The Sharp End: Armed Opposition Movements, Transitional Truth Processes and the Rechtsstaat

Colm Campbell* and Ita Connolly†

Abstract

While ex-combatant and disarmament, demobilization and reintegration issues have generated rich literatures, transitionary armed opposition movements — actors central to transitional justice processes — have been neglected. This article addresses part of this research gap, focusing on the agency of armed movements with respect to three key transitional justice themes: transition, law and truth processes in the law-based rechtsstaat. Drawing on examples from South Africa, Namibia, Israel/Palestine and the Basque country, the article offers a framework for analyzing this agency by exploring the political opportunity structures presented by truth processes, as well as their implications for the movements’ mobilizing structures and framing processes. This analytical framework is grounded in original Northern Ireland data drawn from interviews with former Irish Republican Army (IRA) activists, IRA public statements and Sinn Féin election manifestos. The data suggests that transitionary armed opposition movements see transitional justice as a site for continuing their political projects and potentially inflicting political damage to their opponents, as well as of attrition, given the victim–perpetrator character of such movements. The truths emerging from transitional processes may reflect the degrees of agency, entrepreneurship (including deliberate silences) and resources deployed by both state and nonstate actors.

Introduction

A key actor is missing in transitional justice (TJ) discourse. While ex-combatant issues and disarmament, demobilization and reintegration processes have generated rich literatures, the interaction between armed opposition movements and TJ has been neglected. Recent scholarship trends suggest exploration strategies.

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2 See, for example, Ana Cutter Patel, Pablo de Greiff and Lars Waldorf, eds., Disarming the Past: Transitional Justice and Ex-Combatants (New York: Social Science Research Council, 2009).

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Recognition of the limitations of state-centered ‘top-down’ approaches to TJ has led to a focus on ‘bottom-up’ initiatives beyond the state. The upshot has been an emphasis of the agency of civil society organizations and social movements in developing TJ initiatives outside state structures and in setting agendas for state-run TJ mechanisms.\(^3\) Seeking to address the research gap on armed opposition movements, this article uses the ‘bottom-up’ approach to analyze such movements’ engagement with three key TJ themes: transition, law and truth processes in the \textit{rechtsstaat}, a state ideologically committed to the rule of law.\(^4\)

Viewed through a TJ lens, armed opposition movements have several distinctive features. They possess elements of the victim, seeing themselves as the voice of those harmed by state repression, as well as of the perpetrator, with their violence creating victims. Whereas TJ typically conceptualizes the victim–perpetrator relationship as dichotomous (either victim or perpetrator), in the case of armed movements the relationship is dyadic (simultaneously victim and perpetrator). Such movements frequently have agency in driving TJ initiatives that focus on the state, while also being potential objects whose violence transitional mechanisms scrutinize. Springing from civil society, they have ‘bottom-up’ features, but they are also frequently bureaucratized, with state-like ‘top-down’ structures.

Part 1 of this article constructs a social movement theory-based framework for analyzing the interaction of armed opposition movements involved in a transition (henceforth transitional movements) with TJ. While the framework has not previously been applied to such transitional movements, it has been successfully employed to analyze both the emergence and development of armed opposition groups\(^5\) and the behavior of peaceful protest movements in political transitions.\(^6\) In conventional, ‘centered’ analyses, the gaze is from inside the process looking out. In contrast, the analysis here offers decentered TJ perspectives: the viewer is the formerly violent opposition movement attempting to mold, and being itself molded by, transition and TJ processes. This perspective shift helps in understanding the movement’s negotiation imperatives around the mandates of truth processes and its reliance upon strategic silences. To a degree, the shift allows aspects of the movement’s political agenda during transition to be inferred from its strategic TJ choices (why emphasize this, why neglect that?). The analysis also


allows links to be traced between the movement’s internal shifts and external changes generated by transition and TJ. The framework is constructed by taking the themes of transition, law and truth processes and mapping them against social movement theory’s three key analytical devices: political opportunity structures, framing processes and mobilizing structures (Table 1). The hypothesis employed is that agency in the movement can be expressed in instrumental assessments of TJ on a rational actor basis. The article examines how processes can be assimilated to become resource providers and to frame strategic messages, and how a movement seeks to maximize gain and minimize attrition. The analysis is amplified using examples from apartheid-era South Africa, Namibia, Israel/Palestine and the Basque country.

Part 2 consists of a case study, with the theoretical framework applied to original data from Northern Ireland. That conflict was triangular, involving the British government, loyalist paramilitaries who wished to keep the region British and the Republican movement, consisting primarily of the Irish Republican Army (IRA) and the associated political party, Sinn Féin (SF), which sought Irish reunification. During the transition, the Republican movement switched from armed opposition to SF’s becoming a joint leader of Northern Ireland’s new consociational government, as well as a major opposition party in the Republic of Ireland.

Whereas Part 1 draws to some extent on evidence from countries that have completed transitions (where outcomes might seem inevitable), Northern Ireland offers the advantage of testing the framework, to a degree, in an incomplete transition. It also allows the framework to be refined (and grounded), taking into account some novel elements in the Northern Ireland data, particularly the strategic use of apology and the evidence of transnational diffusion of ‘peace process’ strategies. The analysis draws on three original data sets that (1) track the IRA’s ideational development through all the organization’s public statements from 1994 (a key ceasefire year) onwards;7 (2) focus on SF ideation as reflected mainly in the party’s electoral manifestos from the early

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Table 1. Armed Opposition Movements: Transition, Law and Truth

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<tr>
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<th>Political opportunity structure</th>
<th>Framing processes</th>
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<td><strong>(A) Transition</strong></td>
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<td>Opportunities • Address grievances • Create alliances (with internationals and moderates) • Enter government</td>
<td>Alter prognostic frames ('peace process' + peaceful change) Alter motivational framing ('peace process') Alter diagnostic framing (to problem capable of being solved by transition) Maintain organizational frames (deprive flankers of exclusive use)</td>
<td>SMO demobilization Enhanced party mobilization</td>
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<td>Risks • Grievances unaddressed • Failed alliances • Flankers succeed • Marginalization</td>
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<td><strong>(B) Law</strong></td>
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<td>The Transitionary Rechtsstaat</td>
<td>Opportunities • Law as sword to maximize political opportunities • Law as vehicle for 'capturing' political gains • State’s previous rule-of-law failings invoked to damage opponents</td>
<td>Diagnostic framing • Rule of law deficits Prognostic framing • Legal transformation • Deepen rule of law</td>
<td>Removal of legal restrictions boosts party mobilization</td>
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<td>Risks • Inability to deploy law • Law-based state repression may continue</td>
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<td><strong>(C) Truth</strong></td>
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<td>Truth Processes as Battlefields</td>
<td>Opportunities • Damage opponents (their past violations) • Create new alliances and diminish flanking threats on basis of above</td>
<td>Mold truth to resonate with diagnostic framing, creating bridge to new targets of mobilization Framing battles concerning past and transition with state, enemies and flankers</td>
<td>Valorize SMO demobilization Employ truth-telling processes to enhance party mobilization Push to valorize earlier armed mobilization</td>
</tr>
<tr>
<td></td>
<td>Risks • Suffer political damage (from SMO past violations) • Fail to create alliances or damage flankers</td>
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1990s onwards, and (3) consist of qualitative data from interviews with former IRA prisoners released early under peace process mechanisms. The semistructured interviews were analyzed using QSR Nud*ist software (e.g., ‘nodes’ were constructed around ‘truth,’ ‘decommissioning’ and other terms). The authors aimed for a reflective group of respondents, who were contacted through Coiste na nArchime, an ex-IRA prisoner group. Of the 16 respondents, aged between 31 and 58 years, 3 were female and 13 male, and 6 were based in a rural area and 10 based in an urban area. The respondents’ social backgrounds were predominantly working class and lower middle class. Educational attainment was high, with several respondents holding undergraduate or postgraduate degrees. The group included some ‘footsoldiers,’ but also elements of middle- and upper-level IRA management.

