this epidemic due to a mix of corruption, political protection, weak bureaucracy, fear of reprisal, and the
difficulty of challenging strongmen.\textsuperscript{68} During the constitution drafting process, a number of constitutional advisors suggested that the new constitution could lay the foundation for a thorough, although not radical, reform of land tenure and land governance.\textsuperscript{69} However, the Constitution Commission rejected this possibility, and did not address landlessness, land-grabbing, or unequal access to land in any of its deliberations.\textsuperscript{70} With no questions directing their attention to this matter, refugees were also unable to discuss their concerns around access to land and property during the Constitution Commission consultations.

A second issue of importance to refugees, and which might have been the subject of dialogue during the constitution drafting process, is the issue of economic and social rights. Many returning refugees have found it difficult to integrate into Afghan life due to problems in accessing not only land and shelter, but also services and livelihoods.\textsuperscript{71} While inadequate access to water, food, healthcare, education and livelihoods undermine the ability of the majority Afghans to achieve an adequate standard of living, returned refugees are disproportionately affected by their shortfall.\textsuperscript{72} Despite this, matters of economic and social rights received virtually no attention during the consultations and Loya Jirga discussions.

While the Afghan government claimed to pursue reconciliation through the Jirga tradition, it failed to engage in a concerted discussion of justice with victims of past

\textsuperscript{71} Nassim Majidi, ‘Urban Returnees and Internally Displaced Persons in Afghanistan’ (Report, Middle East Institute, 25 January 2011) 1, 9.
atrocities, including refugees. This indicates that engaging with local mechanisms does not automatically lead to more representative outcomes. Engaging with the ‘local’ is complex, and can result in merely symbolic or even futile actions, especially if the main goal is to fit the local into a pre-existing standard. For refugees, this means that an invitation to participate in the Loya Jirga consultations did not equate with their voices being heard, or having the ability to influence the outcome of the constitution drafting process.

In the end, the drafting process generated a differentiated citizenship that suggested different treatment for different categories of person. The inclusion of mujahedin leaders and their ability to dominate discussions at the Loya Jirga meant that short-term interests prioritising the consolidation of authority won out over long-term considerations of how to share power in a multi-ethnic, divided society. By ignoring victims and endorsing mujahedin leaders, the constitution suggests a preferential citizenship, whereby the state ignores the demands for accountability from victims but recognises the ‘sacrifices’ of those who fought, despite the violations they committed. In addition, the lack of opportunities for refugees to discuss with their state issues of importance to them, such as access to land and property or the issue of economic and social rights, suggested that citizenship does not entail making claims against the state. This undermined the ability of the drafting process to drive forward the goals of transitional justice.

74 Ibid, 75.
75 Barnett Rubin, above n 18, 10.
7.4 Substantive Provisions of the Constitution

The 2004 Constitution was based upon the previous constitution of 1964. The 1964 Constitution was the most liberal of Afghanistan’s previous constitutions, as it turned Afghanistan into a constitutional monarchy and attempted to usher in an era of greater citizen participation and more representative and accountable government.\(^{76}\) It provided for a popularly elected parliament, elected city councils, an independent legislature, and guarantees of public liberty unprecedented in Afghanistan’s history.\(^{77}\) By referencing the 1964 Constitution, the parties to the Bonn Agreement intended ‘to connect the peace process with memories of a more stable Afghanistan.’\(^ {78}\)

Some states pursue transitional justice objectives explicitly in their constitution, but this was not the case in Afghanistan. The only reference the Constitution of Afghanistan makes to its troubled history is in its Preamble, whose beginning statements acknowledge the ‘previous injustices, miseries and innumerable disasters which have befallen our country.’\(^{79}\) There are no provisions relating to the accountability for war criminals, although the Constitution does prohibit a president, vice-president, minister, national assembly member, or Supreme Court Justice who has been convicted of a crime against humanity from being elected or appointed.\(^{80}\) To date, however, Afghanistan has not prosecuted any person accused of committing crimes, and the appointment of mujahedin leaders to positions as Ministers, Governors, and Parliamentarians has undermined the integrity of the provision.\(^{81}\)

\(^{76}\) J. Alexander Thier, above n 33, 561.
\(^{77}\) The Constitution of Afghanistan 1964 (Government of Afghanistan).
\(^{80}\) Ibid, arts 62, 72, 85, and 118.
Overall, the Afghan Constitution presents a mixed picture of rights protection. It is the first time in Afghanistan’s history that the constitution acknowledges both the ethnic pluralism and the political unity of Afghanistan. The constitution recognises religious rights for non-Muslims, subordinates customary and religious law to positive legislative statutes, and prohibits gender-based discrimination. It also commits the Afghan government to respecting the *Universal Declaration of Human Rights* and other international human rights conventions Afghanistan had ratified, which, in theory, assures all Afghan citizens a wide range of civil, political, economic, social, and cultural rights. Tempering this, the 2004 Constitution gives greater official recognition to the application of *shari’a* law than existed in the 1964 Constitution. Originally, Islamists argued that the Constitution should cite Islam or *shari’a* as limits on Afghanistan’s international human rights obligations. However, they agreed finally to the provision that the Afghan government observe, without qualification, the *Universal Declaration of Human Rights*, and permitted the inclusion of Article 22, which declares the legal equality of men and women, without any of the qualifications found in *shari’a*.

No provision in the Constitution expressly mentions refugees. However, a number of provisions deal with issues of concern to refugees. Although discussions during the drafting consultations and the Loya Jirga did not address the issues of land and property rights, or economic and social rights, both topics are the subject of limited provisions in the 2004 Constitution. The Constitution did not attempt to reform land ownership.

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82 Barnett Rubin, above n 18, 17.
85 Barnett Rubin, above n 18, 14.
87 Barnett Rubin, above n 18, 14.
However, it did establish a number of related protections relevant to the situation of returning refugees. Lacking affordable housing options, refugees who have returned to Afghanistan often occupy private and public land without permission, which exposes them to precarious living conditions and a constant risk of forced eviction.\(^{88}\) Here, the Constitution provides some limited protection. Article 40(4) of the Constitution provides that: “nobody’s property shall be confiscated without the provisions of law and the order of an authorized court,” while Article 38 states that: “no one, including the state, shall have the right to enter a personal residence […] without the owner’s permission or by order of an authoritative court, except in situations and methods delineated by law.” Article 14 then requires that: “the state shall adopt necessary measures for provision of housing and distribution of public estates to deserving citizens in accordance with the provisions of law and within financial possibilities.”\(^{89}\) The Constitution also guarantees freedom of movement and residency, which is relevant for refugees as they often become displaced from their place of origin upon return, and then face harassment as internally displaced persons who have no security of tenure.

The potential for the Constitution to create more egalitarian access to land, in a way that remedies past injustice, has not been realised in Afghanistan.\(^{90}\) The government has made some limited attempts to enact domestic legislation to carry out the principles enshrined in the constitution. Working in conjunction with the provisions of the 2004 Constitution, a 2003 Presidential decree created an independent *Special Property Disputes Resolution Court* to deal with property disputes concerning returnees.\(^{91}\) The Court was subject to

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\(^{90}\) Aeyal Gross, above n 7, 83.

\(^{91}\) Presidential Decree 89, Regarding the Creation of a Special Property Disputes Resolution Court (Islamic Transitional State of Afghanistan, 30 November 2003).
widespread criticism, and collapsed several years later due to lack of enforcement ability, corruption and inaccessibility.\footnote{Nezamuddin Katawazi, ‘Land Disputes and Governance in Afghanistan’ \textit{Transconflict} (online) 1 October 2013 <http://www.transconflict.com/2013/10/land-disputes-governance-afghanistan-110/> .} The constitutional provisions on forced eviction have been equally unsuccessful in protecting returned refugees. Evictions are regularly carried out without the authorisation of a court order, despite the legal requirement that those doing the eviction obtain such an order.\footnote{Caroline Howard and Jelena Madzarevic, ‘Still at Risk: Security of Tenure and the Forced Eviction of IDPs and Refugee Returnees in Urban Afghanistan’ (Report, Norwegian Refugee Council, February 2014) 13.} Evictions are planned and carried out with no genuine consultation, inadequate notice, no due process and without compensation. Furthermore, in the vast majority of cases, evicted refugee families have no prospect of being relocated to adequate alternative housing.\footnote{Ibid, 17.}

Despite these provisions, many returning refugees continue to suffer from an inability to fulfill their economic and social rights and obtain an adequate standard of living. One major reason for this is the failure of constitutional provisions to result in domestic legislation. As the AIHRC found in its research on the Afghan drafting process, one challenge is that the constitution ‘must not only guarantee rights on paper, but must explain how those rights will be protected.’ This requires it to ‘build in mechanisms for enforceability and justiciability,’ a requirement that is especially important in the context of moving from a transitional period to a permanent system.\footnote{Afghanistan Independent Human Rights Commission, above n 31, 30.}

The 2004 Constitution makes multiple references to the principles of economic and social rights. Article 6 asserts that the state is “obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realisation of democracy and to ensure national unity and equality among all ethnic
groups and tribes and to provide for balanced development in all areas of the country.\textsuperscript{96}

Article 7 of the Constitution states that everyone has the right to a standard of living for the health and well-being of himself and of his family, including food, clothing, housing, medical care, social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. The Constitution also provides for the protection of labor rights,\textsuperscript{97} right to social security,\textsuperscript{98} protection of the family,\textsuperscript{99} health,\textsuperscript{100} and the right to education.\textsuperscript{101}

However, the economic and social rights protections enshrined in the 2004 Constitution have generated very little follow through, and in practice are poorly enforced. The rights proclamations are not accompanied by administrative instructions or other means for implementation, which has limited the effectiveness of rights protection, prevention of violations, and law enforcement in general.\textsuperscript{102} The constitution locates responsibility for the pursuit of economic and social rights with local government in very general terms. It states that the Afghan government, while preserving the principle of centralism, is to delegate certain authorities to local administration units for the purpose of expediting and promoting economic, social, and cultural affairs, and increasing the participation of people in the development of the nation.\textsuperscript{103} What this might mean in practice, and exactly how central government authority might extend into the provinces and interact with local-level governance mechanisms, was not addressed in any substantial form during the constitution drafting discussions.

\textsuperscript{97} Ibid, arts 48 and 49.
\textsuperscript{98} Ibid, art 53.
\textsuperscript{99} Ibid, art 54.
\textsuperscript{100} Ibid, art 52.
\textsuperscript{101} Ibid, arts 43 and 44.
\textsuperscript{102} Afghanistan Independent Human Rights Commission, above n 72, 7.
\textsuperscript{103} The Constitution of Afghanistan 2004 (Islamic Republic of Afghanistan) art 137.
7.5 Conclusion

A constitution can further the objectives of transitional justice by addressing former patterns of discrimination and abuse, and putting in place guarantees to ensure such violations do not take place again. A legal reading of the 2004 Constitution of Afghanistan suggests that it made small steps towards this goal. It recognised religious rights for non-Muslims, subordinated customary and religious law to positive legislative statutes, prohibited gender-based discrimination, and embraced the Universal Declaration of Human Rights. From the liberal perspective of citizenship, these provisions strengthened the quality of citizenship by formally protecting the rights of citizens, and indicating the state’s intention to safeguard those rights.

Another way in which the Constitution furthered the objectives of transitional justice was through its inclusive drafting process. Both the Constitution Commission and the Constitutional Loya Jirga targeted groups that were habitually marginalised, including Afghan refugees living in Pakistan and Iran. In doing so, the Afghan government formally recognised Afghan refugees as rights-bearers and citizens, and opened a limited channel of dialogue between the state and its refugee population. From a civic republican perspective, the ability of citizens to influence the way they were governed, and engage in dialogue directly with their own government, also strengthened the quality of citizenship.

Notwithstanding these positives, a closer examination of the constitution-drafting process as experienced by refugees generates a more circumspect assessment. The Constitution recognised only a limited set of rights. For refugees, the constitution was largely
irrelevant to the repair of ongoing harm, such as an ongoing lack of access to land, housing, food and water. It also failed to address the loss or appropriation of land and property, or to put in place appropriate reparative measures. This did not necessarily have to be the case – potentially, a constitution offers an opportunity to formally protect the economic and social rights of marginalised groups, and to facilitate a more egalitarian distribution of resources.104 From the refugee perspective, then, the Constitution did not secure adequate rights protection, thus undermining its contribution to liberal citizenship.

In addition, the formal constitution-drafting process only acknowledged only a select number of voices. While refugees were invited to engage in dialogue with their government, the topics of that dialogue were heavily circumscribed and excluded many issues of importance to them. However, refugees identified valuable opportunities in the margins of the official process that allowed them to contribute their voices to the national narrative. This took place by way of building relationships and connections with government officials, such as when the Constitutional Commission traveled to the refugee camps in Pakistan and Iran for instance, and then recorded Afghan voices and sent them back to Kabul. In this way, personal connections were forged between refugees and officials from their home country that may have influenced the perspective of power brokers in Kabul. These unofficial channels appeared to contribute to a stronger sense of citizenship, in the civic republican sense, on the part of Afghan refugees.

The next chapter explores other unconventional forums and methodologies by which Afghan refugees pursued the objectives of transitional justice.

104 Aeyal Gross, above n 7, 91.
CHAPTER 8: BEYOND CONVENTIONAL TRANSITIONAL JUSTICE
IN AFGHANISTAN

8.1 Introduction

This chapter challenges the standard boundaries of transitional justice. It suggests that while the Afghan government may have failed to implement conventional mechanisms such as criminal trials or a truth commission, both Afghan nationals and the Afghan government pursued the objectives of transitional justice in a number of alternate forums. This chapter examines two of these forums. The first is the enfranchisement of Afghan refugees in the 2004 Presidential elections, through an out-of-country voting program. The second is the National Solidarity Program, a state-led community development program that operated from 2003 until 2014. The chapter questions how Afghan refugees pursued their claims for justice in these two forums, the ways in which the Afghan government used these forums to repair its relationship with its citizens, and what contribution these forums made to the overall objectives of transitional justice.

