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Bridging the Chasm: Reconciliation's Needed Implementation Fourth Step

Eric K. Yamamoto,^{*} Miyoko Pettit-Toledo,^{**}
and Sarah Sheffield^{***}

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I. INTRODUCTION

In South Korea, after extensive national Truth and Reconciliation Commission fact-finding and recommendations on a range of atrocities, survivor-participants confronted minimal government implementation efforts.¹ They saw in 2010 “institutionalize[d] attempts to frustrate the goals and functionality of [the] truth commission.”²

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¹ See *infra* Sections III.A, IV.B and V.C & D (describing the South Korea Truth and Reconciliation Commission process and impacts).

² See Tara Melish, *Implementing Truth and Reconciliation: Comparative Lessons for the Republic of Korea*, 19 BUFF. HUM. RTS. L. REV. 1, 42 (2012).

In Peru, despite initial progress, those suffering from the government's prolonged fight with insurgents called loudly for follow through on truth commission recommendations.³ They demanded in 2013 badly-needed, long-delayed economic justice.⁴

In South Africa, the widely praised post-apartheid reconciliation initiative faced charges of having “fallen tragically short.”⁵ The former chair of the Truth and Reconciliation Commission lamented in 2014 that by “choosing not to follow through on the commission's recommendations, [the] government not only compromised the commission's contribution to the process, but the very process itself.”⁶

And in the United States, after apologizing to Native Hawaiians for the illegal overthrow of the sovereign Hawaiian nation and committing to reconciliation, shifting American political leadership and conservative justices halted steps in 2015 toward indigenous self-governance.⁷ “For too long,” implored a Native Hawaiian leader, “[we] have waited for the United States . . . to make right the wrong . . . only to see the small steps taken for

³ See *infra* Section V.D (describing Peru Truth and Reconciliation Commission recommendations and impacts).

⁴ See *infra* Section V.D (describing the need for economic justice in Peru).

⁵ See *infra* notes 6 and 238 and accompanying text.

⁶ Desmond Tutu, *Tutu: 'Unfinished Business' of the TRC's Healing*, MAIL & GUARDIAN (Apr. 25, 2014), <http://mg.co.za/article/2014-04-24-unfinished-business-of-the-trc-healing>; see also *infra* Sections III.A and IV.B & C (describing the South Africa Truth and Reconciliation Commission process and impacts).

⁷ See Chloe Fox, *Supreme Court Blocks Native Hawaiians' Attempt to Form Own Government*, HUFFINGTON POST (Dec. 2, 2015), http://www.huffingtonpost.com/entry/supreme-court-hawaii-election_us_565f6849e4b079b2818d1767 (discussing how the Supreme Court of the United States granted an injunction, requested by a group of Native Hawaiians and non-Hawaiians, challenging an election that Native Hawaiians hoped to use to form their own government and therefore “indefinitely stopped” Native Hawaiians from moving forward “until at least the 9th U.S. Circuit Court of Appeals issues its ruling on the election”).

our benefit persistently attacked . . . Reconciliation has been an option thus far denied.”⁸

In recent years, governments and populaces embarked on major reconciliation initiatives to heal the persisting wounds of historic injustices. With an emphasis on personal and societal benefits of victim storytelling, perpetrator apologies, compensatory or symbolic payments, institutional reordering, and public education, reconciliation initiatives emerged on the political agendas of both established and transitioning democracies.⁹ Acknowledging and repairing the damage of grievous transgressions signaled government and populace commitments to human rights and reparative justice.¹⁰ And it illuminated the high aspirations and moral tenor of civil societies.¹¹

Despite those aspirations and commitments and notwithstanding major reconciliation undertakings in South Korea, Peru, South Africa, the United States, and beyond, reconciliation initiatives stall.¹² Genuine social healing awaits. As eloquently recited by the National Survivors Network in its 2015 petition to the Kenyan National Assembly, the “lack of a framework for implementing the recommendations of the *Truth, Justice and Reconciliation Commission*” has “huge repercussions on the lives of hundreds of victims

⁸ Statement by Trustee Haunani Apoliona, Chairperson, Board of Trustees, Office of Hawaiian Affairs; Testimony offered to the Committee on Senate Indian Affairs, February 25, 2003; *see also infra* note 39 and accompanying text (describing partial United States and Native Hawaiian reconciliation efforts).

⁹ *See, e.g.*, TRUTH & RECONCILIATION COMM’N OF CAN., <http://www.trc.ca/websites/trcinstitution/index.php?p=3> (last visited July 15, 2016); Hun Joon Kim, *Truth Commissions in South Korea: Lessons Learned*, MIDDLE EAST INST. (2013), <http://www.mei.edu/content/truth-commissions-south-korea-lessons-learned> (describing South Korea’s transitional justice measures since the democratic transition in 1987); *see also infra* Sections II & IV.B.

¹⁰ *See infra* Section II.A (referencing various global reconciliation initiatives).

¹¹ *See infra* Section II.A (describing an “Age of Reconciliation”).

¹² *See infra* Section II.B (analyzing stalled global reconciliation initiatives).

who bear the scars of past serious human rights abuses.”¹³ The systemic failure to follow through on the commission’s reparative directives “under[cuts] victims’ ability to obtain closure and restart their lives.”¹⁴

Why, then, despite substantial investments of time, energy, and money, are there often failures to follow through on truth commission reparative recommendations? And after considerable global truth commission experience, why are participants left without a workable framework for implementing crucial recommendations?

More practically, in light of the persisting wounds of injustice, what needs to be done and by who to recalibrate and reinvigorate reconciliation stalled? In concept and in practice. Now and in the future. At bottom, how do we, as members of civil societies, bridge the chasm between aspiration and realization?¹⁵

These questions lie at the heart of our inquiry into the implementation of truth commissions’ reconciliation recommendations. That specific inquiry is guided more broadly by *social healing through justice*—an analytical approach for shaping, evaluating, and reconfiguring reconciliation initiatives aimed at engendering healing for those still suffering deep wounds of injustice and for society itself.¹⁶ This approach is grounded

¹³ *Kenyan Victims Demand National Assembly Adopt TRJC Report and Implement Recommendations*, INT’L CTR. TRANSITIONAL J. (Dec. 4, 2015), <http://www.ictj.org/news/kenyan-victims-demand-national-assembly-adopt-tjrc-report-and-implement-recommendations>.

¹⁴ *Id.* (quoting Christopher Gitari, Head of the Kenya Office of the International Center for Transitional Justice, who commented on the impact of legislative inaction of reparations recommendations).

¹⁵ See *infra* Section III.B (describing the “enormous chasm”).

¹⁶ Briefly stated, the *social healing through justice* framework aims (1) to provide an analytical structure grounded in common points among respected academic disciplines, (2) which draws insights from the successes and failures of actual redress initiatives, (3) and employs a common language that attempts to speak to the hearts and minds of communities in conflict, (4) while serving as a strategic guide for shaping, and then assessing, reparatory justice initiatives. See Eric K. Yamamoto and Sara Lee, *Korean*

theoretically—it draws from commonalities among several disciplines (particularly social psychology, political theory, economics, and human rights law).¹⁷ It is also pragmatic—it acknowledges practical redress experiences and the strategic significance of a convergence of interests and is attentive to words, actions, and realpolitik influences.¹⁸ And this approach to social healing engages individuals, communities, justice organizations, businesses, and governments in a dynamic process of *recognition, responsibility, reconstruction, and reparation*¹⁹—the “Four Rs”—with the larger aim of fostering the kind of reparative justice that heals.²⁰

“*Comfort Women*” Redress 2012 Through the Lens of U.S. Civil and Human Rights Reparatory Justice Experiences, 11 KOREAN L.J. 123, 138-39 (2012).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ Commonalities among diverse disciplines (social psychology, theology, economics, law—including international human rights—political theory, and indigenous healing) highlight four aspects of the kind of justice that fosters social healing: *recognition, responsibility, reconstruction, and reparation*. See *id.* These four points of inquiry assist groups and governments first in shaping a particular redress initiative and then in assessing whether the effort is on the path toward genuine social healing. See *id.* For elaboration upon the 4Rs (summarized below) in operation, see *id.* See also Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 33 (2009) [hereinafter Yamamoto & Obrey, *Reframing Redress*]. See generally ALFRED BROPHY, REPARATIONS PRO AND CON (2006); Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT’L L. 257, 267 (2009).