Through this data, the article addresses four research questions that emerge from the framework discussed in Part 1: To what extent do an armed opposition movement’s approaches to normativity and law affect its disposition toward TJ? What is the movement’s strategy in relation to state violations? How does the movement engage with its own violations? What are the circumstances under which one mechanism could address both?

Part 1: Armed Opposition Movements, Transition and the Rechtsstaat

While some armed opposition movements have unitary structures, bifurcated models with political parties and armed ‘wings’ are more common. Examples from conflicts with self-proclaimed rechtsstaaten include the African National Congress (ANC) and Umkhonto we Sizwe (MK) from apartheid-era South Africa; the South West Africa People’s Organization (SWAPO) and the People’s Liberation Army of Namibia (PLAN) from Namibia when it was under South Africa; the Movement for the National Liberation of Palestine (Harakat al-Tahrir al-Watani al-Filastini, or Fatah), the Palestinian Liberation Organization’s principal member, opaquely linked to Tanzim in the Occupied Palestinian Territories (OPT); and Basque Homeland and Liberty (Euskadi Ta Askatasuna, or ETA) and Batasuna in the Basque country.

In recent years, social movement theory has hardened to emphasize three analytical devices, mentioned above, in explaining movements’ development: mobilizing structures, political opportunity structures and framing processes. Mobilizing structures are ‘collective vehicles, informal as well as formal, through

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which people mobilize and engage in collective action.\textsuperscript{10} When structures crystallize, the result is the ‘social movement organization’ (SMO), which together with linked organizations forms a ‘social movement family.’ Hereinafter, ‘SMO’ is used to refer to the armed ‘wing’ of bifurcated structures, while ‘party’ refers to its linked political party and ‘movement’ refers to the entire social movement family (SMO, party and other elements). The authors use rational actor models to explain structure building. This is not to suggest that decision making by armed opposition movements is free from irrationality, but rather that a movement’s success in structure building is likely to depend on rational choices it makes in maximizing resource uptake, widely conceived. Some movements grow, and some wither.\textsuperscript{11}

Shifts away from violence can also be theorized as changes to the political opportunity structure, or the ‘structure of political opportunities and constraints confronting the movement.’\textsuperscript{12} This refers, among other things, to the state’s nature (ranging from democratic to authoritarian) and to the creation of political openings during transition that were previously unavailable to groups linked to violence.

The third key analytical device is that of framing processes, or ‘conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action.’\textsuperscript{13} These provide members with shared frames of reference, encompassing multiple cultural and ideational elements. The literature identifies three ‘core tasks’ of framing: diagnostic, prognostic and motivational. Diagnostic framing refers to identification of problems with which the movement is concerned, prognostic framing ‘involves the articulation of a proposed solution . . . or at least a plan of attack’\textsuperscript{14} and motivational framing ‘provides a “call to arms” or rationale for engaging in ameliorative collective action.’\textsuperscript{15}

While some frames are movement-specific (‘organizational frames’), others have broader reach. Few, however, are identified as having sufficient interpretive scope to function as ‘master frames’ across a wide range of social movements, as do the ‘injustice’ and ‘rights’ frames, for example. The widespread and enduring qualities of these frames speak to frame ‘diffusion’ – processes by which frames are spread within and between social movements.

\textsuperscript{10} Doug McAdam, John D. McCarthy and Mayer N. Zald, eds., \textit{Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings} (Cambridge: Cambridge University Press, 1996), 3.
\textsuperscript{12} McAdam, McCarthy and Zald, supra n 10 at 2.
\textsuperscript{13} Ibid., 6.
\textsuperscript{14} Robert D. Benford and David A. Snow, ‘Framing Processes and Social Movements: An Overview and Assessment,’ \textit{Annual Review of Sociology} 26 (2000): 616.
\textsuperscript{15} Ibid., 617.
Flanking Threats and Changing Movement Structures in Transition

Early TJ analyses focused on transitions from authoritarianism to democracy. The need to include analyses of the legacies of violent internal conflicts has prompted revised conceptualizations of transition to include peacemaking. Peace processes involving armed opposition movements frequently entail shifts away from both authoritarianism and conflict.

The question of the political opportunities peace processes present is well covered in the conflict resolution and peace process literature. Peace processes offer movements chances to form alliances with moderates and international actors, to have grievances addressed and to enter government. As regards constraints, the question of ‘spoilers’ and ‘flankers’ merits highlighting. ‘Spoilers’ refers to those who tactically or strategically oppose the process, particularly dissenters within a movement who are unhappy with the compromises required for peace.16 The dilemma for a change-oriented leadership is whether it is better to have this group inside the tent facing out, or outside facing in. If spoilers remain within the movement they may be able to veto change. If they depart, so does the danger of an internal veto, but threats to the process may be enhanced if they form a new group and attempt to outflank the main organization, whose ‘betrayal’ they are certain to highlight (hence ‘flankers’). During the Spanish transition from Francoism, for example, ETA split into ETA Politico-Militar and the more radical ETA Militar. The former split again when elements accepted the Spanish government’s offer of individual amnesty in the 1980s. One faction integrated with a political party (Euskadiko Ezkerra), while the other merged with ETA Militar, allowing the latter undisputed ownership of the ‘ETA’ name17 and the allegiance of Batasuna. In contrast, in the current peace process, ETA seems to face no flanking threats, at least partly because no constituency seems to exist with whom more radical framing would resonate. In addition, although Batasuna has been banned, the Bildu coalition has been successful in articulating a separatist position that resonates strongly with ETA’s political goals and peace strategy. In the OPT, Fatah’s negotiating position (until 2011) was steadily weakened by effective flanking by Hamas (and its military wing, Izz ad-Din al-Qassam Brigades), as one distinguishable social movement family partly supplanted another.

Compromise in peace processes presents new challenges not only in terms of flankers and spoilers but also for group framing. These shifts are likely to entail ‘strategic efforts by [transitionary movements] to link their interests and interpretive frames with those of prospective constituents and actual or prospective

resource providers’ (or targets of mobilization). This is likely to involve movement entrepreneurs in ‘frame transformation,’ which entails ‘changing old understandings or meanings and/or generating new ones.’

As regards mobilizing structures, the transitionary movement typically faces two sets of issues: (1) how to handle SMO demobilization so as to boost party mobilization (which typically requires significant entrepreneurship) and (2) how to deal with particular kinds of violations that appear functionally linked to dedicated SMO structures. Larger SMOs tend to be highly bureaucratized, both vertically (fighting units) and horizontally (functionally differentiated headquarters units) (Figure 1). For the latter, intelligence and security have particular salience. As the US Army and Marine Corps Counterinsurgency Field Manual insists, ‘Both insurgents and counterinsurgents require an effective intelligence capability... Both attempt to create and maintain intelligence networks while trying to neutralize their opponent’s intelligence capabilities.’ Given that comparable imperatives drive the state and its armed opponents, it is unsurprising that their institutional expression, specifically in larger SMOs, can be similar. MK established both a military intelligence unit and a unit for counterintelligence, security and intelligence (Figure 1). Likewise, SWAPO’s Central Committee decided in 1981 to establish a wide-reaching security apparatus. The behavior of such units parallels that of state cognates, including detaining and interrogating suspected spies. SMO security units have a high degree of autonomy; safeguards are rare, and the units are prime targets for enemy disinformation and infiltration.