The chapter begins by considering the existing scholarship on refugee enfranchisement as a mechanism of transitional justice. It then suggests that in the case of Afghanistan, refugees considered their enfranchisement in relation to the 2004 Presidential elections an expression of their citizenship and a method of justice; equally, they considered their lack of enfranchisement in subsequent elections a blow to both justice and their status as citizens. The chapter identifies a number of unexpected methods of justice and repair associated with out-of-country voting, and argues that overall, refugee enfranchisement in Afghanistan contributed in a range of ways to the objectives of transitional justice.
The chapter then turns to the National Solidarity Program. It examines how the objectives of transitional justice and development overlap, and in what circumstances development might contribute to the goals of transitional justice. It then considers the NSP’s engagement of returned refugees, and how this engagement contributed to reconciliation between refugees and their state, as well as between refugees and the domiciled communities to which they returned. I argue that refugee perspectives on the NSP shift the understanding of what constitutes transitional justice, and how actors such as the state, citizens and victims themselves define the boundaries of transitional justice.

8.2 Out-of-Country Voting

Refugee enfranchisement does not ordinarily engage the language of transitional justice. One reason for this is that transitional justice imagines itself through a discourse of human rights and international law, and struggles to conceive of harms, or remedies, which fall outside the human rights framework. This impedes refugee enfranchisement because the right of a non-domiciled national to vote in national elections is not clearly established under international law. Article 25 of the International Covenant on Civil and Political Rights extends the right to political participation, including the right to vote in elections, to ‘every citizen.’\(^1\) However, this right is limited by Article 2, which clarifies that each state party undertakes ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.’\(^2\) This limits the right to vote to domiciled citizens, and denies any clear legal obligation upon states to ensure that citizens residing outside of the country can vote in national elections.

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\(^2\) Ibid, art 2.
This limitation reflects a pragmatic approach to enfranchisement. In order to enfranchise those members of the polity that live outside the nation, the state must set up out-of-country voting apparatus. The resources that this requires can be demanding. States may not have the resources available to support out-of-country voting; or, alternatively, may have the capacity to enfranchise some but not all of its citizens living abroad, especially if they are widely dispersed or their location entails security or political concerns. Acknowledging these challenges, international standards allow for electoral participation to be contingent upon reasonable restrictions pertaining to residency in the country of origin.³

Refugee enfranchisement is commonly discussed within the literature on peace-building and state-building.⁴ These fields approach out-of-country voting from the perspective of the state, and tend to focus on the impact refugee enfranchisement has on the state’s legitimacy or its method of governance. For instance, scholars argue that free and fair elections can provide legitimacy to new political institutions and leaders, promote accountability and good governance, and kick-start sustainable democratic transitions, thereby contributing to national stability.⁵ The enfranchisement of external populations, in particular, is often identified as an important element of a post-conflict transition to democracy, and has been implemented in countries as diverse as Eritrea, Namibia, Bosnia and Herzegovina, Kosovo, Timor-Leste, Afghanistan, and Iraq.⁶

⁴ Ibid, 121.
⁵ Ibid, 97.
An alternative to the state-based approach is to consider the enfranchisement of refugees as a matter of personal reparative justice. Under international law, reparations are intended to, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.\textsuperscript{7} While it is impossible for the state to repair all forms of harm, there are numerous instances where restitution is possible. Cherif Bassiouni, for instance, argues that:

Restitution involves the situation where something has been taken from the victim, which either the State or the individual violator has the ability to return, such as cultural property, \textit{objects d’art}, or confiscated lands. It would also include such intangibles as the restoration of the right to vote, or own property.\textsuperscript{8}

The loss of the right to vote is caused either directly or indirectly by the state: directly, in instances where the state itself was responsible for the refugee’s forcible migration; and indirectly, in cases where the state was willing but unable to protect the refugee from the harm which forced her to flee. Since refugees would have been citizens with voting rights had the state protected them from violence as it should, restoring the refugee’s citizenship rights by way of enfranchisement becomes a matter of rectificatory justice.\textsuperscript{9}

It is not just the loss of the right to vote that compels refugee enfranchisement as a matter of justice. Individuals whose circumstances of life link their future well-being to the flourishing of a particular polity are stakeholders in that polity. As stakeholders, they have a claim to participate in collective decision-making processes that shape the shared future

\textsuperscript{7} Factory at Chorzów (Germany v Poland) (Merits) [1928] PCIJ (ser A) No 17, 47.
of that political community. Refugees face the prospect of voluntary, or, often, involuntary return following the end of conflict. Out-of-country voting has significance as a justice measure because it offers national authorities a way to guarantee, both in law and in official practice, that displaced populations have a say in the political and economic decisions which either do, or will, have a significant affect on their lives. The inclusion of refugees can serve as a powerful symbol of their (re)admission to the political community as equal citizens, and indicate that the conflict has ended or is likely to be resolved soon and, consequently, that repatriation is either imminent or forthcoming. This also means that out-of-country voting is not necessarily reparative in nature. There have been instances in which states of asylum have withdrawn their protection prematurely and pressured refugees to return, on the basis that elections signaled the end of conflict.

The following section examines the enfranchisement of Afghan refugees, and their subsequent loss of the ability to vote. It intentionally takes the perspective of refugees, in order to understand, if, and in what ways, out-of-country voting functioned as a measure of justice, and how it might contribute towards the objectives of transitional justice.

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10 Ibid, 2422.
11 Jeremy Grace and Erin Mooney, above n 3, 95.
14 Ibid, 221.
8.3 Presidential Elections in Afghanistan: State and Refugee Perspectives

In 2004, in accordance with the roadmap set out in the Bonn Agreement, the Transitional Government of Afghanistan held Presidential elections. A key part of this process was the enfranchisement of Afghan refugees living in Pakistan and Iran, who were provided with the opportunity to vote concomitantly with voters in Afghanistan. Overall, 846,776 refugees cast their vote: 590,732 in Pakistan, and 256,044 in Iran. Female turnout was 29 per cent in Pakistan and 40 per cent in Iran.

From the beginning, political considerations drove refugee enfranchisement. The Joint Electoral Management Body (JEMB) was responsible for all aspects of the elections, including out-of-country voting. The JEMB, together with the IAEC and UNAMA, started discussions about incorporating an external voting program in January 2004, and on 12 April 2004 the JEMB made a first favourable decision to extend enfranchisement to refugees living in Pakistan and Iran. Shortly thereafter, operational challenges including a lack of funds, difficult negotiations with Pakistan regarding the scope of the program, and concern on the part of JEMB and UNAMA on the short timeframe, led JEMB and UNAMA to discard the idea, and declare out-of-country voting infeasible.¹⁵

Despite the decision to abandon the out-of-country voting program, two months later, the issue of refugee enfranchisement reappeared on the political agenda. Interim President Karzai’s popularity was waning, which concerned the intervening international community since Karzai was their preferred candidate.¹⁶ Seeking addition voter support, the attention of the international community and the incumbent government turned to the

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¹⁶ Ibid.
Afghan refugee populations in neighbouring Pakistan and Iran. It was widely expected that voter preferences would run along ethnic lines, and since the bulk of Afghan refugees living in Pakistan were of Pashto ethnicity, they were expected to vote for Karzai. Refugees in Iran were mainly of Tajik and Hazara ethnicity, so they were anticipated to vote for one of the opposing candidates.\footnote{Jeff Fischer, ‘The Political Rights of Refugees and Displaced Persons: Enfranchisement and Participation’ in Andrew Ellis et al (eds), Voting From Abroad: The International IDA Handbook (International IDEA, 2007) 151, 159.} However, given that there were far fewer refugees in Iran than in Pakistan, overall the Pashto constituency within the refugee populations was expected to be higher. Conscious of this, on 23 June 2004, Interim President Karzai requested that JEMB include Afghans in Iran and Pakistan in the Presidential Election. Notwithstanding its concerns surrounding the technical and operational challenges, the JEMB agreed to Karzai’s proposal. It issued a statement on 30 May 2004 confirming the enfranchisement of the refugee populations in Pakistan and Iran, acknowledging that: ‘[t]he decision to proceed with out-of-country registration and voting is based on political concerns rather than technical considerations.’\footnote{Catinca Slavu, above n 15, 28.}

In July 2004, the government of Afghanistan signed MoUs with the governments of Iran and Pakistan regarding out-of-country voting, and contracted IOM as the operational partner responsible for implementing voter registration and polling. The international community threw their support behind this initiative, making funding available for voter registration and polling through the voluntary donation project budget, and donors imposed few budgetary constraints upon the process.\footnote{Jeff Fischer, above n 17, 161.}

A complex regulatory framework administered the right to vote. According to the legal framework enacted by the government of Afghanistan, Afghan nationals living in
Pakistan and Iran who were 18 years or older and could prove their nationality were eligible to vote. However, in addition to this, the governments of Pakistan and Iran demanded their own separate amendments before they would agree to permit out-of-country voting within their respective jurisdictions. The Iranian government stipulated that only those who had legal residence in Iran were eligible to vote, a requirement that covered approximately 50 per cent of the refugee population. The Iranian government also provided JEMB with a refugee database of all Afghan refugees legally resident in Iran to use as a voter registration role. The Pakistani government, by contrast, asserted that voter eligibility extended to all Afghan nationals who had arrived in Pakistan after 1979. This covered virtually the entire refugee population. The government of Pakistan did not have a refugee database commensurate with that of Iran, and as a result IOM had to carry out voter registration in Pakistan prior to the election, in order to develop an election roll.

On 29 October 2004, refugees in both Pakistan and Iran voted in the Presidential election. Karzai was successful by a narrow margin, winning 55.6 per cent of the total vote. The enfranchisement of refugees proved critical to his success. He received the majority of the refugee votes in both Pakistan and Iran, constituting 80 per cent of the refugee vote in Pakistan, and 44.4 per cent of the refugee vote in Iran. Together, the refugee vote accounted for around 11 percent of all the votes Karzai received, thus ensuring his success.21

Since 2004, Afghanistan has held two subsequent Presidential elections, one in 2009 and the most recent in 2014. In both of these elections, refugees living in Pakistan and Iran

20 Ibid, 159.
were not provided with the opportunity to vote. This was despite large populations of Afghans still living in asylum: in 2009, UNHCR estimated that approximately 1.7 million Afghan refugees remained living in Pakistan, and almost 1.1 million in Iran,\(^{22}\) while in 2014, estimations of the refugee population stood at 1.5 million Afghan refugees in Pakistan and almost 1 million in Iran.\(^{23}\) In these subsequent elections, no steps were taken by either the Afghan government or the international community to make arrangements to enfranchise Afghan refugees,\(^{24}\) leading to criticisms that the Afghan government and international community ‘seems to have forgotten about the right of franchise for displaced people.’\(^{25}\)

The decision not to enfranchise refugees drew sharp criticism from the Governments of Pakistan and Iran. In internal discussions, both governments accused the Afghan Government, and to a lesser extent UNAMA and UNHCR, of not genuinely wanting Afghan refugees to return to Afghanistan. The perception of the two governments was that if the Afghan Government was genuinely committed to the return of Afghan refugees, then they would take whatever steps were necessary to ensure refugee enfranchisement.\(^{26}\) Pakistani authorities also voiced their discontent in public. For instance, Shah Farman, the information minister of Pakistan's northwestern Khyber Pakhtunkhwa province claimed it was a ‘mere excuse’ that it was not logistically possible to allow Afghan refugees to vote, since the Pakistani authorities were in fact willing to make all the necessary arrangements.\(^{27}\)

\(^{22}\) Division of Program Support and Management, 2009 Global Trends (UNHCR, 15 June 2010) 7.


\(^{26}\) Interview with UNHCR official (Kabul, 10 December 2013).


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The Afghan Government publically stated that the lack of refugee enfranchisement stemmed from factors beyond its control. Officially, Article 5 of the 2013 Election Law asserts that voting in the Presidential election is a right for Afghan refugees living outside the country. However, more than six months before the election was due to take place, the AIEC announced that out-of-country voting would not be available due to financial and logistical constraints.28 On a number of occasions, the IEC shifted the responsibility for the lack of enfranchisement to the failure of the international community to fund the venture. For instance, IEC Secretary Ziaul Haq Amarkhel noted that the IEC had provided the government and the international community with a preliminary plan for how to enable overseas Afghans to vote, but the required funds – estimated at USD50 million, had not been forthcoming.29

Scholars tend to assess the enfranchisement of Afghan refugees from the perspective of the state. This perspective means that even when refugees were enfranchised, because refugee enfranchisement was spurred largely by political considerations, scholars are critical that such enfranchisement contributed to justice or a genuinely inclusive political process. Instead, since the decision to enfranchise refugee in 2004 was based on the intention to influence favourably the political standing of President Karzai, the external voting process failed to enhance, or even compromised, the legitimacy of the presidential election.30 Others argue that the enfranchisement of Afghan refugees undermined the state-building intervention, and was detrimental to Afghanistan’s long-term democratic

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30 Catinca Slavu, above n 15, 33.
development.\textsuperscript{31}

The perspective of refugees tells quite a different story to that of the state-centred scholarship. Notwithstanding the political imperatives, refugee enfranchisement signified the Afghan Government’s formal recognition of refugees as citizens, with political rights equal to those of their compatriots. This meant that when refugees were unable to vote, it indicated their exclusion from the national polity. In 2009 and 2014, refugees regularly complained that their lack of enfranchisement negated their identity as citizens. Some argued that ‘by denying Afghan refugees the right to vote from Iran and Pakistan, the Afghan government made them feel politically vulnerable and alienated.’\textsuperscript{32} From the perspective of others, not being able to vote ‘means that we are neither citizens of Afghanistan nor Pakistan,’ or that ‘we don’t have voting rights, which means it’s the end of our [Afghan] identity.’\textsuperscript{33}

Media coverage of the 2014 Presidential elections regularly referred to the ‘disenfranchisement’ of refugees, implying or sometimes even explicitly accusing the Government of Afghanistan, and the international community more broadly, of intentionally denying refugees the right to vote. In doing so, most articles painted a picture of Afghan refugees as stakeholders in the future of Afghanistan, people with vested interests in the way its political future was decided. Media articles charged that the Afghan government did not sufficiently value the ways that the refugee population was engaged with the domestic population, and failed to appreciate the contribution that refugees made to Afghanistan, for instance through remittances earned in Pakistan and

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\textsuperscript{31} Malaiz Daud, above n 21.