Recognition “addresses the psychological” by examining the historical, cultural, and structural context for past and continuing suffering. See ERIC YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 175-85 (2000) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE]. By investigating the ways in which individuals “continue to suffer pain, fear, shame and anger,” by decoding “cultural stereotypes that seemingly legitimize” injustice, and by scrutinizing “the ways that organizational structures” contribute to the injustice, participants can arrive at a recognition of the harm that paves the way for future healing. *Id.*

Responsibility includes both “assessment of power over others” and “acceptance of responsibility of repairing the damage . . . imposed on others through power abuses.” *Id.* at 185. By focusing not only on the assessment of responsibility, but also on acceptance of the responsibility to act, the mutual engagement of participants that leads to successful healing is ensured. *Id.*

According to David Tolbert, president of the International Center for Transitional Justice, 40 national truth commissions, along with reparations programs and prosecutions, have initiated paths toward social healing through justice.²¹ They “have given victims a voice and recognized their

Reconstruction aims to build “new productive relationships.” *Id.* at 161-62. Effectively building the kind of relationships needed for successful healing and a sense of justice restored might include “apologies and forgiveness,” reframing the “history of interaction,” and the “reallocation of political and economic power.” *Id.* Reallocation of power, through change in a “state’s social, legal or political institutions and policies,” is an important part of reconstruction as it can assure underlying abuses will not be repeated. See Yamamoto & Obrey, *Reframing Redress, supra*, at 34.

Reparation draws from its root word “repair.” See YAMAMOTO, *INTERRACIAL JUSTICE, supra*, at 35. While it may include restitution, monetary payments, and “medical, legal, or educational and financial support for individuals and communities in need,” reparation encompasses more than money. *Id.* Reparation as repair, and reparations as specific reparative actions, also encompasses rehabilitation, “restoration of property, rebuilding of culture, economic development” and public education. *Id.* Public education particularly can serve to “commemorate, impart lessons learned, and . . . generate a new justice narrative about a democracy’s commitment to civil and human rights.” *Id.*

²⁰ The framework, originally termed “interracial justice,” was initially developed in YAMAMOTO, *INTERRACIAL JUSTICE, supra* note 19. See also DAVID HANSEN, *NATIVE AMERICANS, THE MAINLINE CHURCH, AND THE QUEST FOR INTERRACIAL JUSTICE* (2016) (interpreting and employing the 4Rs reconciliation framework to assess reconciliation efforts with Native Americans).

²¹ David Tolbert, *A Wrong Turn for Human Rights*, INT’L CTR. TRANSITIONAL JUST. (Sept. 4, 2014), <https://www.ictj.org/news/wrong-turn-human-rights>; see generally THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES 58 (Will Kymlicka & Bashir Bashir eds., 2008) (addressing the salutary and regressive potential of reconciliation initiatives); Adrian Little, *Disjunctured Narratives: Rethinking Reconciliation and Conflict Transformation*, 33(1) INT’L POL. SCI. REV. 82, 86 (2011) (rethinking the idea of reconciliation as a key aspect of transitional justice); Yamamoto & Obrey, *Reframing Redress, supra* note 19, at 21 (describing social benefits and problems of incompleteness of reconciliation initiatives).

The International Center for Transitional Justice is an international non-profit organization that “works to help societies in transition address legacies of massive human rights violations and build civic trust in state institutions as protectors of human rights.” *About Us*, INT’L CTR. TRANSITIONAL JUST., <https://www.ictj.org/about> (last visited July 15, 2016). The International Center assists institutions and civil society groups “in considering measures to provide truth, accountability, and redress for past abuses.” *Id.* In particular, the International Center provides technical expertise and knowledge in the following ways: advising government institutions and policymakers at all levels with a

suffering, while signaling to culprits that their crimes will not be forgotten.”²²

Yet, as briefly recounted at the outset, reconciliation initiated does not signal social healing achieved. Reconciliation is a long-term, multi-faceted political, social, and economic process.²³ It bears potential not only for significant legal and social benefits, but also for incompleteness and even regression.²⁴ Recognizing injustice and accepting responsibility (words) do not themselves assure reconstruction and reparation (actions). Many now see even well-structured reconciliation initiatives as stalled works in progress.²⁵

Writing for the International Center for Transitional Justice, Eduardo González aptly observes that a truth commission’s findings and recommendations are a key piece, but only a piece, of the reconciliation process. Implementation requires a convergence of factors, particularly political will; it is illusory to assume that government and private actors will automatically follow through.²⁶ Executive and legislative implementing

focus on government responsibility for past human rights violations; working with victims’ and women’s groups, human rights activists, and civil society with a justice agenda; and researching, analyzing, and reporting on transitional justice developments worldwide through publications, policy recommendations, working sessions, and international convenings. *Id.*

²² Tolbert, *supra* note 21; *see generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998) (exploring various struggles globally to find meaningful responses to historic injustices that fall between stark vengeance and unilateral forgiveness).

²³ *See infra* Section IV.B (discussing the prevailing reconciliation template).

²⁴ *See* Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing through Justice*, 15 ASIAN-PAC. L. & POL’Y J. 1, 38 (2014).

²⁵ *See* HUN-JOON KIM, THE MASSACRES AT MT. HALLA: SIXTY YEARS OF TRUTH SEEKING IN SOUTH KOREA, 11-13, 166-67 (2014) (discussing South Korea’s reconciliation efforts).

²⁶ Eduardo González et al., *Risks and Opportunities in a Truth Commission Process, in Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?*, INT’L CTR. TRANSITIONAL JUST. 1, 15, 22 (2014), <https://www.ictj.org/challenging->

actions often proceed slowly. Political organizing raises public consciousness and applies pressure for implementation.²⁷ Experience shows, however, that sporadic public scrutiny and political pressure are not enough *after* a commission makes recommendations to compel long-term follow-through.²⁸

Reconciliation policymakers, scholars, and advocates now search for a cogent next-step framework for assessing and refashioning troubled reconciliation initiatives.²⁹ That search is both conceptual and practical. Implementation (like creation and operation) functions in an intensely legal and political environment.³⁰ Participation by a range of stakeholders—bolstered by local, national, and international scrutiny—is essential to effectiveness and accountability.³¹

With realpolitik influences in mind, to facilitate recalibration and rejuvenation, we suggest remaking a key part of the prevailing reconciliation template rather than scrapping reconciliation initiatives

conventional-truth-commissions-peace/docs/ICTJ-Report-KAF-TruthCommPeace-2014.pdf.

²⁷ See generally DONATELLA DELLA PORTA & MARIO DIANI, SOCIAL MOVEMENTS: AN INTRODUCTION (2d ed. 2009) (focusing on political movements and their impact on society and politics); MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE (2014) (examining the importance and consequences of the civil rights movement on the process of state building in American political and constitutional development); JOSEPH F. HEALEY & EILEEN O'BRIEN, RACE, ETHNICITY, GENDER, AND CLASS: THE SOCIOLOGY OF GROUP CONFLICT AND CHANGE (2014) (describing how the civil rights movement raised awareness about injustice against minorities and led to political changes for other minority groups).

²⁸ See *infra* Sections III, IV.C & V.A (describing unimplemented truth commission recommendations). Reasons may vary for lesser-sustained post-commission collective efforts for implementation—people have already been given a recognized voice through public hearings, causes have been investigated, some recommendations have been acted upon, and collective political energy is directed elsewhere. This subject warrants further inquiry.

²⁹ See generally *id.* at 2 (urging drafters and other stakeholders pay less attention to general standards and more “to realities on the ground”); see also *infra* Section V.

³⁰ See *infra* Section V.