Predictably, the result tends to be the replication of the kinds of allegations typically leveled by SMOs at their state opponents, as an examination of the record of SWAPO’s and MK’s security units in the Southern African frontline states illustrates. With limited resources, each fought a powerful enemy skilled in disinformation and espionage. In SWAPO’s case, evidence emerged of ill-treatment of suspected spies, forced confessions and widespread unjustified

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18 Benford and Snow, supra n 14 at 624.
19 Ibid., 625.
executions, with suspects frequently ‘disappeared.’ MK was also accused of brutality and failing to inform the families of those executed, though the scale of executions was much smaller.

The Transitionary Rechtsstaat

SWAPO’s response to allegations of abuse was persistent denial. In contrast, the ANC’s response was markedly legalistic, involving inquiries and the creation of internal legal safeguards. The difference can be understood partly in terms of divergent cultures, particularly with respect to law. An understanding of legal culture and normativity in armed opposition movements requires some exploration of law’s role in the conflicted rechtsstaat. Self-identification as a rechtsstaat provides powerful legitimation for state action during conflict and transition. This is an ideological device, not an actual description, as no state can continuously obey all the law. Part of the state’s legitimating package is a judiciary with reasonable claims to independence that rules on alleged breaches, including those of the state. State action is therefore simultaneously legitimated and opened to challenge.

Recognition of the Janus-like quality of law is an enduring contribution of the law and society movement. If law has a hegemonic quality, oriented to buttressing the status quo, it also presents counterhegemonic potential. It is open to exploitation by social movements, a dynamic captured in law’s depiction as a ‘relatively autonomous’ phenomenon. Law might be used as a sword to prise open the political opportunity structure (challenging radical groups’ exclusion from public office) or as a shield to protect group mobilizing structures (challenging proscription). Law may also figure in group framing processes. Indeed, master frames frequently have strong legal resonance (‘rights,’ ‘injustice’).

As regards possible deployment of law by armed opposition movements, three factors are key. The first is that legal contestation will be forced upon a movement irrespective of its strategic choices. In the rechtsstaat, repression through formal

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rationality is central (typically coexisting with illegal covert repression).\textsuperscript{26} Formal rationality requires criminal trials, and such trials create contests where use of law as a shield is inevitable. The second factor relates to dynamics where degrees of frame alignment exist between the SMO and peaceful social movements. Here, law-based frame diffusion from the latter may occur. The third factor brings together a cluster of issues around the movement’s legal culture. As noted above, larger SMOs are typically bureaucratic, forcing attention on the Weberian insight that to function best bureaucracies require legal or quasilegal regulation. In MK’s case, most abuses seemingly occurred when the organization lacked internal legal regulation. Indeed, it was knowledge of abuses that prompted the ANC to adopt its Code of Conduct, including MK’s Military Code. The Code of Conduct, drafted by a future Constitutional Court judge,\textsuperscript{27} provided fair trial safeguards with two layers of appeal.\textsuperscript{28} Furthermore, the ANC established an Office of Justice to ‘maintain the principles of legality in the organization.’\textsuperscript{29} This emphasis on legal redress is testament to a strong ideological legal commitment by key ANC cadres, which raises the paradoxical issue of possible legal infusion into the SMO, partly from its \textit{rechtsstaat} opponent and more generally from its society of origin. Despite experiencing law as an instrument of apartheid, the ANC valorized law in its code and in its Freedom Charter.

This also points to a need for greater attention to legal pluralism in the violently conflicted \textit{rechtsstaat}. If law in general has a hegemonic quality, the gravitation surrounding it is nevertheless complex. Law could also be said to exercise a pull not only on the state\textsuperscript{30} but also on opposition movements – a centripetal effect. This may be true of attitudes not only toward domestic law but also toward international law. The ANC, SWAPO and the PLO declared adherence to international humanitarian law (IHL) in moves to depict theirs as struggles of peoples against ‘colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,’ as provided for in 1977 Protocol I to the Geneva Conventions.\textsuperscript{31} The Protocol permitted such declarations to be made by the ‘authority representing a people’\textsuperscript{32} and involved a process separate from that of the possible ratification of the Geneva Conventions.

\textsuperscript{27} See, Carol Hills, ‘Sachs Tells How He Crafted ANC’s Code of Conduct,’ \textit{Mail & Guardian}, 9 November 2007.
\textsuperscript{29} Ibid., sec. B2(a).
\textsuperscript{32} Ibid., art. 95(3).
and Protocols by a liberation movement claiming the character of a state’s government.33

Truth Processes as Battlefields

Law is a key driver for, but not a guarantee of, TJ in the postconflict rechtsstaat. Questions as to whether the settlement involves sharing or separation, and of power balances, may be more important. South Africa’s withdrawal from Namibia and Namibia’s independence in 1990 were not followed by TJ initiatives. Likewise, in the separation-oriented Israel/Palestine context, a joint truth commission is improbable. In the Basque country, the power balance is such that ETA and allied groups seem to have limited capacity to compel TJ mechanisms.

The implication is that where law drives TJ processes, it is political law. As Richard Abel astutely observes, in the conflicted rechtsstaat, law can be ‘politics by other means.’34 It is likewise a truism that for armed opposition movements, transitional politics is war by other means. The implication is that law is part of the calculus of political action in the transitional rechtsstaat, and therefore of proxy war. In such cases, initiatives need to be crafted to take account of the imperatives of the preexisting rechtsstaat and of the principle of legality generally at the domestic and international level. In South Africa, the Truth and Reconciliation Commission (TRC) was statutory. Its distinctive formula of granting offenders amnesty in return for truth telling rested on domestic law while aiming to address some objections to blanket amnesties in international law.35

TJ processes present movements with a radical new political opportunity structure. Truth processes offer opportunities to inflict damage on the enemy state by highlighting former violations. This may facilitate new alliances with moderates who become alienated when the state’s wrongs are uncovered. It is critical for a movement to oversee the emergence of truths that resonate with its diagnostic framing. Success will automatically validate its prognoses (‘the peace process as way forward’). The problem it faces is that its own violations may obscure those of the state. One way of addressing this problem is preemptive self-investigation, such as that employed by the ANC,36 which was timed partly to deny political opportunities to its opponents in critical democratic elections. To a degree, unaddressed issues from the ANC’s self-investigation prompted the party to propose

33 See further below.
34 Abel, supra n 24 at 7.
a truth commission that would deal both with these and with state violations. As truth processes inevitably involve some assessment of the overall weight of human rights violations, they constitute framing battles with exceptionally high stakes, primarily between the state and an armed opposition movement. Since the contours of the TJ terrain are defined by law in the rechtsstaat, it is imperative for both actors to devise and deploy legal processes to generate desired results.

For the state, a two-fold strategy suggests itself. As regards overt repression, formal rationality may be employed as a shield during truth-seeking processes. Several variants are available, generally revolving around claims that to castigate acts that were allowed under domestic law violates the maxim of nulla crimen sine lege. As regards covert repression, official silence may suffice. In the rechtsstaat, responsibility for such repression may be harder to uncover than in the lawless state, as in the former it occurs far below legal radars. This helps explain why the TRC seemed unable to deal definitively with state collusion in ‘Third Force’ violence.37

The other part of the state’s strategy is to exploit the growing trend of including nonstate actors in the remit of truth commissions in order to damage the SMO by highlighting its violations. This approach has presentational attractions, as claims that ‘all sides will be judged equally’ may enhance the process’ legitimacy internationally and among government-aligned constituencies. The strategy has its pitfalls, however. Stanley Cohen’s analysis of the parallel issue of mutual amnesties is that treating state and nonstate actions in the same way provides ‘a convenient symmetry to disguise very different social realities.’ 38

Attempts to frame SMO violations according to law involve reference to IHL. Rechtsstaaten faced with a serious armed insurrection invariably decline to ratify 1977 Geneva Protocols I and II, denying insurgents actual or perceived legal status. This leaves the possibility of using Article 3 common to the 1949 Geneva Conventions, which provides some minimal guarantees in internal ‘armed conflicts,’ but rechtsstaaten may resist this option because it seems to bestow retrospective political status on SMOs. Furthermore, findings that ‘serious breaches’ of the article were committed by nonstate and/or state parties raise thorny issues of whether amnesties for such acts could be lawful when both sides favor the amnesty option.