\textsuperscript{32} Nasreen Ghufran, ‘Afghan Refugees in Pakistan: Current Situation and Future Scenario’ (2005) 3(2) Policy Perspectives 1, 13.

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Another article noted that refugees are unhappy about their inability to vote, and think that their participation in the poll could have strengthened Afghanistan and the next government.\textsuperscript{35}

A number of media articles highlighted that the loss of the ability to vote affected those of Pashtun ethnicity more than any other ethnic group. This was because more than 90 per cent of the Afghan refugee population resided in Pakistan, and, within Pakistan, the majority of Afghan refugees were of Pashtu ethnicity. The language used by media reports was often accusatory. One article, for instance, reported that: ‘the denial of voting right to refugees in Pakistan…means that a significant number of ethnic Pashtun voters have been disenfranchised.’\textsuperscript{36} Another charged that: ‘There is no peace in the Pashtun majority areas of Afghanistan, and now the Afghan refugees, the majority of whom are also ethnic Pashtuns, won't have any say in these elections. This means that the new Afghan president won't represent the majority of Afghans.’\textsuperscript{37}

Going beyond their symbolic inclusion in the national polity, the enfranchisement of refugees was valuable to refugee because it suddenly imbued them with political relevance. Throughout the lead up to the 2004 elections, Afghan political parties campaigning for the different Presidential candidates were active amongst the refugee communities in both Pakistan and Iran, although more so in the former than the latter. In Pakistan, a primary election observer group, the Asian Network for Free Elections (ANFREL) noted the presence of numerous political party agents in the refugee camps promoting the out-of-country voting program, even arranging transportation to bring the

\textsuperscript{34} Shamil Shams and Faridullah Khan, above n 27.
\textsuperscript{35} Ibid.
\textsuperscript{37} Shamil Shams and Faridullah Khan, above n 27.
people to registration facilities.\textsuperscript{38} ANFREL was of the view that this was ‘very positive’ and enhanced the number of registered Afghan voters in Pakistan, as well as their knowledge concerning the different candidates.\textsuperscript{39}

In Iran, campaigning by political parties was more limited. ANFREL observers interviewed eligible Afghan votes in several refugee communities, and found that voters lacked information on who the candidates were and what they stood for, which made it difficult for them to compare the political agendas of different candidates. Instead, refugee voters in Iran had to rely on information about candidates from the radio stations (which broadcasted news on Afghanistan Election) and the international news. Campaigning from the candidates was almost non-existent, and Afghan refugees complained that their ability to choose between candidates was constrained by their lack of knowledge concerning each candidate.\textsuperscript{40}

This alternate account of out-of-country voting suggests that the reparative value of refugee enfranchisement should not only be assessed from the perspective of the state. The perspective of refugees – those who are the subject of the enfranchisement – indicates a different understanding of what constitutes justice, as well as the reparative value of out-of-country voting. The experience of Afghan refugees suggests that out-of-country voting should be understood as a holistic process, involving not only the legal act of casting a vote, but also all the activities that take place in the margins, such as political mobilisation and the building of relationships between the displaced and political leaders. This suggest that even if the state perspective suggests that out-of-country voting undermines the goals of state-building, the process of imbuing refugees with political


\textsuperscript{39} Ibid.

\textsuperscript{40} Ibid.
relevance renders out-of-country voting with reparative value.

In order to create the possibility for justice outcomes to become more widely accepted by people with opposing rationales for that acceptance, it is necessary to take a ‘broader, deeper and longer’ view of transitional justice can.\textsuperscript{41} Cass Sunstein describes a situation commonly experienced by domestic courts, where a wide range of people will accept one of its decisions for incompatible ethical reasons. There might be consensus that the court got the decision right, but those who agree on the decision do so for theoretically conflicting reasons. Sunstein argues that it is a good thing that legal agreements are incompletely theorised, since it results in a greater percentage of the population accepting the court’s decisions as legitimate.\textsuperscript{42} For transitional justice, this suggests that accepting competing rationales for different interventions might allow people to agree, for competing reasons, to work together towards that outcome.\textsuperscript{43} Some scholars might argue that out-of-country voting is valuable because it can contribute to the legitimacy of the state, whereas others might recognise the reparative value of including refugees in the national policy, and imbuing refugee lives with political relevance. By acknowledging the perspective of different actors, and allowing those perspectives to expand the boundaries of transitional justice, scholars and practitioners might be better equipped to achieve the goals of justice and reconciliation.

\textsuperscript{43} John Braithwaite and Ray Nickson, above n 41, 449.
A second space where Afghan refugees – and Afghan citizens generally – seemed to be engaged in activities related to reconciliation and justice was in the national development program known as the NSP. The NSP is Afghanistan’s largest community development program. It was launched in 2003 in 5,000 rural communities, and, since then, it has brought its programs to 32,000 villages, across 361 districts in all of Afghanistan’s 34 provinces.\textsuperscript{44} The NSP is not a transitional justice mechanism in any conventional sense. However, the government of Afghanistan linked its activities and processes to broader goals related to national unity and social repair, and in this way mirrored some of the concerns of transitional justice processes. The following two sections examine if, and how, the NSP contributed to reconciliation between returned refugees and their state, and between returned refugees and the communities to which they returned.

Transitional justice has not typically been concerned with development. Development, in its most general sense, refers to processes intended to improve the socioeconomic conditions of people.\textsuperscript{45} The United Nations Development Program describes development as a process of enlarging people’s choices, the most critical of which relate to an individual’s ability to lead a long and healthy life, to be educated, and to enjoy a decent standard of living.\textsuperscript{46} In contrast to this focus on economic and social rights, transitional justice tends to favour civil and political rights. Instead of intervening through social processes, as is the case of development, transitional justice is conventionally

\textsuperscript{44} Andrew Beath, Fotini Christia, Ruben Enikolopov, ‘Randomized Impact Evaluation of Afghanistan’s National Solidarity Programme’ (Final Report, World Bank, 1 July 2013) viii.


expressed through a limited number of legal, institutionalised mechanisms, such as trials, truth commissions and reparations. As such, the two fields have only in recent years begun to interact more systematically.

There are a range of reasons for a more systematic interaction between transitional justice and development. To begin with, the two fields share a number of complementary and overlapping aims. Both aim to create reconciliation amongst post-conflict populations, and are concerned to some extent with the renewal of civic trust and confidence between the state and citizens. The two fields often work more effectively in tandem, since reconciliation without economic justice – which might be achieved through development programs – is likely to be viewed as ‘cheap and spurious.’ In addition to the shared pursuit of reconciliation, there is also widespread acknowledgement that transitional justice measures are likely to be most significant when part of a broader program of structural reform and development. Simply dealing with individual, past human rights violations is likely to be inadequate; instead, what is needed are reforms that address structural problems and injustices such as institutional incapacity, gender discrimination, poverty, and land insecurity.

In many instances, development programs provide the same assistance as transitional justice reparations. Any benefit that can be used to repair victims’ lives, such as compensation, preferential access to basic services, or allocation of land and housing,

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can, at least in principle, also be used by actors trying to foster the economic and social development of communities and individuals. 51 It is not uncommon that victims themselves prefer reparations to take the form of specific development projects, such as rebuilding community structures or providing schools or health clinics. 52 The distinction between the two fields, then, is not in the type of assistance, but in the broader political context: namely, whether the particular efforts are presented by the state as official acknowledgments of past violations, and are openly intended to provide justice for past suffering. 53 Equally, it is important that the assistance is recognised by the community as atonement for past harms.54

This chapter considers whether, and how, development assistance provided through the NSP contributed to the objectives of transitional justice. A central consideration is whether the NSP functioned as a tool of reconciliation. Reconciliation is a process through which a society moves from ‘a divided past to a shared future,’ 55 and is fundamentally about building relationships of trust and cohesion at multiple different levels, from the individual, inter-personal and communal, to the national and international. 56

For refugees, reconciliation is particularly important between those who repatriate, and the communities to which they return. 57 Repatriation is not the end of the refugee cycle

53 Peter Van der Auweaert, above n 51, 168.
54 Naomi Roht-Arriaza and Katharine Orlovsky, above n 52, 173.
56 Joanna Quinn, ‘Introduction’ in Joanna Quinn (ed), Reconciliation(s): Transitional Justice in Postconflict Societies (Queen’s University Press, 2009) 1, 5.
but the beginning of a new cycle, and entails the social, political, and economic reintegration into the person’s home country. The economic conditions to which refugees return directly affect the possibility of reconciliation, and a weak economy can aggravate divisions. In response to this challenge, throughout the 1990s UNHCR implemented a range of ‘co-existence’ projects in Bosnia and Herzegovina and Rwanda, intended to foster social reconciliation between returned refugees and their non-displaced compatriots. These projects relied upon income-generating, psychosocial, sports-related, educational and cultural initiatives to improve the environment for return and reintegration, and achieved a range of successes in repairing social relationships, addressing poverty and strengthening communities.

Restoring the relationship between refugees and their home state is an equally important element of reconciliation. After a period of violence or human rights abuse, citizens often have little trust in the institutions of government to protect them, or ensure their interests. In order to restore the relationship between citizens and state, it is necessary to renew civic trust and confidence between the two. Here, the interests of development and transitional justice converge: both are concerned to some extent with contributing to the development of institutions and their capacities to ensure the conditions for peaceful coexistence, to protect the rights of citizens, and to restore the state-citizen relationship. Scholars suggest that human rights law offers a way to frame this interaction, since it draws attention to the relationship between a state and its citizens, and how the state can

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61 Marcus Lenzen, above n 47, 83.
62 Ibid.
meet its obligations to provide long-term guarantees for citizen well-being, particularly for the most vulnerable and marginalised in society.  

Development assistance is often a determining factor in the ability of refugees to reintegrate after their return. The process of reintegration is long-term, and requires the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood. In communities composed of returned refugees, efforts to increase security, reconstruct infrastructure, generate employment opportunities, and strengthen equitably accessible social services have made a more significant contribution to enabling reconciliation than conventional mechanisms of transitional justice.

However, scholars suggest that such interventions should not stand alone, but are more effective when implemented in conjunction with national development programs. Reflecting on UNHCR’s coexistence projects of the 1990s, for instance, scholars assert that they were limited in their impact and sustainability because they were planned and implemented in isolation from national development processes and priorities.

8.5 Afghan Refugees and the National Solidarity Program

One of the most significant challenges facing the transitional Afghan government in 2003 was the fractured nature of Afghanistan’s national identity, brought about by years of violent conflict. Mohammed Ehsan Zia, the Head of the Ministry of Rural Rehabilitation

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63 Ibid, 85.
65 Department of International Protection, Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees UN doc HCR/GIP/03/03 (10 February 2003) art 4.
and Development, explained that social inclusion was the most urgent need of the country during this period, and the government believed that ‘the only way that we could promote social cohesion on a massive scale was to bring people to work together for a common good.’ It was from this idea that the NSP was born. Finance Minister Ashraf Ghani explained that a crucial part of the NSP was to create a sense of shared national citizenship. The intention was ‘to create a core of solidarity around the idea that all Afghans were citizens of a new Afghanistan, with rights and obligations.’ This need was particularly high for the younger generation, who had never lived and worked together as members of a shared political community, and for returning refugees who had spent most of their lives abroad as refugees.

A second challenge was the lack of connection most Afghans felt towards their central government. In Afghanistan, there has been historically little, or no, tradition of formalised community participation in political decision-making or development planning, either on a national or local level. Even in the 1960’s when the Afghan government aimed to introduce a more democratic state, this mostly remained a ‘democracy from above’ that rarely engaged ordinary citizens. At the community level, and separate from the state, a customary system of self-governance exists, known as the Jirga system (shura in Dari). The jirga is a local council consisting of male representatives of all extended families of a village, and functions mainly as a local conflict resolution body, rather than handling day-to-day governance. The jirga occasionally takes place on the national stage, such as the Constitutional Loya Jirga.

70 Rushda Majeed, above n 68, 1.
72 Ibid, 6.
discussed earlier in this chapter. However, the *jirga* system usually functions quite apart from the state, and is the primary system of governance for ordinary Afghans.

This context prompted the new government to seek ways to extend the administrative reach of the state, and build representative institutions for local governance.\(^73\) As a result, the NSP was framed around two related village-level interventions. The first was the Community Development Council (CDC). The CDC was a village-level governance mechanism, created by the NSP in each target village, and similar in some ways to the *jirga*. It acted as the liaison point between the community and the central government with respect to the activities of the NSP. Members of each CDC were elected by their local community, using a secret-ballot election based on universal suffrage. The dearth of other state governance structures at the local levels meant that soon after their establishment, the CDCs became the main hub through which not only the NSP, but also other Afghan government agencies coordinated their interventions. International organisations and development NGOs also came to rely on the CDCs as coordination structures, linking Afghan communities to broader development programming.\(^74\)

Through the CDCs, the NSP achieved unprecedented, widespread involvement of women in rural Afghanistan’s community decision-making apparatus.\(^75\) The NSP mandated that women must be represented on the CDC, and must participate in the development of the community’s development priorities.\(^76\) In light of the cultural variety within Afghanistan, the exact ways in which women participated varied. In some communities, women participated directly, on par with men. In others communities they formed a separate

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\(^{73}\) Andrew Beath, Fotini Christia, Ruben Enikolopov, above n 44, 1.

\(^{74}\) Jennifer Brick, ‘Investigating the Sustainability of Community Development Councils in Afghanistan’ (Final Report, Afghanistan Research and Evaluation Unit, February 2008) 34.