³¹ See *infra* Section V.B.

altogether without viable alternatives for social healing. This remaking entails a new, formalized fourth step in the truth and reconciliation process. This proposed fourth step—an Assessment, Implementation, and Oversight Task Force—is *an independent yet politically attuned stakeholder-comprised follow-up body to assess and update existing recommendations, to facilitate the implementation of outstanding recommendations, and to refashion and oversee future reconstructive and reparative actions to further comprehensive and enduring social healing.*³²

The Assessment, Implementation, and Oversight Task Force would undertake (1) integrated convenings of survivor groups, government officials, businesses, policymakers, and justice advocates, with oversight from journalists and civil society organizations; (2) an assessment of original truth commission findings and recommendations, particularly an evaluation of fairness and completeness;³³ (3) a grounded critique of government, business, and community implementation of truth commission recommendations to date, particularly those aimed at institutional restructuring, economic justice, and public education;³⁴ and (4) the recalibration and oversight of paths toward further reparative justice in light of evolving social, political, and economic conditions.

To lay the foundation, this article's Section II describes the global reconciliation setting by canvassing salutary and troubled initiatives. Section III addresses the implementation challenge in bridging the chasm

³² See Yamamoto et al., *supra* note 24, at 37-81 (acknowledging the need for a fourth step mechanism to further the reconciliation process and describing a potential Joint Task Force to further social healing efforts in South Korea).

³³ See Eric K. Yamamoto and Susan K. Serrano, *Healing Racial Wounds? The Final Report of South Africa's Truth and Reconciliation Commission*, in *WHEN SORRY ISN'T ENOUGH* 492, 496 (Roy Brooks ed., 1999) (providing a positive, though not necessarily critical, evaluation of South Africa's TRC report).

³⁴ See Melish, *supra* note 2, at 29 (observing that comparative lessons from Cambodia, Peru, and South Africa focus on these aspects of implementation, including "community-level reconciliation, economic reparation packages, and memorialization initiatives").

between reconciliation aspiration and realization. Section IV starts with a glimpse of reconciliation theory. It then describes the three-step basic structure of the prevailing reconciliation template: truth revelation, criminal prosecutions or amnesty, and executive or legislative action on reconstruction and reparation. The section concludes by painting a recurring picture of unfulfilled promises and identifies what is missing.

Section V shapes these insights, along with principles of *social healing through justice*,³⁵ into a more fully delineated new fourth step for better implementing truth commission social healing recommendations—an approach embodied pragmatically in the suggested Assessment, Implementation, and Oversight Task Force (“Task Force”). The section then describes comparative case study snapshots of two beneficial—though still limited—implementation efforts arising out of Peru’s (no government participation) and South Korea’s (too much government control) follow-up efforts. It concludes with observations about the potential and limitations of an integrated government-community-civil society task force.

The aim of this article is not to fashion a cure-all for reconciliation ills. Rather its aim is to advance a crucial next step, in concept and practical structure, for channeling often fractious political and social interests further down a mutually beneficial path toward social healing through justice.

II. THE SETTING: RECONCILIATION UPLIFTED, RECONCILIATION CRITICIZED

A. An “Age of Reconciliation”

Reconciliation initiatives proliferate. In the United States, a congressional truth commission investigated the mass incarceration of Japanese

³⁵ See *infra* Section IV.A for a discussion of the *social healing through justice* framework.

Americans during World War II.³⁶ The national government adopted the commission's recommendations and, in 1988, authorized a groundbreaking congressional and presidential apology, provided symbolic individual reparations, and funded public education projects.³⁷ These words and actions aimed to heal the wounds of 100,000 mostly American citizens wrongly incarcerated because of their race and to repair the damage to America's ethos of equal justice under law.³⁸ Soon after, the US Congress and President formally apologized to Native Hawaiians for the 1893 illegal overthrow of the sovereign Hawaiian nation and promised, and later approved, initial actions toward reconciliation.³⁹

³⁶ See COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1983) (official report of the Commission detailing the congressional investigation of the World War II internment of mainly Japanese Americans), <https://www.archives.gov/research/japanese-americans/justice-denied/>.

³⁷ See generally ERIC K. YAMAMOTO, MARGARET CHON, CAROL IZUMI, JERRY KANG & FRANK WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2d ed. 2013).

³⁸ See COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 36; YAMAMOTO ET AL., *supra* note 37.

³⁹ See Apology Resolution, Pub. L. No. 103-150 (1993). In November 1993, 100 years after the overthrow of the Hawaiian Kingdom, President William Clinton signed the Apology Resolution into law. *See id.* In addition, the Hawai'i Supreme Court and state legislature partially addressed the state's commitment to reconciliation with Native Hawaiians over self-governance and claims to homelands taken more than a hundred years ago in the illegal, US-aided overthrow of the Hawaiian nation. *See* Jesse Greenspan, *Hawaii's Monarchy Overthrown with U.S. Support, 120 Years Ago*, HISTORY (Jan. 17, 2013), <http://www.history.com/news/hawaiis-monarchy-overthrown-with-u-s-support-120-years-ago>. The Hawai'i Supreme Court reinforced the state's legislative commitment to reconciliation by commanding that the governor stop selling formerly native-owned lands (now held in trust by the State of Hawai'i partially for the benefit of Native Hawaiians) until indigenous Hawaiian reparations claims to these lands resolved politically. *Office of Hawaiian Affairs v. Hous. & Cty. Dev. Corp.*, 177 P.3d 884, 902 (Haw. 2008) (ruling on the basis of state law while incorporating aspects of federal law). *But see* *Hawai'i v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009) (vacating state supreme court decision on federal law grounds and remanding to state court to determine whether state law alone provided independent grounds for its ruling). In recent years, both federal and state governments have taken steps—met with support as well as vehement opposition—to act upon commitments to fully reconcile with Native Hawaiians either through recognition of Hawaiian independence or through some other form of

More recently, in the language of reconciliation, the US Senate apologized to African Americans for its failure to stem the early twentieth-century epidemic of southern state lynchings, and the US House of Representatives apologized for the horrific harms of slavery and Jim Crow segregation.⁴⁰ The House also apologized to Native Americans and Native Alaskans for taking lives and land and destroying native culture.⁴¹ These federal apologies followed path-breaking apologies for slavery by the state legislatures of Florida, Maryland, North Carolina, Alabama, New Jersey, and Virginia.⁴² Virginia's lawmakers also expressed regret for devastating Native American life, land, and culture⁴³—strong words of remorse and an articulated desire for reconciliation.⁴⁴

Private institutions in the United States also employed the language of reconciliation. In 2015, University of Missouri's president resigned after

government-to-government relationship. See Michael Grass, *As Feds Hold Hearings, Native Hawaiians Press Sovereignty Claims*, GOV'T EXEC. (Aug. 12, 2014), <http://www.govexec.com/state-local/2014/08/hawaii-sovereignty-department-interior-hearings/91247/> (describing Native Hawaiian sovereignty movements and the recent hearings held about possible federal recognition of Native Hawaiians).

⁴⁰ H.R. Res. 194, 110th Cong. (2008); *Congress Apologizes for Slavery, Jim Crow*, NPR (July 30, 2008), <http://www.npr.org/templates/story/story.php?storyId=93059465>; see also SHERRILYN IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* (2007) (describing Congress' failure to take any steps to halt the epidemic of African American lynching).

⁴¹ See Sean McCollum, *An American Apology, Long Overdue*, TEACHING TOLERANCE (Jan. 6, 2010), <http://www.tolerance.org/blog/american-apology-long-overdue>.

⁴² See, e.g., Damien Cave & Christine Jordan Sexton, *Florida Legislature Apologizes for State's History of Slavery*, N.Y. TIMES (Mar. 27, 2008),

<http://www.nytimes.com/2008/03/27/us/27florida.html> (covering the spate of apologies by states with a history of slavery); see also Robert Allen, *Past Due: The African American Quest for Reparations*, 28 THE BLACK SCHOLAR 2-17 (1998) (focusing on reparations as "a matter of social justice for African Americans").