The South African TRC confirmed that apartheid constituted a ‘crime against humanity,’ but this merely restated preexisting international law.39 It also found that during the conflict, the state had seriously violated the right to life and the right to be free from torture. When viewed as a framing battle, however, with the

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37 ‘Third force’ violence was defined by the TRC as involving ‘covert units of the security forces acting in concert with individuals or groupings, such as the IFP and certain right-wing paramilitary organizations.’ Truth and Reconciliation Commission of South Africa (TRC), Truth and Reconciliation Commission of South Africa Report, vol. 6 (2003).


39 Article 1(1) of the 1976 Apartheid Convention states, ‘Apartheid is a crime against humanity.’
ANC and the National Party as the prime actors, the TRC process featured some successes for the latter. The Commission’s mandate was to focus on ‘gross violations of human rights,’ defined as violations through ‘the killing, abduction, torture or severe ill treatment of any person; or . . . any attempt, conspiracy, incitement, instigation, command [to do so].’\textsuperscript{40} It therefore shifted the focus away from apartheid toward acts (committed by any political actor) that were in any case illegal under domestic law. This was reinforced by the TRC’s failure to link its findings of violations to apartheid structures\textsuperscript{41} and by its refusal to extend the interpretation of ‘severe ill treatment’ beyond bodily integrity rights to include apartheid-related forced removal and Bantu Education.\textsuperscript{42} The overall result came close to a \textit{de facto} acceptance of domestic legality as a shield. Likewise, as mentioned above, the TRC’s discussion of state collusion lacked depth.

Furthermore, when examining MK violations, the Commission moved from infractions in the organization’s training camps (it was somewhat dismissive of ANC justice initiatives) to examining combat offences in a way that showed a sometimes hesitant grasp of IHL. For example, it judged MK’s car bombing of the South African Air Force headquarters to be a gross violation of human rights as it resulted in both civilian and military casualties.\textsuperscript{43} This seems problematic in that the Commission’s evaluation of the compatibility of MK’s actions with IHL omitted discussion of the key ‘proportionality’ concept. Furthermore, in an interstate armed conflict, such an attack, executed from the air, would be lawful. The overall result was that MK violations appeared to be presented in a manner suggesting some symmetry with the crimes of the apartheid state. This narrative was not anticipated by the ANC, but a court challenge failed.\textsuperscript{44}

\textbf{Part 2: Northern Ireland Case Study}

The \textit{rechtsstaaten} examined above involved states that had racist regimes (South Africa), that were belligerent occupiers of the territory in question (Israel) or that had experienced authoritarian rule until the late 1970s (Spain). In contrast, the UK, which includes Northern Ireland, was both a \textit{rechtsstaat} and a long-established democracy. Nonetheless, the state contained a ‘brown area’\textsuperscript{45} (Northern Ireland), where for the half-century prior to the outbreak of violence one party drawn from one ethnonational group was continuously in power. Rule of law deficits were evident, and during the conflict (1968–1998), the state

\textsuperscript{40} Section 1(1)(ix) of the Promotion of National Unity and Reconciliation Act (No. 34 of 1995).


\textsuperscript{43} TRC, supra n 37 at 649.

\textsuperscript{44} Ibid.

perpetrated systematic human rights violations. The paradox, therefore, was of a liberal democratic rechtsstaat engaging in violations that its mechanisms should have rendered impossible.

This has had important implications for justice issues in Northern Ireland’s transition. The first is that although serious and systematic, the levels of state (and nonstate) violations were not catastrophic; no genocide occurred, and it is difficult to make a convincing case that crimes against humanity featured. The second is that achieving legal accountability for covert violations has been particularly challenging precisely because they were organized well below legal radars. The third is that the state has had difficulty ‘seeing’ that it committed any serious and systematic violations because such violations conflict with its self-image. The retrospective conflict narrative it has sought to create is one in which state violations were limited to individual ‘rotten apples.’ Consequently, the state sees no need for an overall truth commission. Rather, when faced with alleged violations, it has taken an atomized approach, addressing issues through discrete public inquiries. Much of the Northern Ireland TJ discourse therefore centers on these inquiries. Finally, the state’s atomized approach has created opportunities for its opponents to call for public inquiries into state violations with limited risk of attrition.

For the IRA and SF, the peace process transformed the political opportunity structure, simultaneously generating major shifts in framing and mobilizing structures. Restrictions affecting SF were lifted and new alliances became possible. Following the 1998 Good Friday Agreement (GFA), party mobilization was boosted and SF and the Democratic Unionist Party became the dominant parties in Northern Ireland’s new consociational government. Post-GFA, the IRA disarmed slowly, extracting maximum leverage, and faded rather than formally disbanded.

The process opened up new targets of mobilization for SF, but equally important for the movement was maintaining its existing support base. For both goals, frame selection was key – the conscious employment of international ‘peace process’ formulae (the ANC loomed large in interview data, with the PLO also figuring). The references to the ANC reflected well-established patterns of two-way diffusion: political expertise from the ANC to SF and military know-how (and seemingly some deployment of personnel) from the IRA to MK. As the transition solidified, frame accommodation involving outward diffusion of political expertise from SF became evident, with the party stating it had ‘ensured that our experience of the Irish peace process is widely available to others.’


47 Seemingly, the IRA trained MK personnel in bomb making, and IRA operatives deployed in South Africa did the reconnaissance for MK’s 1980 attack on the Sasolburg oil refinery. See, Kader Asmal and Adrian Hadland, with Moira Levy, Kader Asmal: Politics in My Blood, a Memoir (Pretoria: Jacana Media, 2011).

Reflecting this perspective, the SF president played a prominent role in the 2011 International Conference to Promote the Resolution of the Conflict in the Basque Country.49

Frame transformation was also important. Such key organizational frames/goals as ‘self-determination for all the Irish people’ were transformed so that, de facto, exercise of the right also required the democratic consent of a Northern Ireland majority (as in the GFA). Maintaining (transformed) organizational frames, delaying disarmament and refraining from formal IRA disbandment restricted the political opportunities of potential flankers. They also inhibited internal spoilers, so that when some (the Real IRA) broke from the movement in 1998, their flanking capacity seemed limited.

The peace process in Northern Ireland functioned as both a prognostic and a motivational frame, which was reflected in the interviews: ‘I think it’s the best way forward . . . Thirty years of fighting’s a long time.’50 Use of the peace process frame could be innovative. For example, disarmament began only after an ANC-linked inspector became involved in examining arms dumps, which allowed decommissioning to be framed as according with international practice.

Reflecting a lack of consensus on ‘dealing with the past,’ the GFA said little about it. Whether there was ‘a past’ and, if so, whose past was part of the overall framing battle. State denial strategies soon became unviable, with the past remerging in the GFA’s outworking as a result of a combination of international law imperatives and political pressures. From 1994 to 2008, the European Court of Human Rights delivered multiple judgments finding the UK in breach of the procedural requirements of the European Convention on Human Rights where security forces were alleged to have killed rather than captured IRA suspects (‘shoot to kill’) and where security force members were alleged to have colluded in killings by loyalist paramilitaries (‘collusion’ cases).51 Political pressures arose from the imperative to secure Republican support for the reconstituted police service, thereby providing political opportunities for SF to demand that disputed killings associated with the former Royal Ulster Constabulary (RUC) be addressed.