\(^{75}\) Andrew Beath, Fotini Christia, Ruben Enikolopov, above n 44, 6.

female CDC committee, and, in more conservative communities, women formed an independent working group that played an advisory role to the CDC but was not directly involved with development decisions. This flexibility allowed communities to incorporate women into the CDC process in a way that was acceptable to the local social structures, while ensuring that the ideas of gender equality and female empowerment were mainstreamed within the community.77

The second village-level intervention associated with the NSP was the disbursement of block grants. Block grants were intended to improve the access of rural villagers to basic services, including transport, water, sanitation, irrigation, power, literacy and vocational training.78 Each CDC was responsible for identifying the development projects needed in its village, in close cooperation and consultation with the community members by whom it was elected. Once the project was identified, the CDC was required to prepare and submit a proposal for that project to the Ministry of Rural Rehabilitation and Development, with a request for funding, in the form of a block grant. The CDC could request a block grant at a rate of $200 per household, up to a community maximum of 300 families, or $60,000.79 If the Ministry accepted the development project proposed, then a block grant would be released directly from Kabul to the village CDC. Then, the CDC was responsible for managing the physical implementation of the project, with community contributions.80

The NSP did make a number of provisions for returned, and returning, refugees. Established in 2003 when millions of Afghan refugees were repatriating from years in exile in Pakistan and Iran, one of the central expected outcomes of the NSP was to assist

77 Ibid.
78 Andrew Beath, Fotini Christia, Ruben Enikolopov, above n 44, 3.
79 Ibid, viii.
80 Inger Boesen, above n 71, 42.
in the reintegration of displaced Afghans.\(^{81}\) There are few areas of Afghanistan that have not experienced displacement, and, therefore, few communities that do not include returned refugees. Areas that had, or were expected to have, particularly high levels of refugee returns were identified by the designers of the NSP during the initial stages of the roll-out, and these villages were targeted for early implementation.

Rather than targeting refugees directly, the NSP aimed to strengthen local economies of the communities where refugees were returning, so as to benefit all those residing there.\(^{82}\) This reflected a broader concern, acknowledged equally within the practice of transitional justice, that targeting particular groups can create divisions within the community. It is not uncommon for real tensions to exist between ‘those who stayed’ and ‘those who left’, and, in the eyes of the former, it is not always true that the latter suffered more. Indeed, those who did not leave may see those who left as the lucky ones, and may have little enthusiasm for creating specific material remedies for the displaced.\(^{83}\) Certainly in Afghanistan, it is not the case that returning refugees are always the most vulnerable members of a community. While returned refugees are often disproportionately affected by lack of access to land, shelter, water and resources,\(^{84}\) displacement can also function as a coping strategy, providing returned refugees with access to remittances and other resources.\(^{85}\)

In order to benefit from the NSP and have their voices heard it was necessary for refugees to be incorporated into the governance structure of the CDC. However, depending upon

\(^{81}\) Sultan Barakat et al, above n 76, 9.
\(^{82}\) Ibid, 55.
\(^{83}\) Peter Van der Auweaert, above n 51, 166.
the timing of their return, this presented a number of challenges. One problem was that each CDC was formed during the initial stages of the NSP in that particular village. Shortly after the arrival of the NSP, the community would vote on which persons are to form their CDC, and this membership was not ordinarily open to change. This meant that if refugees returned to that village after the CDC members were elected, they would not be eligible for election; and, equally, they would not be able to vote for persons who represented their views. As a result, under the initial structure, the representation of returned refugees (and IDPs) was not completely assured.\textsuperscript{86} If the views of returned refugees concerning development and infrastructure conflicted with those of the elected CDC members, the refugee voices would be excluded.

The disbursement of block grants also failed to take into account the large-scale return of refugees. Initially, the rules pertaining to block grant disbursements precluded an increase in the block grant funding once the grant cycle has started. Therefore, if a community applied for a grant to build a school for 100 children, and then 50 refugee families returned with 100 school-age children, it was not possible for the CDC to apply for additional funding to build a bigger school. This placed greater strain on projects that were designed to benefit only a set number of people, such as schools, clinics, and water supply projects, such that the projects underway did not have the capacity to support the additional numbers.\textsuperscript{87} This, in turn, had the potential to undermine the relationship between refugees and the receiving community.

The NSP did take some steps to facilitate the inclusion of returned refugees in the CDC structure. It changed the rules around CDC elections, so that in communities where CDC elections had been completed and then a substantial number of refugees returned to the

\textsuperscript{86} Sultan Barakat et al, above n 76, 58.
\textsuperscript{87} Ibid, 60.
area, a separate round of sub-elections could be held, just among the returnee population, to ensure their representation within the CDC. The NSP also made some amendments to the disbursement of block grants. It changed the rules so that if refugee families returned after a block grant request had been submitted but the funds had not yet been disbursed, then the CDC could apply for additional money to cover the newly arrived families. In cases where the block grant entitlement ceiling was already determined and the money was already disbursed, the NSP still allowed an increase in the block grant entitlement of the community to include the $200 USD per family among the returnees, provided the total entitlement of the community would not exceed the $60,000 limit.

However, despite these positives changes in policy, in reality, the strict rules governing grant disbursements were not always flexible enough to account for an influx of returnees or IDPs in a community, and it was not always possible to obtain extra funding.

One factor that undermined the NSP as a tool for creating reconciliation was the lack of coordination with other development assistance programs. One example is the Land Allocation Scheme. Mandated by Presidential Decree 104 and launched in December 2005, the Land Allocation Scheme was administered by the Ministry of Refugees and Repatriation. It legalised the distribution of intact and uncultivated government land to landless returnees and IDPs, who were expected to live there in newly created communities. This land was often undeveloped and lacking any supporting infrastructure that would have existed in other communities. As a result, today much of the land remains unoccupied, and only 25 percent of those who paid for plots actually live on them. The rate of departure of residents has been as high as 80 percent in some areas, due to lack of

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88 Interview with UN official (Kabul, 6 April 2014).
89 Sultan Barakat et al, above n 76, 9.
90 Ibid, 59.
livelihoods and inadequate basic services. \(^{91}\) One significant reason why these communities remain under-developed is that they are not recognised by the NSP. The NSP has strict by-laws defining what constituted a ‘community,’ and people living on sites distributed under the Land Allocation Scheme did not meet this criteria due to the government designating the land they live on as ‘townships.’ Therefore, due to the lack of official status, the communities living on Land Allocation Scheme sites were not eligible to participate in the NSP.\(^{92}\) In addition, the NSP held the position that it would only target refugee communities when they are mixed with the local population, in order to support integration between the two.\(^{93}\)

Despite these limitations, overall, the NSP contributed to reconciliation between returned refugees and their state. The network of CDCs brought the Afghan government to its citizens, often for the first time. The government actively modified the CDC format, as well as the way in which block grants were disbursed, in order to improve the NSP’s engagement of the returned refugee population. There is evidence of increased public faith in the system of government and improved state-civil society relations.\(^{94}\) The NSP provided a tangible indication of the new government’s intention to connect with, and provide for, its citizens. For returning refugees, the NSP program has been able to alleviate short-term economic difficulties,\(^{95}\) and 92 per cent of returned refugees consider such development projects to be important to their ability to reestablish their lives, and those of their family, in their village.\(^{96}\)

\(^{91}\) Ingrid MacDonald, ‘Landlessness and Insecurity: Obstacles to Reintegration in Afghanistan’ (Report, Middle East Institute, 9 February 2011) 5.

\(^{92}\) Sultan Barakat et al, above n 76, 59.


\(^{95}\) Sultan Barakat et al, above n 76, 64.

\(^{96}\) Ibid.
The NSP also appears to have contributed to the relationship between returned refugees and the receiving community. There is evidence of improved community relations as a result of the empowerment of CDCs.\textsuperscript{97} Moreover, the whole-of-community approach had a positive impact upon returned refugees by supporting the development of the communities of which they were a part.\textsuperscript{98}

### 8.6 Conclusion

Transitional justice scholars usually envisage the work of transitional justice being achieved through conventional mechanisms such as criminal trials, truth commissions, and reparations. However, this does not take into account the varied forums in which both states and citizens pursue the objectives of transitional justice. In Afghanistan, refugees and the Afghan government both pursued the objectives in alternate forums including out-of-country voting, and the National Solidarity Program. These two forums contributed both towards the reparation of past harm, and the repair of the relationship between Afghan refugees and their state.

These forums also highlighted the importance of alternate methodologies. Ordinarily, transitional justice processes rely on an institutionalised approach, influenced heavily by the law. However, for Afghan refugees, a strictly legal or institutional approach appeared inadequate to address their claims for justice. Instead, they tended to rely on personal networks and relationships. The value of the out-of-country program and National Solidarity Program was that they provided refugees with the opportunity to forge and maintain such networks and relationships.

\textsuperscript{97} Sultan Barakat and Arne Strand, above n 91, viii.
\textsuperscript{98} Sultan Barakat et al, above n 76, 56.
As a whole, the Afghan case study illuminated the disputed nature of citizenship in the transitional state, and the different methodologies by which state and citizen pursued their own concept of what it means to be an Afghan citizen. This was seen in the process of drafting the 2004 Constitution, for instance, when the consultant process and Loya Jirga focused on determining the legal framework issues such as restitution or compensation for land and property, or concrete remedies for economic and social rights, which were of key importance to ordinary Afghans and their conception of citizenship. It was also seen in the way that the Afghan government treated different categories of citizens. For instance, the government included refugees in the consultation process and Loya Jirga on the basis that they were ‘brothers,’ thus formally recognising their citizenship status. However, despite this formal recognition, refugees were largely unable to have their key concerns reflected in the drafting process. Mujahedin, by contrast, were recognised in the 2004 Constitution for their sacrifices and historical struggles, and acknowledged as martyrs for the country’s freedom. This provision has enabled mujahedin leaders to claim support for their position as saviors of the homeland and of Islam, and thus bolster their claims to be rightful leaders.

For Afghan refugees, the ability to participate in national elections was also crucial to their sense of citizenship and identity. This was not limited to the act of voting, but encapsulated the activities by which they were recognised as political actors, such as the visits to refugee camps by political leaders. When the Afghan government failed to enfranchise refugees in subsequent elections, many refugees considered this loss of recognition a blow to their identity as citizens.

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100 Patricia Gossman, ‘Documentation and Transitional Justice in Afghanistan’ (Special Report No. 337, United States Institute of Peace, September 2013) 3.
101 Ashfaq Yusufzai, above n 33.
Overall, then, the Afghan case study demonstrates the contested nature of transitional justice, its links to citizenship, and the highly contested question of who gets to define the substance and boundaries of both concepts.
CHAPTER 9: RETHINKING TRANSITIONAL JUSTICE
AND DISPLACEMENT

9.1 Introduction

This chapter reflects on the findings of my thesis. Through the two case studies, I aimed to compare the scholarly understanding of the interaction between transitional justice and refugees, with the lived experience of Liberian and Afghan refugees. I focused on the three themes that, to date, have characterised the scholarship. The first is a consistent use of human rights law to understand the harm refugees suffer, as well as the methods by which that harm might be repaired. The second is an emphasis on state-led mechanisms of transitional justice, with little consideration of alternate models, or of the impact that state dominance might have for refugees. The third is an assumption that the ultimate goal of the interaction between transitional justice and refugees is refugee return.

In the case studies, contrary to the neat, linear approach of the scholarship, the interaction between transitional justice and refugees emerged as an active and multilayered site of conflict and negotiation. In both Liberia and Afghanistan, refugees described the harm associated with displacement, the justice outcomes they sought, and the methods best suited to pursue those justice outcomes in terms that differed considerably from those of human rights law and the transitional state. However, refugees were often unable to pursue their own understanding of justice due to the power differential between themselves and the state-centred transitional justice mechanism. This meant that as well as contesting the terms of the conventional mechanisms of transitional justice, refugees also turned to their own forums to pursue their own justice outcomes.
This chapter begins by considering how the dominance of law imposed a particular understanding of the harm associated with displacement, and how this restricted the ways that refugees were able to engage with transitional justice processes. It then examines the role of the transitional state, and demonstrates that the interests held by the Liberian and Afghan governments and their respective refugee populations towards transitional justice differed considerably. Given the power differential between the two, refugees were often unable to achieve their preferred outcomes in conventional forums of transitional justice. The chapter concludes by reflecting on the assumption that refugee return is the ultimate goal of transitional justice. It introduces an alternate understanding: that of rebuilding the state-citizen relationship. This approach suggests that repair of displacement may take place in the absence of physical return, and in forums other than those of legal, institutionalised transitional justice.

9.2 The Limitations of Using the Law to Structure Justice Claims

International law is the *lingua franca* of transitional justice, responsible for defining its standards and structuring its mechanisms. When transitional justice first began to address displacement, advocates focused primarily on obtaining recognition of the legal violation of arbitrary displacement under human rights and international criminal law. Once this recognition was achieved, they used the legal framework to pursue justice claims on behalf of displaced persons through international criminal trials, reparations programs, and truth commissions. In each of these mechanisms, international law set the

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parameters for the harms transitional justice mechanisms recognised, as well as the remedies each mechanism could offer.

The dominance of law within transitional justice has generated a legalistic approach towards justice. A legalistic approach means that scholars and practitioners do not just rely on the law as a tool or framework to deliver justice, but, more fundamentally, that they assert that the law offers a standard that is objective, certain, universal and rational, and consider rigid adherence to legal rules the epitome of moral conduct. Proponents of legalism emphasise the use of courts of law and criminal trials in the pursuit of justice, and tend to isolate law from the social context in which it exists. For transitional justice practitioners, this means that they are more likely to focus on the systematic collection of testimony and investigation of facts, rather than the process of engaging with victims.