⁴³ See S.J. Res. 332, 2007 Sess. (Va. 2007). See also HANSEN, *supra* note 20 (documenting mainline denomination American churches' apologies to Native Americans for participation in abusive boarding schools and for past support of the land-dispossessing "doctrine of discovery").

⁴⁴ See Yamamoto & Obrey, *Reframing Redress*, *supra* note 19, at 21.

failing to address student grievances about racism,⁴⁵ and Georgetown University's president convened a Working Group on Slavery and Reconciliation to respond to the university's roots in the slave trade.⁴⁶ Brown University undertook a year-long public educational dialogue about its slavery history⁴⁷ with an eye toward racial healing.⁴⁸ And business giants Wachovia, Aetna, and J.P. Morgan Chase apologized for their historical roles in the slave industry.⁴⁹

⁴⁵ See Elliott C. McLaughlin, *University of Missouri President and Chancellor Step Down Amid Race Row*, CNN (Nov. 9, 2015), <http://www.cnn.com/2015/11/09/us/Missouri-football-players-protest-president-resigns/index.html> (reporting on the resignation of the University of Missouri president and chancellor amid a campus controversy over race).

⁴⁶ Christina Cauterucci, *Why Protesting Georgetown Students Want Their School to Pay a Novel Form of Reparations*, THE SLATEST (Nov. 13, 2015), http://www.slate.com/blogs/the_slatest/2015/11/13/georgetown_students_protest_a_residence_hall_named_for_a_slave_selling_jesuit.html.

⁴⁷ See Letter from Ruth J. Simmons, President, Brown University, to Steering Committee on Slavery and Justice, Brown University (Apr. 30, 2003), http://brown.edu/Research/Slavery_Justice/about/charge.html; *Slavery, the Brown Family of Providence and Brown University*, BROWN U. NEWS SERV., http://www.brown.edu/Administration/News_Bureau/Info/Slavery.html.

⁴⁸ See generally Pam Belluck, *Panel Suggests Brown U. Atone for Ties to Slavery*, N.Y. TIMES (Oct. 19, 2006), <http://www.nytimes.com/2006/10/19/education/19brown.html?fta=y> (noting that the issue of reparations for slavery was controversial); BROPHY, *supra* note 19.

⁴⁹ Wachovia apologized "to all Americans, and especially to African Americans and people of African descent," but refused reparations. In 2002, Aetna acknowledged its role in insuring slave owners and apologized, but refused reparations because courts would not award them. J.P. Morgan also apologized for using more than ten thousand slaves as collateral for loans. See Darryl Fears, *Seeking More than Apologies for Slavery*, WASH. POST (June 20, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/06/19/AR2005061900694_pf.html; see also J.P. Morgan *Discloses Past Links to Slavery*, WASH. POST, Jan. 21, 2005, at E2. Only J.P. Morgan committed to reparatory action. It set up a \$5 million scholarship program for African American undergraduates from Louisiana. Ken Magill, *From J.P. Morgan Chase, an Apology and \$5 Million in Slavery Reparations*, THE SUN (Feb. 1, 2005), <http://www.nysun.com/business/from-jp-morgan-chase-an-apology-and-5-million/8580>.

Globally, countries energetically embarked down formal reconciliation paths to repair the damage of historic injustice.⁵⁰ Among established democracies, New Zealand's Waitangi Tribunal, with an eye on reconciliation, made favorable determinations on indigenous Maori land claims.⁵¹ And after years of debate about reconciliation, Australia's new prime minister apologized to its stolen generations⁵²—thousands of aboriginal children forcibly taken by the government en masse from their homes and homelands.⁵³

In the teeth of class action lawsuits and mounting political agitation, the Canadian government and churches embarked on a far more extensive program of reconciliation with Canada's stolen generations.⁵⁴ From the late

⁵⁰ See, e.g., TRUTH & RECONCILIATION COMM'N OF CANADA, *supra* note 9; Kim, *supra* note 9 (describing South Korea's transitional justice measures since the democratic transition in 1987).

⁵¹ See generally Joe Williams, *Truth, Reconciliation, and the Clash of Cultures in the Waitangi Tribunal*, AUSTL. & N.Z.L. & HIST. E-JOURNAL 234 (2005). Many of those determinations, however, also awaited implementing Crown government action amid shifting political alignments. See *id.* (describing political process for government approval of Tribunal awards).

⁵² See The Australian Prime Minister's website, <http://www.pm.gov.au/node/5952> (last visited Jul. 16, 2016) (text of Prime Minister's apology speech); Tim Johnston, *Australia Says "Sorry" to Aborigines for Mistreatment*, N.Y. TIMES (Feb. 13, 2008), <http://www.nytimes.com/2008/02/13/world/asia/13aborigine.html>. See also Chris Cunneen, *Reparations, Human Rights and the Challenge of Confronting a Recalcitrant Government*, in THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW 183 (2003); Pamela O'Connor, *Reparations for Australia's Removed Aboriginal Children: Defining the Wrong*, in THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW 219 (2003).

⁵³ See AUSTL. GOV'T, *Sorry Day and the Stolen Generations*, <http://www.australia.gov.au/about-australia/australian-story/sorry-day-stolen-generations> (last updated May 20, 2015) (referencing the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report about the forcible separation of indigenous children from their families and communities during the European occupation of Australia).

⁵⁴ Twelve thousand individual claimants brought lawsuits, including two class actions, against the Canadian government and religious organizations. See *\$2B Package Unveiled for Residential School Survivors*, CBC.CA (Nov. 23, 2005), <http://>

1800s, in the name of educational assimilation, Canada's government forcibly removed aboriginal children from families and placed them in native residential schools that banned their mother tongue and inflicted rampant physical and sexual abuse.⁵⁵ In 2015, the Canadian government formalized its reconciliation commitment.⁵⁶ Its initiative encompassed apologies, monetary payments, and creation of a healing foundation.⁵⁷ And, after the official publication of the Truth and Reconciliation report, newly elected Prime Minister Justin Trudeau promised to seek a formal apology from the Catholic Church for its pivotal role in operating and benefitting from the grossly abusive schools.⁵⁸

Across the Atlantic Ocean, in the language of reconciliation, then-Prime Minister Tony Blair apologized for the British Empire's sponsorship of and profiting from slavery in its many colonies.⁵⁹ Later, Foreign Secretary

www.tribemagazine.com/board/showthread.php?t=105565; see also Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self Determination*, 31 AM. INDIAN L. REV. 341, 380 (2006/2007) (discussing conflicting perspectives on indigenous peoples' right to self-determination in international law). The pressure from the Baxter class action resulted in the Canadian government negotiating an Agreement in Principle, allotting \$1.9 billion to fund a four-part reparations program. See *Baxter v. Canada* (Attorney General), [2006] 83 O.R.3d 481 (Can.).

⁵⁵ See Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 U. TORONTO L.J. 253, 255, 257 (2002).

⁵⁶ See Julian Walker, *The Indian Residential Schools Truth and Reconciliation Commission*, LIBR. OF PARLIAMENT (Feb. 11, 2009), <http://www.parl.gc.ca/content/lop/researchpublications/prb0848-e.pdf>.

⁵⁷ See *id.*

⁵⁸ Susana Mas, *Justin Trudeau Says He'll Engage Pope on Apology for Church's Role in Residential Schools*, CBC NEWS (Dec. 16, 2015), <http://www.cbc.ca/news/politics/aboriginal-residential-schools-trudeau-meeting-1.3367026>. Although not a formal apology, in 2009, Pope Benedict XVI "expressed his sorrow at the anguish caused by the deplorable conduct of some members of the church." *Id.*

⁵⁹ See Jonathan Petre, *Blair's Deep Sorrow for Slavery 'Is Not Enough'*, DAILY TELEGRAPH (Nov. 28, 2006), <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/28/nslave28.xml>; see also Esther Stanford, *Reflections on a Global Reparations Conference*, NEW NATION, Aug.