The movement’s strategy was to insist on law-based processes, particularly public inquiries, to investigate past state violations. Three other state mechanisms were deployed to police the past: the Historical Enquiries Team, which


50 Personal interview, rural male, Northern Ireland, April 2003.

51 See, Finucane v. the United Kingdom, European Court of Human Rights, App. No. 29178/95 (1 July 2003); Brecknell v. the United Kingdom, European Court of Human Rights, App. No. 32457/04 (27 November 2007); McCartney v. the United Kingdom, European Court of Human Rights, App. No. 34575/04 (27 November 2007); McGrath v. the United Kingdom, European Court of Human Rights, App. No. 34651/04 (27 November 2007); O’Dowd v. the United Kingdom, European Court of Human Rights, App. No. 34622/04 (27 November 2007); Reavey v. the United Kingdom, European Court of Human Rights, App. No. 34640/04 (27 November 2007).
reexamined conflict deaths, the Police Ombudsman and the Police Service of Northern Ireland (PSNI). These mechanisms could lead to prosecutions, but trials have played a very limited part in the Northern Ireland TJ repertoire to date.

While these initiatives have mainly focused on the state’s responsibilities, the police-based mechanisms have also covered IRA killings and one of the public inquiries focused on allegations that elements in the Republic of Ireland’s police colluded with the IRA in killing two Royal Ulster Constabulary (RUC) officers. Furthermore, two dedicated bodies were tasked with overseeing the discharge of SMO obligations, with disarmament coming under the Independent International Commission on Decommissioning (IICD) and cases where victims’ bodies are missing coming under the Independent Commission for the Location of Victims’ Remains.

Rather than pointing toward eventual closure on the past, these initiatives seemed to create expectations for yet more inquiries and pressure for a holistic mechanism grew. In 2007, the British secretary of state formed the Consultative Group on the Past, which recommended a Legacy Commission to serve as a truth commission of sorts. Societal and official reception of the proposal was lukewarm and none of the Commission’s recommendations has been implemented to date.

**Paradoxes of Movement Normativity**

The Northern Ireland peace process was heavily juridicized. The GFA was both a political deal between negotiating parties and an international treaty between sovereign states. Furthermore, the political deal contained numerous commitments that required fresh legislation. Arrangements for weapons decommissioning and for locating victims’ remains followed similar patterns: an Ireland–UK agreement, followed by domestic legislation in each state, creating dedicated institutions and providing partial amnesty.

This approach demonstrated greater concern with the principle of legality than was evident, for instance, in the Israel–PLO Oslo Accords. A critical factor is that the negotiations in Northern Ireland involved a second state, Ireland, also a rechtsstaat. There were other factors: the movement showed high degrees of normativity overlapping with paradoxical approaches to law that suggested prolonged norm infusion.

Founded in 1913, the IRA based its vertical structures on the British Army model of the time (Army Council, Headquarters, Brigades, etc.). The only major innovations to occur later were the partial introduction of cell structures and of two Commands. The IRA was also segmented horizontally, with departmental Headquarters structures (Figure 2). Counterintelligence was initially dealt

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53 See, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland Establishing the Independent Commission for the Location of Victims’ Remains (27 April 1999); Criminal Justice (Location of Victims’ Remains) Act (No. 9 of 1999) (Ireland); Northern Ireland (Location of Victims’ Remains) Act (1999).
with *ad hoc*, but a dedicated Security Department was later created alongside the existing Intelligence Department. The IRA therefore developed state-like security and intelligence institutions, reflecting an imperative also evident in other contexts (compare Figures 1 and 2).

Infusion into the IRA extended to the paralegal, with its manual setting out basic rules of court martial procedure for the organization. These can be traced to at least 1920 (during the Irish ‘War of Independence’ of 1919–1921) and were based on British Field General Courts Martial. The organization also modeled its internal investigative mechanism, the ‘court of inquiry,’ on British precedents. During the 1919–1921 conflict, the IRA issued a prominent claim that its forces constituted a *levée en masse* under the 1907 Fourth Hague Convention and Regulations, with the result that captured fighters were entitled to be treated as prisoners of war. The British authorities did not publicly accept the claim, though later they privately agreed that if the truce in place at the time broke down, IRA operatives captured in uniform would be accorded belligerent rights. Also in that period, the revolutionary Irish government sought admission to the Versailles Peace Conference. In this it failed, but the example of the approach taken to Ireland was apparently drawn upon in 1989 when the PLO attempted to accede to the Geneva Conventions and Protocols. In a rebuff, the Swiss Federal Council announced that it was unable to decide on the issue ‘due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine.’ Unsurprisingly, the experience of these years seems to have become ingrained in the IRA: planning for the organization’s ill-starred 1956–1962 campaign against Northern Ireland included the provision that fighters bear

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56 Convention (IV) respecting the Laws and Customs of War on Land, annexed Regulation 2.
appropriate insignia (the Irish tricolor), presumably in an attempt to meet the requirements for a ‘distinctive sign’ to qualify as a ‘volunteer corps’ under the 1949 third Geneva Convention.

At the start of the most recent Northern Ireland conflict (1968–1998), the IRA therefore had something like the command and disciplinary infrastructure required by IHL. If, as is often claimed, the peaceful resolution of disputes is a core task of law, the empirical data suggests that the infrastructure produced some measurable effects in this regard. Three related Republican armed opposition groups emerged out of the maelstrom of the late 1960s and early 1970s: the IRA, the Official IRA and the Irish National Liberation Army (INLA, an offshoot of the Official IRA). The IRA and the Official IRA had similar structures, including court martial systems. Indeed, an account exists of an Official IRA court martial at which the accused was served with a written ‘summary of evidence,’ with witnesses also heard in his presence. In contrast, the INLA dispensed with courts martial in favor of summary justice by the chief of staff (‘direct military rule’). Both the IRA and the Official IRA demonstrated a capacity to settle internal differences reasonably peacefully. The INLA, however, suffered from almost constant violent feuds that virtually destroyed the organization.

Despite its infrastructural legacy, the IRA declined to declare adherence to IHL (although apparently it considered doing so). One obvious issue it faced was that it was indisputably the Irish government in Dublin that represented the Irish people in international law. The UK, meanwhile, also declined to ratify the 1977 Geneva Protocols while the conflict persisted. At times, the British authorities came close to ‘recognition of belligerency’ (as when Prime Minister Margaret Thatcher said, ‘[The IRA] are acting under what they regard as rules of war and we are acting with the ordinary law’), but ultimately recognition was denied.

A paradox therefore emerged of an armed movement infused with the structure and normativity of its regular army opponent. In parallel, SF in the lead-in to the peace process made increasing use of judicial review to combat exclusion from official bodies. Paradoxical attitudes to law were also evident in the interview data, with activists’ schemata casting law sometimes as a repressive

60 Article 4.
61 Hanley and Millar, supra n 59.
62 On the INLA’s self destruction see, Jack Holland and Henry McDonald, *INLA: Deadly Divisions* (Dublin: Poolbeg Press, 2010).
tool and at other times as a vehicle for capturing political gain (e.g., in equality legislation).\textsuperscript{65}

This had a number of implications for the transition. The first is that IRA bureaucratization helped agreements to stick. The second springs from the fact that the IRA (and the Official IRA) displayed degrees of compliance with the ‘principle of distinction’\textsuperscript{66} that were high by international standards (MK’s record was also good, though inferior to the IRA’s).\textsuperscript{67} The number of security force violations in Northern Ireland was likewise much lower than in South Africa, particularly once the egregious violations of the early 1970s had passed. These levels of norm compliance suggest that factors were at work that dampened state repression and indiscriminate nonstate violence in Northern Ireland. They also lend support to claims regarding the centripetal effects of law over time, with the ‘pull’ affecting both the state and its armed opponents. All of this meant that there were elements of historical consistency when the movement looked to law-based public inquiries to highlight strategically important state violations.