In both case studies, a legalistic approach to transitional justice prevented refugees from pursuing justice in the ways they wished. In Liberia, a legalistic understanding of justice was a central feature of the TRC. The ultimate aim of the TRC’s statement-taking process was to quantify the type and extent of past abuse, and to provide a substantiated legal basis for the criminal prosecution of those responsible. In pursuit of these objectives, the TRC aimed to create a forensic account of truth, which meant that its data collection methodology focused upon gathering factual, accurate and authenticated data in a consistent manner. It enforced a relatively inflexible method of giving testimony,

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7 Ibid, 1-2.
8 Ibid, 2.
structured around an international legal framework. Those giving testimony had to identify as either victim or perpetrator, and describe their experiences in terms of a recognised violation of international law. There was no possibility to reflect upon past harm without specifying a violation, victim, and (at the very least, an inferred) perpetrator.\textsuperscript{10}

Naming past violence as a human rights violation has a tendency to narrow and individualise the experience of harm.\textsuperscript{11} It forces people to reduce the complex realities of their lives into neat, clear-cut, legalised categories, and prevents them from relating their experiences in their own words.\textsuperscript{12} For Liberian refugees, the TRC’s narrow and inflexible understanding of what constituted harm, together with the constraints upon how they could speak about that harm, meant that they were frequently unable to speak about their experiences in the way they preferred. Refugees disputed the requirement that they identify as a victim, since this suggested they were passive and helpless, and silenced the many ways that people had negotiated their loss, rebuilt their lives, and created a new existence quite apart from that of victimhood. Some wished to reflect upon their own harm without having to attribute responsibility to another for causing it, or to speak of harms that fell outside the catalogue of human rights, such as damage to social structures and relationships. Within the TRC’s legalistic approach, however, there was no possibility to do so, since the TRC valued the consistent collection of factual data over individualised accounts.

\textsuperscript{10} This is a feature of the criminal law tradition generally: in order to conceive of an atrocity or injustice, it is necessary to first imagine a victim; and, equally, victims must speak \textit{as if} there were an agent responsible for their loss. Robert Meister, ‘Human Rights and the Politics of Victimhood’ (2002) 16(2) \textit{Ethics and International Affairs} 91, 102.


In contrast to the TRC’s emphasis on forensic truth, the refugee-led Peace Cells and Tribal Leaders’ Forum aimed to generate a narrative form of truth. Instead of determining the content of testimony according to a set of fixed rules, these grassroots forums urged participants to describe their experiences as a personalised story, describing what happened according to how they both experienced and interpreted it. This allowed for a complexity in identity, and broadened the understanding of harm well beyond recognised human rights violations. People often spoke about social harms, for instance, such as the rise in teenage pregnancy and the breakdown in traditional family structures, in terms of the ongoing effects of the war.

A second characteristic of the grassroots forums was an emphasis on dialogic truth. Participants were urged to deliver a personalised narrative that reflected their own understanding of past events, with an expectation that they engage other members of the forum throughout that narrative. Participants were prompted to ask questions of each other, and encouraged to link personal experiences to broader issues that affected the whole community. This gave others in the group an opportunity to question, dispute or add to the subjective experience described by the narrator. This practice was most conspicuous when perpetrators gave testimony: other members of the forums would routinely press the perpetrator to explain how they came to commit such atrocities, in an attempt to understand why the conflict had taken place in the way it did. The end result of this dialogue was a multifaceted and fluid truth that took into account the perspectives of multiple actors.

By contrast, the TRC did not provide refugees any opportunity to engage in dialogue, either between victims and perpetrators, or between victims themselves. Although some limited dialogue did take place during public hearings in Liberia, the TRC cancelled its
public hearings in West Africa, thus taking away the little opportunity that did exist. As a result, the only opportunity for refugees to participate in dialogue was during the narrative statement process, which involved communication between the statement taker and refugee, but not between refugees themselves. Due to the rigid enforcement of the ‘who did what to whom’ methodology, interactions between the statement-taker and refugee were limited to clarifying the refugee’s factual account. In addition, and creating further distance between the two parties, The Advocates used American lawyers as statement-takers. This changed the nature of the interaction, since ‘there is always a truth that can be known only by those on the inside. Or if not a truth…then a moral significance to these facts that only an insider can fully appreciate.’

Eric Weilbelhaus-Braham, a legal practitioner and volunteer statement-taker with The Advocates, maintained that many refugees viewed the use of American lawyers positively. Because American lawyers were removed from the conflict, he suggested, this made them appear neutral and disinterested, which facilitated the testimony collection process. Buur made a similar assessment in relation to the South African TRC, observing that foreign investigators could assess victims’ statements more impersonally than their South African counterparts due to the distance they had to the events. As a result, he asserted, foreign investigators were more objective in their work. Contesting this view, Liberian refugees complained that the use of American lawyers meant they could not discuss issues of greatest concern to them, such as those around return, since the American statement-takers had no lived experience of repatriation. Instead, refugees often identified the opportunity to speak with domiciled TRC officials as the most

valuable aspect of the TRC’s proceedings, since it allowed them to speak with people who could more easily understand their perspective, about the topics they most valued.\textsuperscript{16}

This raises a fundamental question about the purpose of a TRC and its statement collection process. If the primary objective of a TRC is to generate forensic truth, then appointing disinterested adjudicators who apply a strict system of rules will be a compatible methodology. If, however, the goal is to create dialogic truth between those who personally experienced the atrocities, then an arms-length, legalistic procedure managed by foreigners is likely to be poorly suited. This can create a tension within truth commissions when different parties prioritise competing objectives, and have a range of capacities to enforce their own perspective. In Liberia, refugees had limited capacity to influence the formal TRC proceedings, which meant that they were forced to deliver testimony in a way that supported the creation of forensic truth, even if they personally did not support this objective.

The dominant influence of the law created similar tensions for Afghan refugees who participated in transitional justice mechanisms. When the Transitional Government of Afghanistan initiated the process of drafting the 2004 Constitution, it provided refugees the opportunity to participate in both the national consultations and the Constitutional Loya Jirga. In some ways, these processes were undermined by a complete disregard for legal process, such as when the President’s office changed the terms of the draft constitution after the completion of public consultations. However, in other ways, the law and legal structures acted in a restrictive manner, constraining the way in which refugees could engage with the respective processes and restricting their ability to attain their preferred justice outcomes.

\textsuperscript{16} Interview with TRC staff member (Monrovia, 9 April 2013).
The constitution-drafting process was focused almost entirely on drafting the legal provisions of the Constitution. The government set topics for discussion, each of which was concerned with a specific legal matter: the rights and duties of the people, the technical system of governance, the structure of Parliament and government administration and the judiciary, and the relationship between government and the courts. The public consultations took place in a highly structured manner, beginning with surveys and then regulated discussions. The surveys described each question in technical rather than conceptual terms, using complex language and often referencing specialist legal terms. This made it extremely difficult for ordinary Afghans – including refugees – to engage in genuine dialogue with their government, or each other.\(^{17}\)

Due to the emphasis on technical legal matters, the constitution-drafting process did not address issues of greatest importance to refugees. Many returning refugees have found it difficult to integrate into Afghan life due to problems in accessing not only land and shelter, but also services and livelihoods.\(^ {18}\) However, the potential for the constitution to create more egalitarian access to land, in a way that remedied past injustices, was not realised, and neither the consultations nor Loya Jirga addressed landlessness, land-grabbing, or unequal access to land in any of its deliberations.\(^ {19}\) Discussion concerning economic and social rights was also noticeably absent from questions in the consultation process, and deliberations at the Loya Jirga. Due to the stringent survey and consultation structure set up by the Constitutional Commission, refugees were unable to initiate


\(^{18}\) Nassim Majidi, ‘Urban Returnees and Internally Displaced Persons in Afghanistan’ (Report, Middle East Institute, 25 January 2011) 1, 9.

questions on their own terms, or push to have the issues about which they were most concerned addressed.

Afghan refugees also valued the opportunity to engage on an informal basis with officials from their home country during the constitution-drafting consultation. The Constitutional Commission spent several months traveling to different refugee communities in Pakistan and Iran in order to witness the conditions in which refugees lived, and to allow them to directly hear from refugees.\textsuperscript{20} As the Constitutional Commission staff relayed the refugees’ opinions back to their headquarters, it also exposed the Kabul and foreign-based Afghan elite to the opinions of Afghan refugees and how they imagined the reconstruction of Afghanistan.\textsuperscript{21} This ability to speak with Commission members outside the formalities of the constitution drafting process meant that refugees were able to speak in terms and about matters of their own choosing, without being restricted to the legal structures put in place by the Commission.

Overall, then, in both case studies, refugees struggled to obtain the justice outcomes they desired, at least in part because of the influence of law upon transitional justice. In the existing literature, scholars make a number of claims as to why this might occur. They refer to a range of significant material and logistical challenges that constrain the ways in which refugees can negotiate their interactions with transitional justice. One is physical isolation, since many refugees live in areas that are distant, inaccessible, and – particularly with respect to urban refugees – not easily identifiable. Refugees also lack financial resources, which they might otherwise use to better organise themselves, advocate their position and influence those in charge of transitional justice programming. They also face


weak levels of coordination within the refugee community, little experience in political organisation, and few individuals conversant with the world of international transitional justice.22

The most common scholarly assertion in relation to generating more responsive transitional justice is to take a ‘victim-centred’ approach, which means that the needs of victims drive the transitional justice process.23 In order to create a more victim-centred response, scholars urge greater consultation and engagement with the affected individuals and communities,24 a process they suggest should involve ‘deliberating, constructing, disputing, accepting, rejecting and reconsidering’ potential responses to mass violence.25 Engaging in this type of consultation, scholars assert, will provide an opportunity to take into account the particular experiences, needs, and justice claims of refugees, thus creating processes and outcomes more closely aligned with their expectations.26

The limitation with this approach is that it situates the disconnection between the justice refugees want, and the justice (or lack of justice) they obtain, in their own disempowered position. There is seldom any acknowledgement that transitional justice mechanisms themselves might be the cause of exclusion. However, the two case studies demonstrate that even when consultation with refugees (or victims more broadly) takes place, it remains bound by the conventional expression of transitional justice. Consequently,

victims are required to envisage their preferred justice outcomes through a set number of institutions – criminal trials, truth commissions, reparations – which are structured according to a legal framework. 27 Transitional justice struggles to account for mechanisms and approaches to justice that do not fit within this institutional, legalistic and individualistic framework, and generally does not allow victims to envisage their pursuit of justice in alternate forums. 28

In order to create an authentically victim-centered transitional justice practice, it is necessary to move beyond the limitations imposed by the legal framework. A more holistic approach to transitional justice would seek to understand the broader justice priorities among the target population, including those that find expression in societal and social responses. 29 It is only by broadening the ambit of recognised mechanisms and methodologies that scholars and practitioners can genuinely democratise and pluralise the practice of transitional justice, and thus reflect the views of victim community. 30 For instance, there are times when violence creates harm that is not adequately captured by the language of rights, but which needs to be addressed in order for the community to recover. 31 In such cases, it may be more useful to focus on the experience and perceptions of violence, and what remedies the community in question considers most relevant, rather than forcing victims to fit their experiences into the conventional legal and institutional framework. 32 This would also contribute to a shift from claiming rights on behalf of

31 Kieran McEvoy and Kirsten McConnachie, above n 11, 496.
victims, which engenders a lack of agency, to allowing victims to identify and claim rights on their own terms. Grounding the idea of rights in the everyday perspectives and actual struggles of those who claim to be rights-bearers might then offer a way to transform the normative parameters of human rights and expand the range of claims that are validated as rights.

9.3 Transitional Justice and the Interests of States and Refugees

Transitional justice is typically a state-driven process, with the government imbued with the responsibility for initiating the mechanism, setting its mandate, and determining its methodology. Within the practice of transitional justice, there are numerous examples of mechanisms and practices led by non-state actors. However, in the scholarship concerning refugees, this breadth is absent, and transitional justice scholars restrict their attention to a limited number of state-led mechanisms. To date, scholars have not considered how refugees and their claims for justice might be affected by the centrality of the state as a transitional justice actor. This section examines the experience of Liberian and Afghan refugees, and argues that in both cases, state and refugee interests often came into conflict, and that the way in which this conflict was resolved by the particular mechanism of transitional justice directly affected the ability of refugees to achieve their preferred form of justice.

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35 For example, see: Kieran McEvoy and Lorna McGregor (eds), Transitional Justice from Below: Grassroots Activism and the Struggle for Change (Hart Publishing, 2008); Rosalind Shaw, Lars Waldorf and Pierra Hazan (eds), Localizing Transitional Justice (Stanford University Press, 2010); Rosalind Shaw, ‘Rethinking Truth and Reconciliation Commissions, Lessons from Sierra Leone’ (Special Report No. 130, United States Institute of Peace, February 2005).
One reason why an analysis of the state as an actor in transitional justice is missing from the existing literature is that scholars and practitioners often fail to analyse what transitional justice is for, and who its mechanisms are intended to serve.\textsuperscript{36} Instead of attributing the objectives of transitional justice to specific actors, scholars commonly describe its aims in terms of normative and legalistic principles, such as ‘bringing justice to victims,’ or ‘holding perpetrators accountable.’\textsuperscript{37} In the case of refugees, the purpose of the interaction is most frequently expressed as resolving displacement,\textsuperscript{38} meeting the long-term justice needs of displaced persons,\textsuperscript{39} or protecting refugees.\textsuperscript{40} The problem with this approach is that it obscures the underlying politics of transitional justice interventions, and suggests that objective principles, and not interests, drive each mechanism.\textsuperscript{41} This is compounded by the legalistic approach, which suggests that the applicable international legal framework is neutral and apolitical, and, therefore, that it offers an objective method of delivering justice.\textsuperscript{42} In reality, however, transitional justice mechanisms do not serve all parties equally. They tend to be top-down,\textsuperscript{43} designed by elites and supported by the international community, both of which are remote from local understandings of justice.\textsuperscript{44}


\textsuperscript{37} Kieran McEvoy, above n 4, 437.


\textsuperscript{39} Marina Caparini, ‘Ensuring Long-Term Protection: Justice-Sensitive Security Sector Reform and Displacement’ in Roger Duthie (ed), Transitional Justice and Displacement (Social Science Research Council, 2012) 279, 304.