William Hague and British High Commissioner of Nairobi Christian Turner similarly expressed the government's "sincere regret" for human rights abuses in colonial Kenya.⁶⁰ These apologies to Kenya's indigenous Kikuyu, also known as Mau Mau, complemented a political settlement of a partially successful Mau Mau reparations suit before the British High Court in 2013.⁶¹ In the settlement's wake, Caribbean nations demanded reparative actions through suits against Britain and other European colonizers (France, the Netherlands, Portugal, Spain, and Sweden).⁶² In France, political leaders deployed the language of reconciliation following eruptions over

14, 2006, at 8 (describing a Pan-African movement for slavery reparations from Britain and other European countries).

⁶⁰ See Ian Cobain & Jessica Hatcher, *UK to Expect More Colonial-Era Compensation Claims*, THE GUARDIAN (June 6, 2013), <http://www.theguardian.com/politics/2013/jun/06/uk-more-colonial-era-compensation-claims> (detailing British high officials' statements of regret and acknowledgment of wrongs in colonial Kenya).

⁶¹ See Miyoko Pettit, *Who Is Worthy of Redress?: Recognizing Sexual Violence Injustice Against Women of Color as Uniquely Redress-Worthy—Illuminated by a Case Study on Kenya's Mau Mau Women and Their Unique Harms*, 33 BERKELEY J. GENDER, L. & JUST. 268, 270-72, 288-91 (2015) (describing the monumental political settlement between the British government and Mau Mau survivors for atrocities committed during colonial rule in Kenya). Most recently, over 40,000 Mau Mau survivors filed another reparations lawsuit before British courts for similar claims of torture and ill treatment under British colonial rule in Kenya. See Ken Olende, *40,000 Kenyans Demand Compensation for British Atrocities in Mau Mau War*, SOCIALIST WORKER (Nov. 4, 2014), <http://www.socialistworker.co.uk/art/39364/40,000+Kenyans+demand+compensation+for+British+atrocities+in+Mau+Mau+war>; Cahal Milmo, *Mau Mau Uprising: Kenyans Still Waiting for Justice Join Class Action over Britain's Role in the Emergency*, INDEPENDENT (Nov. 24, 2014), <http://www.independent.co.uk/news/world/africa/mau-mau-uprising-kenyans-still-waiting-for-justice-join-class-action-over-britains-role-in-the-emergency-9877808.html> (detailing the testimonies of claimants, who will not be test cases, involving torture, extreme violence, and sexual assault).

⁶² This spate of recent lawsuits demanding forward-looking reparations is pending. Some will be adjudicated in domestic courts; others will come before the International Court of Justice in The Hague, Netherlands. See Don D. Marshall, *Capitalism, Slavery and Reparations Battle*, STABROEK NEWS (Sept. 1, 2014), <http://www.stabroeknews.com/2014/features/09/01/capitalism-slavery-reparations-battle/>.

discrimination against mainly African immigrants.⁶³ And Spain's National Court opened the reconciliation door to victims of the Franco dictatorship.⁶⁴

Spotlighting South Africa's transition from apartheid, social healing initiatives also encompassed democracies emerging from despotic rule.⁶⁵ Those initiatives spanned South and Central America (Chile, Peru, Colombia, Guatemala, and Argentina), Africa (Morocco, Rwanda, Sierra Leone, Kenya), and Asia (Timor-Leste, Indonesia, Nepal, Cambodia, and South Korea).⁶⁶ Most nations established investigative truth commissions as a breakthrough public step toward recognizing and redressing historic and

⁶³ See Julie Chi-Hye Suk, *Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 309 (2007) (describing race riots in France, the country's "strict adherence to race-blindness"); Jennifer Kolstee, *Time for Tough Love: How France's Lenient Illegal Immigration Policies Have Caused Economic Problems Abroad and Social Turmoil Within*, 25 PA. ST. INT'L L. REV. 317, 329, 330-35 (2006) (discussing the history of France's immigration policy and explaining how France's tension with its former African colonies has caused "French resentment" and "racism and discrimination against African immigrants").

⁶⁴ See Jim Yardley, *Facing His Torturer as Spain Confronts Its Past*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/world/europe/facing-his-torturer-as-spain-confronts-its-past.html?_r=0 (describing criminal prosecution of regime enforcer "Billy the Kid"). Most recently, amid calls for a formal truth commission, a Spanish court ordered the first exhumation of a civil war victim from a mass unmarked grave. James Badcock, *Spain Exhumes Civil War Victim as Calls Grow for Truth Commission*, THE TELEGRAPH (Jan. 19, 2016), <http://www.telegraph.co.uk/news/worldnews/Europe/spain/12106843/Spain-exhumes-civil-war-victim-as-calls-grow-for-truth-commission.html>.

⁶⁵ This is also known as "transitional justice" and refers to the "set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses," including criminal prosecutions, truth commissions, reparations programs, and institutional reforms. *What Is Transitional Justice?*, INT'L CTR. TRANSITIONAL JUST., <http://www.ictj.org/about/transitional-justice> (last visited July 15, 2016). Transitional justice specifically focuses on "achieving justice in times of transition from conflict and/or state repression" through accountability and redress. *Id.* It "provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law." *Id.*

⁶⁶ See Pettit, *supra* note 61, at 278-79 (describing a wide array of reconciliation initiatives globally).

continuing harms.⁶⁷ For instance, Kenya's Truth, Justice and Reconciliation Commission heard testimonies from thousands of victims (or family members) about murder, torture, sexual assault, and forced displacement, mainly surrounding the country's controversial 2007 presidential election.⁶⁸ The commission documented atrocities, assessed responsibility, and, in 2013, recommended extensive reparations for survivors.⁶⁹

According to the International Center for Transitional Justice, 40 truth and reconciliation commissions have given victims a voice and recognized their suffering.⁷⁰ We are amid an "Age of Reconciliation."⁷¹

⁶⁷ International human rights observers see truth commissions as part of an "effective transitional justice policy and as instruments that can contribute to the rule of law and the rights of victims of gross human rights violations." Eduardo González, *Set to Fail? Assessing Tendencies in Truth Commissions Created After Violent Conflict, in Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?*, INT'L CTR. TRANSITIONAL JUST. 1, 1 (June 2014), <https://ictj.org/sites/default/files/ICTJ-Report-KAF-TruthCommPeace-2014.pdf>. According to reparations scholar Eduardo González, "[t]ruth commissions have become common components of post-conflict policy, with parties involved in peace processes routinely including commissions in the agendas of their negotiations and final agreements." *Id.*

⁶⁸ See THE FINAL REPORT OF THE TRUTH JUSTICE AND RECONCILIATION COMMISSION OF KENYA (2013), available at <http://digitalcommons.law.seattleu.edu/tjrc>. See also Makau Mutua, *Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15, 15-24, 34-56 (2004) (detailing the Task Force's recommendation to establish the Truth, Justice and Reconciliation Commission and possible goals for the commission).

⁶⁹ See THE FINAL REPORT OF THE TRUTH JUSTICE AND RECONCILIATION COMMISSION OF KENYA, *supra* note 68 (presenting the commission's work, findings, and recommendations). See also *Kenyan Victims Demand*, *supra* note 13 (discussing victims' calls for the implementation of recommendations set forth in the Truth, Justice and Reconciliation Commission's report).

⁷⁰ Tolbert, *supra* note 21.

⁷¹ See generally THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES, *supra* note 21, at 58 (addressing the salutary and regressive potential of reconciliation initiatives); Little, *supra* note 21, at 86 (rethinking the idea of reconciliation as a key aspect of transitional justice); Yamamoto & Obrey, *Reframing Redress*, *supra* note 19, at 21 (describing social benefits and problems of incompleteness of reconciliation initiatives); Roy L. Brooks, *The Age of Apology*, in *WHEN SORRY ISN'T ENOUGH 3* (Roy L. Brooks ed., 1999) (describing an "Age of Apology").