**Transitional Justice as Opportunity**

The transitionary SMO and party are inevitably hooked uncomfortably in a victim–perpetrator dyad. Key to understanding the movement’s strategy in negotiating this dyad is to tease out the links in the overall narrative it has sought to create: its transitionary prognostic framing, its engagement with its responsibility as perpetrator and its self-perceived role as the voice of the state’s victims. As regards representation, ‘victimhood’ schemata, both personal and communal, loomed large in the interview data. At a communal level, the state was presented as exclusionary: ‘It wasn’t ... a state that our people or our families could feel that they were a part of.’\textsuperscript{68} Respondents heavily emphasized the state’s denial of ‘civil rights.’

The personal dimension of experiencing heavy-handed state repression has been analyzed elsewhere.\textsuperscript{69} A pattern emerging strongly from the interview data was of involvement in one of two periods of mass mobilization around prisoner-related claims (1971–1972 and 1981–1982), followed by personal involvement in violence. For the respondents, the reported ‘tipping point’ came with multiple deaths associated with the mobilization. The earlier cluster focused

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\textsuperscript{66} University of Ulster’s Conflict Archive on the Internet (CAIN) classifies 30% of IRA-inflicted fatalities as ‘civilian.’ To generate the figures using cross-tabulations, see, CAIN, ‘Sutton Index of Deaths,’ http://cain.ulst.ac.uk/cgi-bin/tab2.pl (accessed 18 October 2011) and enter ‘organization’ by ‘status summary.’ Another study classifies 36% as ‘civilian.’ David McKittrick, Seamus Kelters, Brian Feeney and Chris Thornton, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Edinburgh: Mainstream Publishing, 2007). CAIN classifies 42% of fatalities caused by the Official IRA as ‘civilian.’

\textsuperscript{67} The TRC observed that while targeting civilians was not MK policy, the organization nevertheless killed more civilians than security force members. TRC, supra n 57.

\textsuperscript{68} Personal interview, rural male, Northern Ireland, March 2003.

\textsuperscript{69} Campbell and Connolly, supra n 65.
on the 1972 ‘Bloody Sunday’ killings, when paratroopers fired at a civil rights march, killing 13 people.\(^{70}\) For the later cluster, it was the 1981 deaths of 10 prisoners on hunger strike. The other major aspect of state repression that featured strongly for both clusters was alleged state-supported killings – the ‘shoot to kill’ policy and the ‘collusion’ cases.

Before the GFA, SF secured commitments from the British government to hold a new public inquiry into Bloody Sunday, which became known as the Saville Inquiry. Post-GFA, the party’s transitional prognostic framing continued to insist on the need for further similar initiatives. After initial investigations by Canadian Judge Peter Cory, a series of inquiries was announced, including two into cases of human rights lawyers whose murders, it was claimed, were due to collusion.\(^{71}\)

The Bloody Sunday killings in particular were viewed as emblematic of state failings. SF’s persistence here is explicable partly in terms of the deep resonance that reopening investigations into the killings had with its constituency. Along with the ‘collusion’ approach, it also suggests a deeper strategy, however. When the Saville Inquiry categorized the Bloody Sunday killings as ‘unjustified’ in 2010, resonance with SF framing was inevitably strong. The inquiry provided multiple opportunities for the movement to inflict political damage on its state opponent. In addition, coming from a champion of a peaceful means of addressing a key grievance, the party’s message resonated in previously inaccessible constituencies, thereby boosting mobilization. There were also degrees of resonance (albeit lower) when, subsequent to Judge Cory’s recommendations, some inquiries were instituted. However, legislation that apparently muzzled these inquiries had first been adopted,\(^{72}\) and their findings were ultimately ambivalent, as discussed below.\(^{73}\)

The overall picture is of movement entrepreneurs effectively exploiting political opportunities presented by past state violations.

**Transitional Justice as Risk**

While the Northern Ireland conflict saw relatively high levels of respect for humanitarian principles on the part of state and nonstate actors, systematic breaches nevertheless occurred. In several respects, patterns also evident in the case of MK and SWAPO are identifiable. The most sensitive issue for the IRA was the alleged ill-treatment and execution of suspected informers. The authorities deployed multiple agencies specializing in intelligence and disinformation, a strategy the


IRA first attempted to combat *ad hoc* and later through the Security Department, which soon developed a reputation for brutality (Figure 2). The state’s success in this sphere can be gauged by the fact that the Security Department suffered penetration at a senior level.\(^{74}\) Altogether, the IRA executed circa 63 alleged informers.\(^{75}\) Of 16 cases of disappearance in the conflict (generally from the 1970s), 11 to 15 are generally attributed to the IRA.\(^{76}\) A second area of apparently systematic breach was the IRA’s practice of beating or shooting (in the leg) alleged petty criminals. Finally, there was the issue of ‘combat offences’ – instances where the principle of distinction was apparently deliberately or recklessly flouted. It has been estimated that 7 percent of IRA killings occurred in sectarian attacks on loyalist civilians who were intentionally targeted in cycles of retaliation and counterretaliation with loyalist paramilitaries (mostly in the mid-1970s). Furthermore, attacks on off-duty locally recruited security force members (almost all of whom were loyalist or unionist) were perceived as sectarian in affected communities (even if they may not have been prohibited in IHL). This perception was deepened when, as appears to have been the case in 10 percent of lethal attacks on the local forces, the intelligence was flawed, as the victim had already left the security forces.\(^{77}\) From a political perspective, the proportionality and the longevity of the IRA’s armed campaign also attracted criticism. In response, the IRA relied mainly upon two devices: the apology, and what could be termed a process of ‘repudiation-investigation.’

Apology is an area of increasing TJ focus.\(^{78}\) At its most basic, it can be seen as acknowledgment of past wrongs, coupled with a victim-oriented expression of regret. Yet, paradoxically, the words ‘apology’ and ‘apologia’ – a defense of one’s own position – share a Greek root (απολογία). Apology may encompass elements of apologia in the self-affirmative potential it represents for the perpetrator. In saying, ‘sorry, we contradicted principles of humanity to which we ourselves adhere,’ perpetrators may square the circle of simultaneous regret and defense.

For transitional movements, acknowledgment and apology offer routes to addressing their violations with apparent advantages over externally imposed mechanisms. The movement can set the agenda, and this can be presented as being in accordance with its core values. The 1994 IRA ceasefire announcement

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\(^{75}\) See, CAIN, supra n 66. Northern Ireland’s total population in 1994 was 1.6 million.


\(^{77}\) This figure and that of 7% for targeted loyalist civilians is calculated using data from Conflict Archive on the Internet (CAIN), ‘Appendix: Statistical Summary,’ in ‘Revised and Updated Extracts from Suttons’s Book,’ http://cain.ulst.ac.uk/sutton/book/#append (accessed 18 October 2011).

omitted apology. By 2002, sufficient ideational diffusion or political progress had occurred for the IRA to issue a wide-ranging statement of apology and acknowledgment:

While it was not our intention to injure or kill non-combatants, the reality is that on this and on a number of other occasions, that was the consequence of our actions. It is therefore appropriate . . . that we address all of the deaths and injuries of non-combatants caused by us. We offer our sincere apologies and condolences to their families.79

The statement’s construction suggests conformity with the apology/apologia formula. Critically, it is limited to the deaths of ‘non-combatants,’ to the exclusion of ‘combatants.’ It is thus built around an IHL concept and can partly be seen as a projection of the IRA as a combatant group in an ‘armed conflict,’ the rules of which spared civilians but not combatants. The deaths are therefore implicitly presented as conflicting with, while simultaneously reasserting, core movement values.