\textsuperscript{40} UNHCR, Rule of Law and Transitional Justice <http://www.unhcr.org/pages/4a293daf6.html>.


\textsuperscript{44} Simon Robins, above n 23, 76.
In order to analyse the role of the state in transitional justice, it is necessary to first acknowledge that the prevailing system of nation states is in no way natural, normal, inevitable or uncontested. This fact is often obscured since, across virtually all disciplines, scholars have tended to dehistoricise and presuppose the state. Structuring the world according to nation state principles has become so routinely assumed and banal that, for the large part, the construction process has vanished from sight altogether. However, the state, and the system of nation states that structures international relations, is in fact the result of a variety of historically contingent practices. In addition, since the state exists only because of such practices, in order to sustain the nation state system and the idea of the state, these practices must be continually reproduced. Amongst these practices, the two primary concepts that both define and constitute the nation state system are sovereignty and nationalism.

Sovereignty comprises a set of norms concerning the legitimate organisation of political authority. The modern understanding of sovereignty arose after the Second World War, when collective horror at the extent to which human rights had been abused led to the emergence of a new international legal regime. The 1948 Universal Declaration of Human Rights, followed by a wide range of human rights instruments, established an obligation upon states to take (or refrain from taking) certain actions in order to protect the rights of their citizens. This shifted the concept of sovereignty. Sovereignty was no

48 Nevzat Soguk, above n 47, 37-38.
longer understood as a purely territorial matter, but required that each state demonstrate its ability to protect the rights of those within its borders.\textsuperscript{52} Within this modern conception of sovereignty, refugees assume a constitutive role. Since a state is required to protect the rights of those within its territory, refugees by their very existence undermine a state’s claim to legitimate sovereignty. Conversely, states often point to refugee repatriation as evidence that the population has renewed confidence in its ability to reconstruct order, thus signifying its legitimate sovereignty.\textsuperscript{53}

The second practice central to the modern state system is nationalism. To use the words of Benedict Anderson, nationalism refers to the process of constructing the nation as an ‘imagined community.’ Members of even the smallest nations will never know or meet all their fellow members, he explains, and yet ‘in the minds of each lives the image of their communion.’\textsuperscript{54} Understanding the nation state in this way implies a number of conditions. Nations are necessarily imagined as bordered, finite entities, since no nation considers itself coterminous with all of humanity.\textsuperscript{55} They are also imagined as exclusive communities, defining themselves not only by who is included, but also by who is excluded, and thus creating a distinction between the citizens, nations and communities within, and the enemies, others and absences without.\textsuperscript{56}


\textsuperscript{55} Ibid, 16.

Today, the practices of sovereignty and nationalism find clear expression in state-building interventions. State-building is the paradigm for structuring international intervention after a period of conflict. Such interventions aim to construct a strong and legitimate liberal state, typically by fostering democratic institutions, introducing the rule of law, and developing a market-driven economy. Since the mid-2000s, almost all transitional justice interventions have taken place in the political context of a state-building intervention. For this reason, it is a mistake to separate the practice of transitional justice from questions of nation-building, legitimisation and the centralisation of state power.

When transitional justice is delivered within the context of state-building, it is common for the new government to prioritise transitional justice mechanisms that establish the state’s legitimate sovereignty, such as those that reinforce the power of state institutions and demonstrate the state’s respect for international rules and standards. This means that mechanisms such as building courts or prosecuting former leaders tend to be more common than longer-term, non-institutionalised processes focused on reconciliation, community-level justice mechanisms or redistribution.

In both Liberia and Afghanistan, transitional justice was delivered within a state-building mission. The UN Mission in Liberia (UNMIL) was a peacekeeping mission established by the Security Council in September 2003, mandated to provide, amongst other things, support for human rights assistance, security reform and implementation of the peace

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61 Chandra Sriram, above n 59, 120. See also: Dustin Sharp, above n 30, 157.
process. This included re-establishing national authority of the transitional government, and rebuilding government institutions.\textsuperscript{63} Similarly, in Afghanistan, the UN Assistance Mission in Afghanistan (UNAMA) was a political mission established by the Security Council in 2002, and mandated to lead and coordinate international civilian efforts to assist Afghanistan with its transition, guided by the principles of reinforcing sovereignty, leadership and ownership.\textsuperscript{64}

The Liberian TRC contributed to building the legitimacy of the transitional government in a range of ways. The first was in the way it dealt with transition. In its final Report, the Liberian TRC set up a clear dichotomy between past and present, comparing Liberia’s ‘bitter past’ with the present-day move towards peace, reconciliation and the rebuilding of the Liberian state.\textsuperscript{65} It described past abuses on the part of the government in terms of ‘poor governance and maladministration,’\textsuperscript{66} and then, in stark contrast, commended the new government’s ‘peace-building aspirations’\textsuperscript{67} and the reforms ‘already underway’ to promote a culture of respect for human rights.\textsuperscript{68} This generated a narrative that set the rights abuse of the former government in counterpoint to the legitimate authority of the new, reformed state.

For a transitional government, setting up a binary between the country’s discredited history and the work of the present government generates a form of ‘otherness’ against which the new polity can define itself.\textsuperscript{69} Through this narrative, the new government becomes all that the previous government was not: respectful of human rights,
accountable to citizens, and, ultimately, legitimately sovereign. One consequence of this narrative, however, is that the continuities of violence and exclusion into the present are overlooked.70 Ongoing structural biases built on economic, social or ethnic power are invisible since, to use the words of Robert Meister, ‘the cost of achieving a moral consensus that the past was evil, is to reach a political consensus that the evil is past.’71

For Liberian refugees, one consequence of the TRC’s transition narrative was to suggest that the violations associated with displacement were now over. In both its testimony-gathering process and Report, the TRC focused almost exclusively on the violations of refugees’ civil and political rights that led to displacement, such as large-scale killing or rape.72 These crimes were all situated firmly in the past, having largely ceased with the end of the conflict, and reflected a perspective on violence that suggested harm was experienced by an individual, as a result of another individual’s actions. By contrast, there was very little discussion of the violation of economic and social rights, no discussion at all of violations that continued to the present, and no conception of violations that harmed the community as a whole.

By addressing violations of civil and political rights without simultaneously addressing violations of an economic and social nature, the Liberian TRC drew attention away from the government’s responsibility to address the economic and social rights of returned refugees. It concealed the ongoing deficiencies of the new government, and located the solution to the harm it described within the state legal system. The narrative implied that the primary responsibility falling upon the new government was to hold the historically-situated perpetrators responsible for their past atrocities, via the state justice system. This

70 Rosemary Nagy, above n 36, 280.
71 Robert Meister, above n 10, 96.
reduced past violations to a set of technical problems concerning the functioning of the legal system,\textsuperscript{73} and silenced the voices of refugees who were worried about their ability to achieve an adequate standard of living on return.\textsuperscript{74}

Refugees themselves understood transition in Liberia very differently. In their Peace Cells and Tribal Leaders’ Forum, refugees exhibited a strong sense of interconnectedness between past, present and future. Harms which continued into their daily, lived experience were understood to be just as much a legacy of the conflict as the killing, rape and destruction that people had suffered years earlier. In addition, refugees did not distinguish between harms associated with civil and political rights, and those associated with economic and social rights; both categories were seen as equally damaging to the lives of Liberians, and their ability to return to Liberia.

The context of state-building also affected the type of solutions the Liberian TRC was willing to consider. In any transitional state, the new government faces a strong imperative to demonstrate that it is safe for refugees to return, and that the violations that triggered their displacement no longer exist. While the TRC Report never explicitly stated that Liberia was safe for refugees to return, it did not provide any details explaining why many refugees remained unwilling to repatriate. In its Report, the TRC did urge states to immediately cease any activities that sought to pressure refugees to return.\textsuperscript{75} However, it failed to provide any reasons justifying this recommendation. This concealed the many fears refugees held about return, many of which related to their ability to achieve an adequate standard of living, and undermined their contention that return remained unsafe. Moreover, when describing the rights of Liberian refugees living in West Africa, the TRC

\textsuperscript{73} Richard A. Wilson, above n 12, 148.
\textsuperscript{74} Interview with Evon, Liberian returned refugee (Monrovia, 7 May 2013).
\textsuperscript{75} Truth and Reconciliation Commission of Liberia, above n 9, vol 3, 21.
used generic language, with little discussion of the administrative or legal measures that West African governments might take to ensure the long-term protection of refugees’ civil, political, economic and social rights. This created the impression that asylum was temporary, and that refugees were not entitled to the full, politically active existence owed to citizens.\(^{76}\) Since no justification was provided as to why refugees could not return, and no solutions were suggested for their long-term residence outside of Liberia, the TRC contributed to the assumption that their displacement would be eventually solved by repatriation.

For Liberians resident in the United States, by contrast, their displacement was considered permanent. The TRC recommended that the Liberian government amend its laws to allow for dual citizenship for Liberian nationals resident in the United States,\(^{77}\) and guarantee, under law, the right of Liberians resident in the United States to vote in Liberia’s national elections.\(^{78}\) These solutions were not extended to Liberians living in West Africa, despite the fact that the Economic Community of West African States Free Movement Protocols could have provided a platform from which to assert citizenship.\(^{79}\) The combination of all these factors meant that Liberians resident in the United States were portrayed as politically active citizens, for whom the resolution of displacement lay in regularised status in the United States. Refugees in West Africa, by contrast, were portrayed as politically inactive both in the country of asylum, and with respect to their own national political community.

\(^{76}\) Ibid, vol 3, 22.  
\(^{77}\) Ibid, vol 2, 396.  
\(^{78}\) Ibid, vol 2, 397.  
In Afghanistan, as in Liberia, transitional justice focused upon strengthening the legitimacy of state institutions. The primary aim of the 2004 Constitution was to establish the framework for the institutions of central government. Debate revolved around three fundamental issues: the separation and balance of powers of government, the power-sharing arrangements between local and central government, and the role of Islam.80 Therefore, the drafting process functioned as a technical forum for discussing institutions for law-making and governance. It curtailed any possibility for refugees to use the forum as a platform to engage with their government regarding the harm they had suffered, and the contribution constitutional change or protection might make towards the repair of that harm.

The emphasis on establishing strong institutions of state influenced the way that the drafting process and, ultimately, the Constitution itself framed the issue of land and property rights. The 2004 Constitution provides that property shall be safe from violation, no one shall be forbidden from owning and acquiring property except by law, and private property can only be confiscated by legal order. It is silent on the authority of customary law, and, although constitutional advisors suggested that the new constitution could lay the foundation for the reform of land tenure and land governance,81 the Constitutional Commission did not address landlessness, land-grabbing, or unequal access to land in any of its deliberations.82 The overall effect, then, is not to reform land ownership but to strengthen central state control over lands and land allocation. This scuttled any hope refugees had of achieving even limited land reallocation, in support of their return.

82 Liz Alden Wily, above n 19, 50-51.
A second issue of key importance to refugees was that of economic and social rights. During the drafting process, debate around constitutional protection of economic and social rights focused on the relationship between local and central government.\(^8\) The 2004 Constitution recognises, in principle, the state’s obligation to uphold the social and economic rights of its citizens, but locates responsibility for the pursuit of economic and social rights with local government.\(^4\) The Constitution directs the Afghan government, ‘while preserving the principle of centralism,’ to ‘delegate certain authorities to local administration units for the purpose of expediting and promoting economic, social, and cultural affairs, and increasing the participation of people in the development of the nation.’\(^5\) What this might mean in practice, and exactly how central government authority might extend into the provinces and interact with local-level governance mechanisms, was not addressed in any substantial form during the constitution drafting discussions. This compromised the ability of refugees to use the constitution-drafting process to address their concerns around achieving an adequate standard of living upon return to Afghanistan.

In both Liberia and Afghanistan, the interests of the new government and the refugee population came into direct conflict over the objectives and expressions of transitional justice. Since the respective governments were responsible for determining the terms of transitional justice, in both cases they were able to use the mechanism to pursue their own aims, such as strengthening the legitimacy of central institutions, and developing a political narrative concerning transition. Although refugees tried to contest the state’s control of the mechanisms, there was little practical opportunity to do so. This highlights the way that an over-reliance on a legal framework can function as a smoke screen,

\(^8\) J. Alexander Thier, above n 21, 561; International Crisis Group, above n 80, 3.


\(^5\) Ibid, art 137.
disguising the interests of the different parties involved in transitional justice and the fact
that they do not all have equal capacities to influence the objectives, structure and
outcomes of transitional justice mechanisms.

9.4 Using Transitional Justice to Rebuild the State-Citizen Relationship

This section discusses the final theme that arose in my research: What is the objective of
refugee involvement in transitional justice? Scholars and practitioners suggest that the
ultimate aim is to resolve refugee displacement through physical return. In the two case
studies, by contrast, refugees spoke of quite different motivations behind their decision
to engage in transitional justice processes. They often referenced their social and political
isolation, and their desire to reconnect with, and influence, structures of power in their
home countries. This section examines the way these different perspectives informed the
structure of transitional justice processes, as well as the way in which refugees interacted
with those processes. It concludes by arguing for an alternate understanding of the
objective of refugee involvement in transitional justice: that of rebuilding the state-citizen
relationship.

Transitional justice relies upon a framework of international law to understand the
experience of displacement. The crime at the centre of this framework is arbitrary
displacement, the key element of which is physical dislodgment from one’s home, land,
or place of habitual residence. It is this understanding of displacement, namely, physical
removal from one’s place of origin, which frames the interaction between transitional

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86 Roger Duthie, above n 26, 23.
87 Francis Deng, Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the
1, section 1, principle 6. See also: UN Special Rapporteur Pinheiro, Final Report on Housing and Property
Restitution in the Context of the Return of Refugees and Internally Displaced Persons, UN Doc
justice and refugees. International criminal trials have prosecuted the crime of arbitrary
displacement, \(^8\) reparations programs have distributed benefits to victims of arbitrary
displacement, \(^9\) and truth commissions have examined arbitrary displacement as a human
rights violation. \(^0\) This means that even when transitional justice mechanisms address
other crimes affecting displaced persons, they do so with reference to physical
displacement. Crimes such as mass killings, arbitrary arrest, torture and rape are described
as violations that triggered physical displacement, while others, such as forced
conscription and sexual assault, are presented as violations that took place during
displacement. \(^1\) Overall, this creates an understanding of physical displacement as the
distinctive harm from which refugees suffer.