B. Reconciliation Stalled

Yet, reconciliation initiated does not signal social healing achieved. Reconciliation is a long-term multi-faceted political, social, and economic process. It bears potential not only for significant benefits but also for incompleteness and regression.⁷² Some characterize as a “soft option” those initiatives granting amnesty to perpetrators as part of the reconciliation bargain.⁷³ Others observe many even well-structured reconciliation initiatives whither at the end stages.⁷⁴ For them, the “Age of Reconciliation” is experiencing a “mid-life crisis.”⁷⁵ What is clear is that reconciliation in concept has disparate meanings and that reconciliation in practice has a mottled record.

Reconciliation can mean a highly organized formal process of truth telling and reparation⁷⁶ or an apparently insincere smokescreen⁷⁷ to hide

⁷² See Yamamoto et al., *supra* note 24, at 38.

⁷³ See Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 *DIACRITICS* 33, 33 (2002) (characterizing South Africa’s TRC as the “fruit of a political compromise whose terms both made possible the Commission and set the limits within which it would work”); J. Duffy & D. Ross, *Bargaining for Truth and Reconciliation in South Africa: A Game-Theoretic Analysis*, 20 *S. AFRICAN J. OF PHILOSOPHY* 66, 66-89 (2001) (examining how policies creating truth and reconciliation commissions that “trade civil and criminal amnesty with applicants in exchange for information” is an “imperfect information game, where the commission attempts to maximize information (truth) while the applicant seeks amnesty for the lowest possible price”).

⁷⁴ See KIM, *supra* note 25, at 11-13, 166-67 (discussing South Korea’s unfinished truth and reconciliation process).

⁷⁵ See Yamamoto & Obrey, *Reframing Redress*, *supra* note 19, at 24.

⁷⁶ See generally Brooks, *supra* note 71, at 10-11 (describing South Africa’s structured, publicly transparent truth and reconciliation commission process); Penelope E. Andrews, *Reparations for Apartheid’s Victims: The Path to Reconciliation?*, 53 *DEPAUL L. REV.* 1155 (2004); LYN S. GRAYBIL, *TRUTH AND RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL* (2002); DESMOND TUTU, *WITHOUT FORGIVENESS THERE IS NO FUTURE* 35 (1999).

⁷⁷ Nepal’s controversial effort to legislatively establish a Truth and Reconciliation Commission to address the decade-long violence between the former royal government and communist insurgents has been sharply criticized for, among other things, its failure to embrace international human rights standards. See Amnesty International, *Nepal:*

behind-the-scenes political maneuvering.⁷⁸ Indeed, aboriginal groups, angry about the government's refusal to consider reparations, sharply criticized Australia's apology to its stolen generations,⁷⁹ and Canadian indigenous groups characterized as insincere Canada's comprehensive reconciliation initiative because of delayed implementation.⁸⁰

Similarly, reparations proponents rebuked Britain's words of apology for slavery because Britain failed to embrace reparative acts toward reconciliation.⁸¹ The Crown government's long delay, likely for political reasons, in finally acknowledging awards undercut the New Zealand Waitangi Tribunal's aboriginal land claims process.⁸² Native Hawaiians too

Reconciliation Does Not Mean Impunity—A Memorandum on the Truth and Reconciliation Commission Bill (2007),

<http://www.amnesty.org/en/library/asset/ASA31/006/2007/en/dom-ASA310062007en.pdf>.

⁷⁸ Thirty years after the Pol Pot "Killing Fields," Cambodia's reconciliation project, emerging out of the 1991 Paris Peace Agreement, appears to be mired in confusion and political maneuvering. See Vannath Chea, *Reconciliation in Cambodia: Politics, Culture and Religion*, in RECONCILIATION AFTER VIOLENT CONFLICT 49-50 (David Bloomfield et al. eds., 2003),

http://www.idea.int/publications/reconciliation/upload/reconciliation_chap03cs-cambodia.pdf.

⁷⁹ See Johnston, *supra* note 52; THE AUSTRALIAN PRIME MINISTER'S WEBSITE, *supra* note 52 (text of Prime Minister's apology speech). See generally Cunneen, *supra* note 52, at 183; O'Connor, *supra* note 52, at 219.

⁸⁰ See TRUTH HEALING RECONCILIATION (2008), available at <http://www.trc-cvr.ca/pdfs/20080818eng.pdf>. Some who suffered find the overall efforts less than sincere, orchestrated by government for its own benefit, and lacking the kind of mutual engagement necessary for genuine healing. *Id.* Following Canada, the Tasmanian government committed to reconciliation, apologizing, and authorizing individual reparations payments to its stolen generation of aboriginal children. Barbara McMahon, *Tasmania to Pay 'Stolen Generation' of Aborigines £2.2m in Reparations*, THE GUARDIAN (Jan. 23, 2008), <http://www.guardian.co.uk/world/2008/jan/23/australia.international>. Yet, the social and economic impacts of its promises are uncertain.

⁸¹ See Petre, *supra* note 59. See also Stanford, *supra* note 59, at 8 (describing a Pan-African movement for slavery reparations from Britain and other European countries).

⁸² See generally Williams, *supra* note 51, at 234.

criticized the United States for failing to follow through on its reconciliation promises.⁸³

Developing Latin American countries also experienced halting steps toward reconciliation. For instance, despite Peru's initial efforts,⁸⁴ victims of the government's fight with insurgents called for disciplined follow-through on truth commission recommendations, emphasizing still badly needed economic programs.⁸⁵ For many, the delayed minimal economic payments and the lack of real economic capacity-building signaled a potential failure of the overall initiative.⁸⁶

In Asia well-intentioned reconciliation initiatives inspired by the South Korea democracy movement foundered at the implementation stages.⁸⁷ The absence of meaningful apologies and the lack of economic justice erected at least partial roadblocks to social healing.⁸⁸

⁸³ See Grass, *supra* note 39 (describing the tension between US government actions and Native Hawaiian sovereignty movements).

⁸⁴ See Lisa J. Laplante, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228, 241 (2007) (explaining that victims and survivors are highly disappointed by the government's failure to implement recommendations).

⁸⁵ See Pablo de Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS 451, 470-71 (Pablo de Greiff ed., 2006); see also Lisa J. Laplante, *Negotiating Reparations Rights: The Participatory and Symbolic Quotients*, 19 BUFF. HUM. RTS. L. REV. 217 (2012).

⁸⁶ See Laplante, *supra* note 85, at 231 (pointing out that delays in implementing reparatory measures left victims in Peru disillusioned with the work of the truth commission). See also Mattia Cabitza, *Slow Justice for Peru's 'Disappeared' 20 Years On*, BBC NEWS (Nov. 14, 2011), <http://www.bbc.co.uk/news/world-latin-america-15718695> (noting that some victims have been waiting for over thirty years to find out what happened to their disappeared loved ones).

⁸⁷ See generally Jae-Jung Suh, *Truth and Reconciliation in South Korea*, 42-4 CRITICAL ASIAN STUD. 503-24 (2010) (describing the Truth and Reconciliation Commission of the Republic of South Korea (TRCK) and noting its success in "bringing back the voices of the silenced" but also pointing out the TRCK's challenges and limitations).

⁸⁸ See Hun Joon Kim, *Trial and Error in Transitional Justice: Learning from South Korea's Truth Commissions*, 19 BUFF. HUM. RTS. L. REV. 125, 158 (2012); Kim Dong-choon & Mark Seldon, *South Korea's Embattled Truth and Reconciliation Commission*, ASIA-PAC. J. (2010), http://www.japanfocus.org/-Kim-Dong_choon/3313/article.html

Japan faced international opprobrium after backsliding on its earlier acknowledgments of imperialist and World War II atrocities⁸⁹ cast in the language of desired reconciliation.⁹⁰ In 2015, Prime Minister Shinzo Abe's special historical review panel praised the country's postwar economic growth and commitment to pacification but also cited "lack of

(printing an interview with Kim Dong-choon, the former Standing Commissioner of the TRCK, in which he describes the achievements and challenges of the TRCK).