In two respects, however, the statement goes further. First, it offers acknowledgment (falling short of apology) of the suffering of security forces’ families: ‘There have been fatalities amongst combatants on all sides. We also acknowledge the grief and pain of their relatives.’ Second, it indicates that the movement accepts some responsibility for societal failure without suggesting apologia (but implicitly requiring reciprocation): ‘The future will not be found in denying collective failures and mistake . . . This includes the acceptance of past mistakes.’80

The interview data likewise suggests some recognition of the value of apology in the case of civilian deaths. Indeed, one respondent noted that, at least in cases involving reckless attacks, only unconditional apologies would suffice. The respondent described apologizing unreservedly to a survivor whose spouse died in one such bombing, to which the survivor replied, ‘People [Republicans] will come up, saying, “Very sorry about your wife, but you know that was an accident, you know.”’ The survivor then noted, ‘You’re the only one didn’t.’81 The interview data also suggests some acknowledgment of the security forces’ suffering, linked to increased identification with the victim’s humanity:

I can honestly put my hand on my heart and say that any death that I was responsible for was to me done very quickly – they didn’t even know what had happened to them . . . I could never look at pain on anybody’s face.82

Having adopted the apology/apologia formula, the IRA proceeded to issue several apologies for previously unacknowledged attacks where collateral damage entailed civilian deaths.83

80 Ibid.
81 Personal interview, urban male, Northern Ireland, January 2003.
82 Personal interview, urban female, Northern Ireland, February 2003.
83 See, for example, IRA statement of 23 June 2005, Conflict Archive on the Internet (CAIN), http://ca.in.ulst.ac.uk/othelem/organ/ira/ira230605.htm (accessed 18 October 2011).
As elsewhere, cases of prisoners of the SMO who were shot and secretly buried proved an effective point for countermobilization by victims’ families. Allegations that the IRA had been involved in ill-treatment and unjustified killings created frame dissonance, resonating with the organization’s diagnostic framing of the state. In Northern Ireland, mobilization of opinion led to the establishment of the Independent Commission for the Location of Victims’ Remains. In several respects, the Commission has operated like a self-contained module of an overall truth process. SMO engagement was facilitated by a partial amnesty, meaning that material recovered from found bodies became inadmissible as evidence in court. The Commission deployed an expert team that included a forensic archaeologist and apparently established an effective liaison with the IRA, which formed a dedicated team for the task and carried out its own investigations.

The IRA’s framing here differed somewhat from the apology/apologia strategy adopted for ‘combat offences’ in that it turned on agency and ultimately on repudiation, with a rhetoric of self-criticism that became gradually sharper. A 1998 IRA statement to victims’ families, in which the organization stated that ‘we sympathize greatly,’ explicitly referred to those ‘whose loved ones have disappeared.’ Use of the term ‘disappeared,’ with its inevitable resonance with crimes of authoritarian states, invested the statement with obvious self-accusation. This was combined with assurances that, as regards families, ‘we have committed ourselves to doing all within our power to alleviate their suffering.’ Displaying elements of apologia, the IRA attempted to distance the movement from its past deeds both in terms of time, stressing that the killings in question occurred in the 1970s, and normatively. In a 1998 interview, an IRA representative stated, ‘Approximately 20 years ago the Army Council issued a directive . . . that the body of anyone executed . . . should be left for their families,’ implying that the Army Council could overrule HQ and other departments (Figure 2). The following year, the SF president labeled disappearances perpetrated by the IRA as ‘a human rights abuse.’ Later, the IRA said of the tactic that ‘injustices for which we accept full responsibility’ had occurred. While ‘injustice’ looms large in Republican diagnostic framing of the state, identification of itself as committing injustice and human rights abuses is rare indeed in movement framing. These statements therefore represent a significant element of repudiation.

In general, movement framing in the interview data and elsewhere shows consistent blind spots in relation to ‘seeing’ IRA actions as violations of IHL or of human rights, even where the need for apology and acknowledgment is accepted.

In relation to the disappeared, therefore, aspects of the movement’s diagnostic framing of the state were applied to itself. The IRA’s stance here can be interpreted as sending three messages. One, showing a commitment to help locate bodies, is aimed at families. The second, of repudiation, is much broader, suggesting elements of self-cleansing and attempts at atonement. The third is an institution-focused one – that the IRA can be relatively effective in making transitional processes deliver. Of the 11 to 15 IRA-linked disappearance cases investigated by the Commission, nine had been located by November 2011. 87

Combining Opportunity and Risk: Truth Commission Options

As discussed above, a desire legally to delimit Northern Ireland’s past prompted the state to initiate the process that led to the 2009 Bradley-Eames report recommending a Legacy Commission. The IRA had refused to participate in the group’s consultations. While SF met with it, the party was dismissive of the process and its report, citing the degree of British government influence. SF called for an ‘independent and international commission established by a reputable international body like the UN.’88

Republican thinking here can be traced through a 2003 Eolas Project report,89 produced by Coiste na nIarchimí and civil society organizations outside the movement. This report proffers a number of truth commission models and, most important, emphasizes reciprocity and inclusivity, calling on Republicans ‘to come forward and acknowledge their role.’90 The interview data shows divergent opinions in relation to the truth commission option, along with institutional resistance and skepticism regarding truth telling. This suggests some symmetry with the state, consistent with an organization with developed intelligence and security organs:

The IRA is a secret organization, doesn’t give away its secrets in the same way as British intelligence, the MI5 or whatever, don’t want you to know how they work. That’s the nature of those organizations.91

In 2010, SF continued to articulate demands for an independent international commission. In at least one important respect, the rhetoric softened: the demand shifted to the commission being established with assistance from, rather than by, a reputable external entity.92 In 2011, SF softened its rhetoric further, with the SF president suggesting that ‘the British and Irish governments should invite a reputable and independent international body to establish an Independent

87 See, Independent Commission for the Location of Victims’ Remains, supra n 76.
90 Ibid., 18.
91 Personal interview, urban male, Northern Ireland, January 2003.
92 SF manifesto of 2010, supra n 8.
International Truth Commission,’93 eschewing references to the UN. In what could be interpreted as a confidence-building measure, the president also drew attention to the unprecedented participation of former IRA operatives in the workings of the tribunal investigating claims of Irish police collusion with the IRA.

SF’s framing of the truth commission issue can be interpreted in two ways. The first is that it represents motivational framing, aimed primarily at activists. A high bar may have the effect of preventing the commission’s establishment, but the state’s refusal to follow the international model fully may create political opportunities for SF, giving resonance to the party’s framing of a state intent on cover-ups. The other interpretation turns on contemporary changes in the political opportunity structure. The GFA institutions apparently bedded down well to SF’s benefit. A drip feed of findings on or denials of past violations, stretching for a decade into the future, risks degrees of destabilization greater than those posed by one truth commission. Furthermore, Real IRA flankers have launched fresh attacks on the police. As a leading government party, SF has been at pains to show its support for the PSNI, creating sensitivities that ongoing complaints about the RUC (from which the PSNI was created) could undermine the new police service. After the degree of frame resonance achieved through the Saville Inquiry’s report, continuing partial initiatives present diminishing returns.

That British security agencies colluded in political killings in Northern Ireland is now beyond doubt. In 2011, it was announced that Prime Minister David Cameron accepted that there had been state collusion in the killing of leading human rights lawyer Pat Finucane (while simultaneously announcing that there would be no public inquiry into the death).94 A 2007 report by the Police Ombudsman into police operations in one Belfast district identified 32 areas of collusion between the RUC and loyalist paramilitaries, culminating in a number of killings.95 The third Stevens report of 2003 by an English police officer on the collusion issue concluded that collusion occurred in assassinations.96 What is less clear is the extent of the collusion, the degree of political cover and the precise agencies involved (those in the frame include RUC Special Branch, MI5, MI6 and the British Army’s Force Research Unit). A number of the public inquiries

recommended by Judge Cory\textsuperscript{97} and some Police Ombudsman’s\textsuperscript{98} reports have thrown up patterns that suggest collusion. These include (1) threats from security force members toward the victim, advance intelligence of an attack and/or the central involvement of an agent, plus (2) a killing and (3) an ineffectual investigation, with Special Branch typically withholding information from investigating police officers. However, the reports in these cases have stopped short of finding that the assassination in question was due to an identifiable act of collusion.