The understanding that physical displacement is the primary harm suffered by refugees
leads to an emphasis on the resolution of physical displacement as the optimum solution
to their situation. This is seen most clearly in the way that scholars and practitioners have
prioritised property restitution, delivered in conjunction with repatriation, as the preferred
form of reparations. \(^2\) This reasoning is evident throughout other mechanisms as well.
For instance, scholars claim that truth commissions can reduce social tensions between
refugees and their non-displaced compatriots by revealing and validating the experiences
of the two groups; \(^3\) criminal prosecutions can pursue the safety of returning refugees by

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\(^8\) For instance: *Prosecutor v Momcilo Krajisnik* (International Criminal Tribunal for the Former
Yugoslavia, Appeals Chamber, Case No. IT-00-39-A, 17 March 2009); *Anfal Cassation Panel Decision*
(Iraqi High Tribunal Appellate Chamber, September 4, 2007); Joint System Monitoring Program, ‘Digest
of the Jurisprudence of the Special Panels for Serious Crimes’ (Report, Joint System Monitoring Program,
April 2007).

\(^9\) Brookings-Bern Project on Internal Displacement, above n 2, 48. See also: Claudia Paz y Paz Bailey,
Happened to the Women? Gender and Reparations for Human Rights Violations* (Social Science Research
Council, 2006).

\(^0\) Susan Harris Rimmer, above n 3, 1.

\(^1\) Roger Duthie, above n 26, 13.


\(^3\) Roger Duthie, above n 26, 24.
removing known perpetrators from security institutions or local communities;\(^4\) and reparations can help refugees to rebuild their lives upon return.\(^5\)

In the two case studies, refugees described the harm associated with displacement quite differently. Rather than describing harm in terms of physical displacement, they most frequently referenced their social isolation, the inability to influence decisions being made by those in power, and a sense of disconnection from institutions of governance in their home countries. In Liberia, for instance, refugees termed their time spent living in asylum as ‘wasted years,’ in part because they were cut off from the political and social structures in Liberia,\(^6\) while in Afghanistan, refugees asserted that being unable to vote rendered them ‘politically vulnerable and alienated.’\(^7\) This suggested a conception of harm that stretched well beyond physical displacement, and encapsulated political exclusion and a loss of social power.

These refugee perspectives suggest that displacement is not merely physical, but fundamentally political. This argument is made by scholars such as Arendt, who asserts that while the experience of being physically displaced may result in very real suffering for refugees, this is only a reflection of a much more significant harm: the inability of refugees to access citizenship rights.\(^8\) This political understanding of displacement is based on the idea that a refugee is someone who not only fled their own country due to persecution, but who, importantly, fled because they were unable to obtain the protection

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\(^5\) Megan Bradley, above n 92, 240.

\(^6\) Interview with Rancy, Liberian county leader and refugee (Buduburam refugee settlement, 7 June 2013); Interview with Joe Myers, Liberian refugee (Buduburam refugee settlement, 10 June 2013).


of their own state against that harm. 99 It is this lack of state protection, rather than persecution, that ultimately creates, and defines, the refugee. On this basis, a more accurate understanding of the refugee, and one which underpins the arguments made in this section, is someone who has been forced out of his or her own domestic political community, indefinitely. 100

Being excluded from one’s national political community generates two significant deprivations. Firstly, refugees are deprived of a forum through which they can claim rights protection. 101 This is because, in our modern political system, it is the nation state that is responsible for protecting the rights of its citizens. Rights cannot be protected by well meaning movements of global cosmopolitanism, but require legitimate and democratic nation-states that guarantee rights as part of their constitutional architecture and provide clear remedies in law. 102 Without any access to such architecture or remedies, refugees lack a forum through they can pursue the enforcement of their rights. The second, related, deprivation is a loss of political relevance. Under our modern political system, it is the citizen who constitutes the proper subject of political life. 103 Without citizenship, refugees are denied the capacity to speak politically, and the expectation that they will be heard. 104 This also means that the problem of how to include refugee voices into governance processes is a deeply political one, based on who counts as an authentic political subject. 105

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100 Emma Haddad, above n 49, 42.
103 Nevzat Soguk, above n 47.
104 Peter Nyers, above n 47, 17.
105 Ibid, 124.
Scholars often describe the potential for transitional justice mechanisms to repair the relationship between the state and its citizens.\textsuperscript{106} They detail the way that mechanisms such as criminal trials, truth commissions and reparations programs can restore the refugee’s ability to make claims against the state, and, in doing so, reposition the refugee as a citizen with legal and moral entitlements equal to those of non-displaced compatriots.\textsuperscript{107} According to this approach, transitional justice contributes to the repair of the state-citizen relationship by identifying specific human rights abuses levied against individuals, and repairing those particular injustices through an institutionalised form of transitional justice. This might entail, for example, recognising the unlawful seizure of an individual’s property, and then remedying that harm through a restitution program.

The limitation with this approach is that it struggles to address harms associated with the political conception of displacement. International law recognises only a narrow range of harms, each of which is articulated as the violation of a specific right. If refugees want to pursue accountability for the harms they have suffered, or obtain a remedy for the breach of their rights, they must describe their grievances in terms of a recognised rights violation. The loss of political relevance, then, must be described as a violation of their right to freedom of expression, for instance, or a limitation on their freedom of association. This strictly legal approach is often inadequate for refugees because, on the one hand, international law permits governments to derogate from a number of political rights in the case of displaced citizens. This is discussed in more detail below. However, the more fundamental and pervasive problem is that the loss of political relevance does not come from the violation of a legal right \textit{per se}, but the fact that refugees exist within

\textsuperscript{106} E.g. David Tolbert, ‘Nexus between Transitional Justice and Development’ (Speech delivered at the Swedish International Development Agency’s Launch for Transitional Justice and Development, Stockholm, 29 April 2014); and Megan Bradley, above n 92, 240.

a political framework that fixes the citizen as the appropriate subject of political action. For refugees, as persons cast out of the national polity and no longer considered part of the national citizenry, this means that they are denied a forum through which they can effectively claim their rights, and have their voices heard.

The limitations of the conventional, legal approach to transitional justice arose in the case of refugee enfranchisement in Afghanistan. The enfranchisement of refugees arguably falls within the category of rectificatory justice, since it entails the state restoring to the refugee something that was lost when the refugee was forced outside the national polity. Typically, scholars rely on a framework of human rights law to understand the harm associated with refugee disenfranchisement. Accordingly, the harm is defined as the inability to exercise one’s right to vote. The way to repair this harm, then, is to enfranchise the individual so they can once again cast a vote. In reality, there are a number of barriers to refugees claiming this right, since, under international law, the right to vote for non-domiciled nationals is subject to ‘reasonable restrictions,’ one of which includes residency requirements. Legally, then, there is no clear obligation upon states to ensure that citizens residing outside of the country can vote in national elections. Moreover, a strictly legal approach fails to appreciate harms that fall outside the loss of the right to vote; or, equally, methods of repair that do not entail restoring that legal right.

When scholars do address the political – and not just the legal – implications of enfranchisement, they usually do so from the perspective of the state. With respect to the

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108 Giorgio Agamben, above n 101, 171.
109 Peter Nyers, above n 47, 17.
2004 Presidential elections, for instance, scholars suggest that the enfranchisement of Afghan refugees was politically motivated, and only supported by the government because the majority of refugees were anticipated to vote for the incumbent transitional President Karzai.\footnote{Katy Long, ‘Voting With Their Feet: A Review of Refugee Participation and the Role of UNHCR in Country of Origin Elections and Other Political Processes’ (Policy Report PDES/2012/2, UNHCR Policy Development and Evaluation Service, September 2010) 42.} Since it did not reflect a genuine intention on the part of the Afghan government to uphold refugee rights and include refugees in the national political community, refugee enfranchisement undermined, rather than upheld, the goals of state-building.\footnote{Catinca Slavu, ‘External Voting for Afghanistan’s 2004 Election’ in Martine van Bijlert and Sari Kouvo (eds), \textit{Snapshots of an Intervention: The Unlearned Lessons of Afghanistan’s Decade of Assistance} (Afghan Analysts Network, 2012) 27, 28.}

Another example of the bias towards the perspective of the state is found in Laurie Brand’s research on out-of-country voting during the Arab spring. She demonstrates that the extension of the right to vote to include people who lived abroad redrew political boundaries, by including those who would otherwise have been excluded. However, she asserts that expanding these boundaries did not necessarily translate into more meaningful transnational citizenship.\footnote{Laurie Brand, ‘Arab Uprising and the Changing Frontiers of Transnational Citizenship: Voting from Abroad in Political Transitions’ (2014) 41 \textit{Political Geography} 54, 60.} While governments often used the language of citizenship to support out-of-country voting, the rationale behind that language often contradicted the principle of inclusive citizenship and reflected a range of elite concerns, from formal legitimation to security monitoring of expatriate communities.\footnote{Ibid, 56.}

These two examples demonstrate the way that scholars typically judge the value of refugee enfranchisement by questioning the state’s motivation for that enfranchisement, and then assign value according to the state perspective. However, this fails to address the perspective of refugees themselves, and assumes that refugees interpret the value of
enfranchisement on the same terms as the state. This omits a key question: how did refugees themselves understand the value (if any) of their enfranchisement?

In the case of Afghanistan, Afghan refugees framed the issue of their enfranchisement in quite different terms from those of human rights law, and state-based politics. For many, the reparative value of out-of-country voting went far beyond the legal act of enfranchisement and the ability to cast a vote. Instead, enfranchisement offered a way to remedy the effects of political displacement, since it gave political relevance to Afghan refugees and provided them with a forum through which they could speak politically, and be heard. Enfranchisement constituted express recognition by the Afghan government of the status of refugees as rights-bearers and citizens, and indicated that governmental institutions would strive for, and derive legitimacy from, their inclusiveness.\textsuperscript{118} This happened not just through the act of casting a vote, but also through the activities taking place in support of the voting process. Political actors and government officials travelled from Afghanistan to refugee communities in Pakistan in order to carry out political campaigning and voter education, which rendered asylum a political space, and refugees as political actors. These visits provided refugees with the opportunity to speak to leaders from their home government about issues that were important to them, in a forum that recognised their voices. From the perspective of refugees, then, the value of enfranchisement was the fact that it politicised the space of asylum. This suggests that even if refugee enfranchisement is motivated by reasons unrelated to refugee rights or inclusive citizenship, the fact that refugees are recognised as political actors, and can therefore access political forums by, in particular, building relationships with government officials, can make a valuable contribution to the repair of the state-citizen relationship.

\textsuperscript{118} Jeremy Grace and Erin Mooney, above n 3, 98.
For Liberian refugees, also, the conventional approach to transitional justice – expressed through the TRC – proved unable to address the harms associated with a political conception of displacement. The Chairman of the TRC asserted that the TRC included refugees in its proceedings because it wanted them to be heard and acknowledged on equal terms as other Liberians.\textsuperscript{119} In its Final Report, also, the TRC explicitly recognised refugees as citizens. However, it was a narrow concept of citizenship, which did not include the right to political participation while displaced. While the TRC recommended that Liberians resident in the US receive legal recognition as dual citizens and inclusion in national elections, these rights were denied to refugees resident in West Africa, due at least in part to an assumption that return was the best solution to their displacement. This perspective was sharply contested by Liberian refugees, who expressed strong opinions regarding the type of support the Liberian government should give them even as they resided in Ghana. This included legal assistance, education packages, and political rights, including the right to vote in Liberia’s national elections.\textsuperscript{120}

While the TRC itself often failed to guarantee the legal rights of Liberian refugees to a political life, it did offer informal avenues through which Liberian refugees could influence national political forums. As part of the TRC’s engagement with the refugee population, a delegation from the Ministry of Foreign Affairs, the Ministry of Internal Affairs and the Ministry of Justice visited Buduburam refugee settlement. This gave refugees an opportunity to discuss directly and informally with government officials their concerns about return, and led to a number of commitments being made on the part of the government concerning services they would provide.\textsuperscript{121} In addition, refugees took the


\textsuperscript{120} Interview with Peter, Liberian refugee (Buduburam refugee settlement, 30 May 2013).

\textsuperscript{121} Interview with Evon, Liberian returned refugee (Monrovia, 7 May 2013).
opportunity to speak with domiciled TRC officials and staff about the reality of repatriation. Since these officials lived in Liberia themselves, they were able to speak with a sense of legitimacy that, in the view of refugees, non-domiciled officials or staff could not. Liberian refugees repeatedly asserted that exposure to Liberian officials and the opportunity to engage in genuine dialogue was the most valuable element of the TRC proceedings, on the basis that the government had to ‘build relationships’ before it could build peace.\textsuperscript{122} A number of refugees asserted that by making efforts to engage in dialogue with refugees, the Liberian government demonstrated that it was actively trying to ‘reconcile with the people.’\textsuperscript{123}

When it came to repairing the harm associated with displacement, refugees in both Afghanistan and Liberia found that relationships, rather than legal institutions, often made a more valuable contribution. One reason for this is that the law is oriented to rules, whereas people will often ‘speak of their place in a network of social relations, and emphasise the social context of their legal problems.’\textsuperscript{124} So, while transitional justice mechanisms, as institutionalised legal processes, aimed to secure legal recognition of refugee rights, refugees themselves often turned to the more flexible forums located in personal relationships. Through these social interactions, refugees were able to speak on their own terms, about those issues of greatest importance to them. They were also able to receive recognition of their political relevance on terms that reflected their own perspectives, rather than only that of the state, or the law.

Another area where refugee perspectives concerning harm and repair diverged from the conventional approach to transitional justice was with respect to development assistance.