⁸⁹ At the 2005 Asia-African Summit in Jakarta, which addressed multilateral efforts in solving conflicts, then-Prime Minister Koizumi, in the general language of reconciliation, acknowledged Japan's imperial transgressions:

Japan, through its colonial rule and aggression, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations. Japan squarely faces these facts of history in a spirit of humility and with a feeling of deep remorse and heartfelt apology always engraved in mind. Japan has resolutely maintained, consistently since the end of World War II, never turning into a military power but an economic power, its principle of resolving all matters by peaceful means, without recourse to the use of force. Japan once again states its resolve to contribute to the peace and prosperity of the world in the future as well, prizing the relationship of trust it enjoys with nations of the world.

Excerpts from Japan PM's Apology, BBC NEWS (Apr. 22, 2005), <http://news.bbc.co.uk/2/hi/asia-pacific/4471961.stm>. See generally Jamie Sheu, *Clash of Asia's Titans: China and Japan's Struggle for "Reconciliation,"* May 1, 2006 (unpublished seminar paper, University of Hawai'i) (on file with author) (analyzing former Prime Minister Koizumi's rhetoric of reconciliation in addressing charges of human rights violations by China).

⁹⁰ See *Japan's Apologies for World War II*, N. Y. TIMES (Aug. 14, 2015), http://www.nytimes.com/interactive/2015/08/13/world/asia/japan-ww2-shinzo-abe.html?_r=0 (noting that Prime Minister Shinzo Abe failed to offer an apology in a 2015 speech, visited a shrine for Japan's war criminals in 2014, and did not express remorse as Japan's leaders traditionally did in a 2013 speech). In 2007, the US House of Representatives called upon Japan's leaders to apologize to World War II Korean military sex slaves and to offer them meaningful reparations. H.R. Res. 121, 110th Cong. (2007) (calling on government to reverse policy against reparations for women forced into sexual slavery for Japanese soldiers). Japan's indigenous Ainu also demanded redress for the longstanding but less well-known colonization of Ainu lands and suppression of Ainu culture. See Yamamoto & Obrey, *Reframing Redress*, *supra* note 19, at 21.

reconciliation with China and South Korea” as a fount of escalating criticism by those countries.⁹¹

Sometimes political instability disrupts implementation of even carefully organized initiatives. In 2005, the new East Timor government established a truth and reconciliation process to address the violence of 20 years of Indonesian military rule.⁹² One of its pathbreaking tenets was gender redress to heal East Timor women’s wounds of sexual violence.⁹³ The truth commission embarked on a remarkable program of psychological healing⁹⁴ and economic support as a foundation for rebuilding the nation.⁹⁵ But political instability slowed, if not scuttled, the healing process.⁹⁶

As this snapshot of troubled reconciliation initiatives reveals, the reconciliation concept’s elasticity and shifting political underpinnings provide little firm guidance to policymakers and justice advocates.⁹⁷ They

⁹¹ *Report on Japan’s History Meant to Ease Skepticism*, HONOLULU STAR-ADVERTISER, Aug. 8, 2015, at A4.

⁹² *See generally* Galuh Wandita, Karen Campbell-Nelson & Manuela Leong Pereira, *East Timor Declares Emergency: Reaching Out to Female Victims*, in *WHAT HAPPENED TO THE WOMEN?: GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 290 (Ruth Rubio-Marín ed., 2006).

⁹³ One of the Commission’s recommendations was that “at least 50% of resources in this program shall be earmarked for female beneficiaries.” *Id.* at 308.

⁹⁴ The Commission proposed the following:

[A] reparations program with five guiding principles—feasibility, accessibility, empowerment, gender, and prioritization [sic] based on need—with the aim to repair, as far as possible, the damage to their [victims’] lives caused by the violations, through the delivery of social services to vulnerable victims and symbolic and collective measures to acknowledge and honor victims of past violations. *Id.*

⁹⁵ *See id.* at 290.

⁹⁶ *See* Tim Johnston, *East Timor Declares Emergency After Attack on Leaders*, N.Y. TIMES (Feb. 12, 2008), <http://www.nytimes.com/2008/02/12/world/asia/12timor.html?scp=1&sq=east%20timor%20emergency&st=cse>.

⁹⁷ *See, e.g.*, Kim & Seldon, *supra* note 88 (noting that the TRCK’s current leadership is unwilling to hold the United States accountable for its “indiscriminate bombing” practices and other atrocities during the Korean War).

render stated commitments to reconciliation susceptible to political mischief as insincere cover for continuing hostilities or power grabs.⁹⁸ And reconciliation politics, by demanding agreement and consensus, at times marginalizes or even silences discordant voices.⁹⁹ Equally important, even solidly conceived and operated truth commissions stumble at the stages of implementation and follow through.¹⁰⁰ Critics of varying aspects of transitional justice abound, at times offering sharp and insightful critiques,¹⁰¹ although often without advancing realpolitik alternatives for social healing.¹⁰²

⁹⁸ See, e.g., *id.* (pointing out that the TRCK does not currently have the support of certain key government institutions, including the police, the military, and the National Intelligence Service).

⁹⁹ See Lawrie Balfour, *Act and Fact: Slavery Reparations as a Democratic Politics of Reconciliation*, in *THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES* 96 (Will Kymlicka & Bashir Bashir eds., 2008) (endorsing disagreements, discord, and differences in the reconciliation process “that cannot simply be managed, forgotten, . . . [and] that resist[] the kinds of seamless narratives of national belonging that have been so effective at silencing [minority] claims”); Adrian Little, *The Complex Agon*, in *LAW AND AGONISTIC POLITICS* 193, 198 (Andrew Schaap ed., 2009).

¹⁰⁰ See Alexander Keller Hirsch, *Theorizing Post-Conflict Reconciliation*, in *THEORIZING POST CONFLICT RECONCILIATION: AGONISM, RESTITUTION AND REPAIR* i (Alexander Keller Hirsch ed., 2012) (critiquing assumptions informing many reconciliation projects and underscoring the importance and difficulty of “restitution and repair”); Bashir Bashir, *Accommodating Historically Oppressed Social Groups: Deliberative Democracy and the Politics of Reconciliation*, in *THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES* 58 (Will Kymlicka & Bashir Bashir eds., 2008) (“[S]ymbolic compensation without accompanying efforts to repair damaged conditions is [also] likely to be labeled ‘insincere.’”).

¹⁰¹ See generally *THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES*, *supra* note 21, at 58; Hirsch, *supra* note 100, at i.

¹⁰² See Paul Muldoon, *The Very Basis of Civility: On Agonism, Conquest, and Reconciliation*, in *THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES*, 114 (Will Kymlicka & Bashir Bashir eds., 2008); Erik Doxtader, *Reconciliation – A Rhetorical Conception*, 89 Q.J. SPEECH 267 (2003); Mark Howard Ross, *Ritual and the Politics of Reconciliation*, in *FROM CONFLICT RESOLUTION TO RECONCILIATION* 210 (Yaacov Bar-Siman-Tov ed., 2004).

Reconciliation policymakers, scholars, and advocates thus search for a cogent framework for guiding, assessing, and refashioning troubled reconciliation initiatives.

III. THE CHALLENGE: BRIDGING THE RECONCILIATION CHASM

Despite important steps forward, a society's failure to implement reconciliation recommendations, often for needed reconstruction and reparation, means that the pain, blame, guilt, and economic dislocation persist.¹⁰³ Reconciliation stalled generates real, on-the-ground consequences for people, communities, and societies. A momentous challenge, then, for both established and developing democracies is this: how to follow through on truth commission recommendations and recalibrate and rejuvenate halting reconciliation initiatives.

A. Unfinished Business—Illustrations

An illuminating example of the reconciliation's unfinished business is South Africa's TRC. Despite initial salutary efforts, South Africa's government stopped individual reparations payments and community economic capacity-building.¹⁰⁴ Additionally, South Africa's businesses reacted with notable indifference to the TRC recommendations that businesses profiting from the racial caste system contribute to repairing the damage.¹⁰⁵ No South African companies operating during apartheid

¹⁰³ See *supra* Section II.A & B.