In part, this can be considered as reflecting the problems of uncovering unlawful covert repression in the \textit{rechtsstaat}. If individually the cases are not definitive, taken together a pattern emerges. However, only a truth commission examining a full range of cases and better equipped to analyze trends than the South African TRC is likely to explore patterns sufficiently to make definitive assessments. Finally, emerging Northern Ireland civil society and academic debates on ‘trading amnesty for truth’ (somewhat along TRC lines) have raised the possibility of incentivizing SMO participation, particularly given the absence of catastrophic violations. For multiple reasons, therefore, the political opportunity structures may now suggest greater SMO openness to truth commission options.

\textbf{Conclusion}

The theoretical framework in Part 1 offers a tool for analyzing the Northern Ireland data, including the Republican movement’s strategic use of apologies, presented in Part 2, although further testing of the framework and use of counterfactuals are needed. This data highlights important ANC–SF and IRA–MK diffusion processes. Since there are similarities in both movements’ approaches to conflict and transition, it seems likely that these parallels can be explained as a combination of similar imperatives emerging in both processes, and of mimetic behavior.

Overall, the data suggests that armed opposition movements see TJ as a site for advancing their political projects. Rather than being passive objects, they are likely to be active agents in transitions. The political skills they deploy are variants of those that brought them to the negotiating table: a capacity for assimilation of varieties of phenomena as resource providers, framing entrepreneurship and organizational adaptability. The data therefore supports the hypothesis that agency in the successful transitionary movement is expressed in instrumental assessments of TJ on a rational actor basis.

The first research question in Part 1 was to what extent armed opposition movements’ approaches to normativity and law affect their disposition toward TJ. The IRA was characterized by high degrees of normativity, employing written

\textsuperscript{97} See, Billy Wright Inquiry, supra n 73; Rosemary Nelson Inquiry, supra n 73.

internal trial procedures and demonstrating important (though incomplete) degrees of IHL adherence. This owed something to infusion from the British armed forces, but was also seemingly due to a decades-old culture. To that extent, the Republican movement’s insistence on the use of law-based public inquiries is consistent with its history. The analysis in Part 1 suggests that the movement has demonstrated patterns of normativity and legal deployment also evident in the ANC and MK. This implies that a direct line can be drawn between normativity in armed opposition movements and a positive disposition toward TJ (at least when the state is the object). In the case of Fatah, its relative failure to put the peace process on stronger legal footing may owe something to an under-developed legal culture, expressed in a failure to harness available expertise. The SWAPO example may also suggest a link between an underdeveloped legal culture and an antipathy toward TJ, so that the relationship may operate positively or negatively.

The second research question concerned movements’ strategies in relation to state violations. During conflict, the Republican movement assimilated egregious state repression as a resource provider (e.g., Bloody Sunday boosted IRA recruitment). The data suggests that the movement has viewed the exploration of such violations in truth processes as creating opportunities to damage opponents politically. Exposition of state violations permits bridge building with previously inaccessible groups. This also fits with patterns followed by the ANC and MK. The movement is likely to attempt to ensure that the overall picture created of state violations resonates with its diagnostic framing, thereby boosting its conflict narrative. Where separation is the desired outcome, the movement is likely to abandon its focus on past state violations (SWAPO), except when issues such as past expulsions affect final status issues (Fatah).

The third research question was how movements engage with their own violations. The IRA’s repertoire involved issuing a directive, making apologies and cooperating in initiatives to locate bodies. However, the data suggests a significant, though not a total, blind spot in seeing IRA violations as human rights or IHL breaches, and furthermore that SMOs with state-like structures manifest a state-like capacity for obfuscation. As regards patterns from Part 1, the Republican movement’s strategy involved less critical self-examination than the ANC’s but more than SWAPO’s or Fatah’s. The ANC, and to some extent the IRA, showed a willingness to acknowledge its institutional failings, but neither the ANC, SWAPO nor Fatah showed enthusiasm for holding individuals accountable. Their approaches can be seen as aimed partly at denying political opportunities to their opponents.

The fourth research question concerned the circumstances under which one forum could address both state and nonstate violations. The IRA’s rejection of a Legacy Commission can be interpreted as a judgment that the Commission offered nothing or that it offered more threat than gain to the movement. The implication is that the movement would only invest in a holistic mechanism if it offers gains to counteract inevitable damage. This is consistent with patterns
described in Part 1. The initial impetus for the TRC came from the ANC, which was keen to deal with outstanding issues from the frontline states and to air apartheid-era state violations without promoting trials. While the National Party showed little enthusiasm for the TRC, the overall political settlement provided payback for it and TRC findings pointed to both ANC and state violations. Peace agreements premised on separation provide movements with little incentive for a unitary forum (SWAPO, Fatah). The apparent answer, therefore, is that a forum is only likely to be able to address state and nonstate violations on the basis of reciprocity calculated on a rational actor basis, and where the peace process is based on shared territory.

Apart from these issues, the analysis suggests a number of other implications for TJ theory and policy. Theory-wise, the study points to the need for greater focus on the relationship between negotiating power, agency and law in the construction of truths. It is unnecessary to take the radical constructivist position that all truth is socially constructed to see that truth processes can involve significant degrees of agency, entrepreneurship (including deliberate silences) and resource deployment, both by those attempting to mold truth and by those to whom the truths relate. Furthermore, in the case of armed opposition movements and of the state, the same agent may play both roles. If this is correct, overall truths may partly reflect the degrees of agency, entrepreneurship and resources deployed in contests over their shaping.

The rechtsstaat commitment does not ensure that security forces act lawfully, but it does mean that there are limits to the extent to which they can be seen to act unlawfully. One result is that rechtsstaaten seem not to commit the very worst mass crimes, such as genocide. Another is that unlawful covert repression – inevitably well below legal radars – can be very difficult to prove. Armed opposition movements inevitably commit violations, inviting serious charges from their victims and enemies. This may help to explain why the TRC, while highly critical of previous regimes, was also quite critical of the ANC and MK, implicitly suggesting degrees of symmetry. The balance of forces in the armed conflict was such that stalemate ensued (hence the peace process). This permitted the National Party to insist on a TRC mandate that shifted attention away from apartheid-specific violations. To some extent, the overall truths may have reflected the same balance of forces. If so, truth processes that follow stalemated conflicts in rechtsstaaten generally may have a similar pattern.

At the policy level, there is some evidence that in conflicts with rechtsstaaten, armed opposition movements show greater respect for IHL than groups combating lawless states. Consequently, they are more open to policy interventions aimed at boosting commitment to humanitarian standards. The data is uneven; however: the claim appears true of MK and the IRA, but less so of Namibia’s PLAN. In the OPT, the Izz ad-Din al-Qassam Brigades seem to have displayed less concern with IHL than Tanzim.

The data also tends to suggest that movements can be usefully analyzed on a rational actor model. If so, this points to the utility of incentivizing both
peacemaking and participation in TJ processes (e.g., trading amnesty for truth). This, in turn, raises the policy issue of the desirability or otherwise of a legal prohibition on amnesty for serious breaches of Article 3 common to the Geneva Conventions in conflicts where catastrophic human rights violations have not occurred.

Finally, the peace processes reviewed show good levels of relative success, particularly in South Africa and Northern Ireland, as well as in Namibia. While the OPT outlook is uncertain, a recrudescence of ETA violence seems unlikely. This suggests (though it does not prove) that normativity in armed opposition movements may be a good indicator of capacity to make the transition to operating state machinery. Furthermore, a preexisting legal culture may help explain easy slotting into the *rechtsstaat*.

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99 ANC and MK personnel accounted for 49% of TRC amnesty applications. Du Bois-Pedain, supra n 35.