\textsuperscript{122} Interview with Franklin, Liberian refugee (Buduburam refugee settlement, 3 June 2013).
\textsuperscript{123} Interview with Suah, Liberian returned refugee (Gbarnga, 29 June 2013).
Development and transitional justice are generally considered separate fields. However, they share a number of objectives, such as creating reconciliation amongst post-conflict populations, and renewing civic trust and confidence between the state and citizens.125

There is some limited practice of engaging refugees in development projects as part of a broader strategy related to transitional justice. In the 1990s and early 2000s, UNHCR initiated a number of ‘co-existence’ projects, aimed at generating reconciliation between returned refugees and the communities to which they returned by engaging those communities in development projects. A number of studies demonstrated that in those communities, efforts to increase security, reconstruct infrastructure, generate employment opportunities, and strengthen equitably accessible social services made a more significant contribution to enabling reconciliation than conventional mechanisms of transitional justice.126 Beyond these co-existence projects, however, there is little scholarly discussion of the potential of development projects to contribute to the objectives of transitional justice.

In the two case studies, the ability to achieve an adequate standard of living was a serious concern for returned refugees, as well as those considering return. In Liberia, one of the most common themes amongst Liberian refugees when asked their views on transitional justice generally, or the TRC specifically, was the need for their government to provide development assistance.127 Numerous people asserted that in order to forget the past and

127 Interview with Samuel Kollie, Liberian Tribal Leader and returned refugee (Monrovia, 25 April 2013); Interview with Triska, Liberian returned refugee (Gbarnga, 29 June 2013); Interview with Henry Suah, Liberian returned refugee (Buduburam Refugee Settlement, 12 June 2013); Interview with Joseph, Liberian refugee (Buduburam refugee settlement, 31 May 2013); Interview with Alice, Liberian refugee (Buduburam refugee settlement, 5 June 2013); Interview with Oliver, Liberian refugee (Buduburam refugee
move on, the most important thing was for people to get access to ‘jobs and support,’ so that they could meet their basic needs. Refugees expressed scepticism towards the Liberian government’s claims that it sought reconciliation through the TRC, when it failed to provide access to education, health care, and basic infrastructure. This supports the assertion that reconciliation without economic justice – which might be achieved through development programs – is likely to appear ‘cheap and spurious.’

The Afghan NSP provided one example of how development assistance might engage displaced persons and, in doing so, pursue the objectives of transitional justice. The NSP was a state-led, community development program, intended to deliver critical development services to the rural population. It had widespread coverage, reaching nearly 70 per cent of rural communities in Afghanistan, making it the largest provider of the development projects that benefitted returning refugees. According to scholars, the NSP’s local governance structure and investment in development projects allowed communities to develop their economies and expand their income-generating opportunities, which positively impacted the integration of returnees and IDPs. It also achieved unprecedented, widespread involvement of women in rural Afghanistan’s community decision-making apparatus, including refugee women.

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settlement, 11 June 2013); Interview with Maxwell, Liberian returned refugee (Ganta, 28 June 2013); Interview with Rita, Liberian returned refugee (Gbarnga, 29 June 2013).

128 Interview with Triska, Liberian returned refugee (Gbarnga, 29 June 2013); Interview with Alice, Liberian refugee (Buduburam refugee settlement, 5 June 2013); Interview with Oliver, Liberian refugee (Buduburam refugee settlement, 11 June 2013); Interview with Maxwell, Liberian returned refugee (Ganta, 28 June 2013).

129 Interview with Rita, Liberian returned refugee, (Gbarnga, 29 June 2013); Interview with Henry Suah, Liberian returned refugee (Gbarnga, 29 June 2013); Interview with Maxwell, Liberian returned refugee (Ganta, 28 June 2013).


132 Ibid, 74.

133 Sippi Azarbaijani-Moghaddam, *A Study of Gender Equity through the National Solidarity Programme’s Community Development Councils* (Final Report, DACAAR, 2010) vi.
The NSP supported the aims of transitional justice in a number of different ways. Firstly, it contributed directly to the process of returned refugees rebuilding their state-citizenship relationship. The NSP explicitly aimed to extend the administrative reach of the state to the provinces, and build representative institutions for local governance through the Community Development Councils (CDCs) it established in each participating village.\textsuperscript{134} Through its CDCs, the NSP provided tangible evidence of the state’s protection in areas of refugee return, meeting the basic needs of refugees such as water, sanitation, health and education. It also opened up a direct channel of communication between rural communities and the central government, something that had not existed previously.

The NSP also contributed to reconciliation between displaced and non-displaced Afghans.\textsuperscript{135} The CDCs provided a framework through which Afghan refugees could rebuild their ties with their local community in a practical way, by engaging in discussion around the development activities the community should prioritise. By targeting the community as a whole, the NSP mitigated sources of conflict that could have arisen if specific groups, such as returning refugees, were the sole beneficiaries of development projects and support.\textsuperscript{136}

One limitation of the NSP, from the perspective of its contribution to transitional justice objectives, was that only returned refugees were eligible to participate. Until they physically moved back to the village in Afghanistan where they intended to live, Afghan refugees were not incorporated into the CDCs – and, for the overwhelming majority, they

\textsuperscript{134} Andrew Beath, Fotini Christia and Ruben Enikolopov, ‘Randomised Impact Assessment of Afghanistan’s National Solidarity Program (Final Report, World Bank, 1 July 2013) 1.


\textsuperscript{136} Sultan Barakat et al, above n 131, 56.
would not even hear about the NSP until after their return.\textsuperscript{137} Grant disbursements from the government to the CDCs were not flexible enough to account for an influx of returnees or IDPs in a community, which meant that projects such as schools, clinics and water facilities were often rendered insufficient.\textsuperscript{138} Involving refugees in CDC discussions prior to their return – through remote means – might be one way to counter this shortcoming. There may also be value in engaging refugees while still displaced so that they can begin to repair their relationship with their state, and community, prior to their physical return, thus supporting the transition.

The experiences described throughout this section highlight markedly different perspectives towards the meaning of citizenship. Conventional mechanisms of transitional justice, such as the Liberian TRC, take a liberal approach to citizenship. This means that the citizen is conceived of as an individual who requires protection both by the state against violent others, and from the excessive powers of the state itself. Under the liberal model of citizenship, the state guarantees such protection through its formal recognition of its citizens’ fundamental rights.\textsuperscript{139} The liberal understanding of citizenship informed much of the Liberian TRC’s work. The TRC asserted the state’s protection of its citizens by establishing a legal framework through which to pursue justice for victims. In addition, it attempted to protect minorities by recommending the criminalization of any mention of ethnic differences, or offensive language. It also emphasised the legal rights of Liberians living in the United States and West Africa.

From the perspective of Liberian refugees, the legal approach to protecting their rights – and the liberal model of citizenship which underpinned that approach – often proved

\textsuperscript{137} Ibid, 61.
\textsuperscript{138} Ibid, 59.
inadequate, and did not lead to the practical realisation of the rights they most valued, or to the justice outcomes they preferred. The human rights framework stymied their ability to speak in the way they wished, and did not provide any protection of their economic and social rights. While the TRC Report recognised specific rights associated with citizenship for Liberians resident in the United States, including dual citizenship and the right to vote, it omitted these same rights for refugees resident in West Africa.

Afghan refugees had a similar experience with respect to the 2004 constitution. On paper, the constitution protected a range of citizenship rights, which supported a liberal approach to citizenship. However, those rights most important to Afghan refugees, such as the ability to claim or access land, and to achieve an adequate standard of living, were absent from the constitution and its process of drafting. As such, the constitution contributed little to the practical realisation of rights most important to refugees.

By contrast, unconventional mechanisms and methods of transitional justice in both Liberia and Afghanistan reflected a civic republican approach to citizenship. While the liberal model accentuates the importance of legal protection of citizens’ rights, the civic republican model focuses on political community. It asserts that each individual has an equal role in the collective decision-making of the polity, and holds that the protection of citizens is achieved through their active membership in the self-governing polity. The ability to build relationships and communicate directly with government officials, for instance, is one way that transitional justice processes contributed to a civic republican conception of citizenship. Out-of-country voting in Afghanistan, for instance, did not

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result in the irrevocable recognition of the right of refugees to vote, but did allow refugees to have their voices heard by officials in their home country. Refugees were able to directly communicate their own interpretation of harm and repair, emphasise the rights or justice outcomes most important to them, and potentially influence the way in which their government engaged with them. Equally, the NSP did not formalise rights protection, but did set up a systematic channel of communication between returned refugees and the Afghan government.

Refugee perspectives in the two case studies demonstrated that displacement is not merely physical, but fundamentally political. Their exclusion from the national polity means that refugees are deprived of a forum through which they can claim rights protection,¹⁴² and suffer a loss of political relevance.¹⁴³ In both case studies, it was these harms that refugees aimed to remedy by participating in transitional justice processes. The primary objective of refugee involvement in transitional justice, then, was not to resolve physical displacement, but to restore political relevance, and the ability to claim rights. In other words, refugees used transitional justice processes in an attempt to restore their state-citizen relationship, even before they were ready to physically return.

The understanding of displacement as political, and not simply physical, underlines that its resolution is best understood in terms of political inclusion, and realisable rights.¹⁴⁴ This separates the repair of the state-citizen relationship from physical return, and suggests that, in fact, the process entails ‘return not to a place, but to a political community.’¹⁴⁵ The way to judge the reparative value of transitional justice activities,

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¹⁴² Giorgio Agamben, above n 101, 171.
¹⁴³ Peter Nyers, above n 47, 17.
then, is not whether they contribute to refugee return; but how they contribute to the quality of the relationship between refugees and their state. This might entail the formal recognition of refugee rights – reflecting a liberal construction of citizenship – or establishing channels of communication between refugees and officials from their home country, reflecting a civic republican construction of citizenship.

In pursuing the restoration of their state-citizen relationship, refugees often relied on unconventional mechanisms, such as out-of-country voting, or development assistance; and unexpected methodologies, such as social interactions and relationships. This was necessary since the conventional approach to transitional justice struggled to respond to the political conception of displacement. Human rights law proved ill equipped to recognise, or remedy, the harms associated with a loss of political identity, and the legal, institutionalised expression of transitional justice was usually too inflexible to incorporate alternate conceptions of harm and repair. These processes and methods also offered practical ways by which refugees could realise their rights, and regain their political relevance, while still displaced.

9.5 Conclusion

In 2015, the number of refugees living in protracted displacement due to conflict and human rights abuse continues to rise, and is proving increasingly difficult to resolve. Transitional justice offers one way to respond to the harms associated with long-term displacement: it can assist refugees to achieve recognition and accountability for the harm they have suffered, allow them to join in a national process of memorialising the past, and assist them with their eventual return home. On this basis, for refugees whose preferred justice outcomes align with those of transitional justice, the use of transitional
justice as a response to protracted displacement appears to be a positive step. Those who wish to return to their original home within the time frame supported by their state, for example, are likely to find significant value in property restitution processes.

However, transitional justice struggles to incorporate the justice preferences of all refugees. In both case studies, transitional justice mechanisms often failed to respond to the lived experience of injustice, as well as to its repair. Many refugees found that their own perspectives concerning the harm, reparation and resolution of displacement were incompatible with those of transitional justice. Part of the problem was the tendency of transitional justice to rely on a discourse of human rights to identify which past experiences it would address, and which remedies it would apply. Refugees who could not fit their experiences into language of human rights, or did not wish to engage with an institutionalised, legalistic forum, often found that they had no way to communicate their experiences, or to achieve the remedies they sought.

At the root of this problem was a lack of genuine engagement with refugees, on both the substance and format of transitional justice processes. Scholars and practitioners tend to use the language of human rights to speak on behalf of refugees, and fail to take into account conceptions of the harm and repair of displacement that fall outside the human rights framework. Scholars also tend to define the purpose of transitional justice in normative terms, which suggests that transitional justice mechanisms are neutral and objective and obscures the fact that refugees often hold very different interests to those of their state.
In both Liberia and Afghanistan, refugees often spoke of justice outcomes that differed markedly from those of scholars and practitioners, and they often pursued these objectives in forums not conventionally recognised by transitional justice. These perspectives demonstrated that a victim-centred approach to transitional justice expands the very idea of what constitutes transitional justice. Victim-centred transitional justice does not simply mean asking refugees if they would prefer a truth commission or criminal trials. Rather, it entails understanding the implications of using a legal human rights framework to define harm and repair, and acknowledging the voices and experiences that a human rights framework excludes. It means analysing mechanisms in terms of actors’ interests, rather than normative principles, in order to provide an account of the politics of transitional justice processes, as well as to acknowledge that actors hold unequal capacities to pursue their own interests. It also means questioning why certain solutions are considered most appropriate for refugees, and whether refugees themselves share those same priorities.

If paying attention to local experiences shows us how foundational assumptions and practices of transitional justice break down, it can also point to new possibilities. In the two case studies, listening to refugee voices produced an alternate understanding of the mechanisms and methodologies of transitional justice. This broader view of transitional justice suggested practices and forums capable of addressing harms, and achieving justice outcomes that conventional process of transitional justice could not. Refugee perspectives suggested that the full effects of political displacement, rather than only that of physical displacement, should inform practices of transitional justice. This entails addressing two main deprivations: the loss of a forum through which to claim rights, and the loss of political relevance. While a conventional approach to transitional justice would attempt

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to repair these harms by establishing laws or institutions that formally recognise refugees as citizens, refugees suggested that the rebuilding of the state-citizenship relationship takes place through a much wider range of non-legal processes. This includes politicising the space of asylum, building personal relationships, and the provision of development assistance.

Defining refugees as those who suffer primarily from physical displacement suggests that justice will be found in physical return. Victim-centred justice, then, must start by looking at what constitutes harm, and who defines the parameters of what is recognised, and what is excluded. Equally, the methods for repair of harm must be shaken free of the institutionalised expression set up by the law and states, and placed back in the hands of those who have been harmed. Together with the opportunity to define the harm that requires repair, and how that repair should be approached, refugees might be better positioned to achieve justice outcomes more closely aligned with their own perspectives, and preferences.
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