¹⁰⁴ See Phillip De Wet, *Reparations Still on the Back Foot*, MAIL & GUARDIAN (Nov. 16, 2012), <http://mg.co.za/article/2012-11-16-00-reparations-still-on-the-back-foot> (explaining why the President's Fund—which was “created with the sole purpose of making reparations for apartheid as part of the broader reconciliation drive”—has not fulfilled its purpose); see also Eric K. Yamamoto & Brian Mackintosh, *Redress and the Salience of Economic Justice*, FORUM ON PUBLIC POL'Y 11 (2010), <http://forumonpublicpolicy.com/vol2010.no4/archive.vol2010.no4/yamamoto.pdf>.

¹⁰⁵ Yamamoto & Mackintosh, *supra* note 104, at 12; see Xolani Mbanjwa, *R525m Paid Out Since TRC Started*, PRETORIA NEWS (July 16, 2008),

contributed to the reparations fund.¹⁰⁶ For Archbishop Tutu, this deliberate corporate absence tears at the heart of the reconciliation initiative—business payments “as a vehicle for those who had benefited from the past to contribute to the future was stillborn.”¹⁰⁷

More broadly, South Africa’s government and apartheid businesses fell far short of implementing the TRC’s economic recommendations “to advance economic transformation and enhance the economic participation of black people in the South African economy.”¹⁰⁸ Observers characterized economic capacity-building programs as “poorly implemented” and “wrought with corruption, fraud and misrepresentation.”¹⁰⁹ For Archbishop Tutu, genuine reconstruction and reparation for those harmed by apartheid remain unfinished business.¹¹⁰

Similarly, in South Korea, some now view its TRCK recommended reconstructive and reparative work for historic atrocities as starkly incomplete. The South Korea government initially implemented several TRCK recommendations from a partial list.¹¹¹ But, as a media watchdog

http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20080716062642926C223345.

¹⁰⁶ See Mbanjwa, *supra* note 105.

¹⁰⁷ Tutu, *supra* note 6.

¹⁰⁸ See *Broad-Based Black Economic Empowerment*, DEP’T OF TRADE & IND., REPUBLIC OF SOUTH AFRICA, https://www.thedti.gov.za/economic_empowerment/bee.jsp (last visited Aug. 10, 2016).

¹⁰⁹ Harry C. Alford, *South Africa’s Black Economic Empowerment Program Has Failed*, NAT’L BLACK CHAMBER OF COMMERCE, <http://www.nationalbcc.org/news/beyond-the-rhetoric/1228-south-africas-black-economic-empowerment-program-has-failed> (last visited May 19, 2015).

¹¹⁰ Tutu, *supra* note 6.

¹¹¹ See generally Suh, *supra* note 87; Kim, *supra* note 9, at 158. South Korea leaders had launched myriad reconciliation initiatives following the country’s transition to democracy. See Tae-Ung Baik, *Fairness in Transitional Justice Initiatives: The Case of South Korea*, 19 BUFF. HUM. RTS. L. REV. 169, 170 (2012). Since 1996, over 18 formal truth and reconciliation commissions sought to repair the damage of historic injustice. *Id.* Most commissions focused on singular events, including the 1980 Gwangju massacre, the 1951 Guchang massacre, and the pre-Korean War Jeju April 3rd Grand Massacre. See Kim Dong-Choon, *Korea’s Truth and Reconciliation Commission: An Overview and*

observed, this entailed minimal effort because the implemented recommendations reflected the “least expensive or least controversial measures.”¹¹² And changes in political leadership at times frustrated the goals and functionality of the truth commission.¹¹³ Whatever the specific reasons, the TRCK’s three key recommendations—individual payments, a permanent research and oversight foundation, and acknowledgement of and proper burial for mass murder victims—still await implementation.¹¹⁴

Assessment, 19 BUFF. HUM. RTS. L. REV. 97, 98-99 (2012) (reviewing “a number of special laws between 1995 and 2000 to settle certain unresolved historical cases”). By contrast, the 2005 TRCK provided a comprehensive approach to investigate human rights violations during the twentieth century, including atrocities during Japan’s colonial rule, the Korean War, military authoritarian regimes, and the 1980s democracy movements. *See id.* at 97 (describing TRCK investigation of “massacres, incidents of death, injury or disappearance, politically fabricated trials, and the killing of unarmed civilians and political prisoner before and during the Korean War”). The TRCK investigated individual cases of human rights violations, at the request of victims and their families, and recommended reparative actions to the appropriate government branches and agencies. *See id.* Despite initial promising investigative findings and reparative recommendations, many victims, survivors and families now express frustration at the truncated array of TRCK recommendations and inadequate implementation of even express reparations recommendations. *See Kim, supra* note 88, at 158.

¹¹² Yun Hyeong Kil & O Seong Kwon, *Government Bodies Stall in Implementation of Truth and Reconciliation Recommendations*, HANKYOREH (S. KOREA) (Apr. 15, 2009); *see Kim, supra* note 88, at 158 (citing the newspaper’s opinion on the implementation of TRCK recommendations). Out of 179 apologies recommended, the government has issued only 52 as of 2010. *Kim, supra* note 88, at 158. And most of those apologies were seen as inadequate. *Id.* According to Professor Hun Joon Kim, they were mere expressions of “regret” or “condolences” by local police chiefs and low-profile military commanders, rather than presidential or formal acceptances of responsibility for the historic injustices. *See id.* at 157 (noting that the one exception was President Roh Moo Hyun’s apology to the victims of civilian massacres during the Korean War, including the Jeju 4.3 Tragedy). Regarding retrials, as of 2010, out of 42 cases recommended for a retrial, only 18 victims were able to show they had been falsely convicted. *Id.*

¹¹³ Melish, *supra* note 2, at 42.

¹¹⁴ Kim, *supra* note 88, at 158-59 (noting that the “conservative wing of Korean society vehemently attacked the commission” for its plan to create a permanent research foundation). “Major conservative newspapers criticized [the TRCK] for ‘trying to extend [its] work under [a] new title’ and impugned commissioners and staff as ‘people who are trying to benefit from the research foundation with taxpayer money worth 800 billion won.’” *Id.* at 159.

Colombia's extensive reconciliation initiative, too, remains partially stuck in the implementation phase. Following truth commission recommendations, in 2005, Colombia's legislature enacted the Justice and Peace Law to facilitate demobilization of paramilitary groups and to redress 50 years of massacres, forced disappearances, executions, torture, sexual violence, kidnappings, and community displacements.¹¹⁵ The legislature passed a follow-up 2011 Victims' Law and other measures to facilitate reparations for victims and to prevent repetition of human rights violations.¹¹⁶ But its comprehensive 10-year reconciliation plan faced mounting criticism.¹¹⁷ The inadequately financed and implemented reparations program and the release of former paramilitary leaders after reduced prison sentences, exacerbated victims' impressions of reconciliation backsliding.¹¹⁸ Many worried about the government's capacity to ensure safety in pockets of continuing armed resistance.¹¹⁹

¹¹⁵ See Maria Camila Moreno, *Uncovering Colombia's System of Macro-criminality*, INT'L CTR. TRANSITIONAL JUST (Aug. 12, 2014), <http://www.ictj.org/news/uncovering-colombia-systems-macro-criminality>; see also L. 975 D.O. (covering the legislation passed to address victims' reparations and demobilization). Of the paramilitary groups in Colombia, the Fuerzas Armadas Revolucionarias de Colombia or Revolutionary Armed Forces of Colombia (FARC) is the largest and oldest. See *FARC*, INSIGHTCRIME.ORG, <http://www.insightcrime.org/colombia-organized-crime-news/farc-profile> (last visited Nov. 10, 2014). The group is estimated to have 8,000 guerillas in its ranks. *Id.* In 2014, FARC commenced peace talks with the Colombia government. *Id.*

¹¹⁶ See Nicole Summers, *Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?* 25 HARV. HUM. RTS J. 221, 225; L. 1448 D.O. arts. 1, 8.

¹¹⁷ See Summers, *supra* note 116, at 234 (explaining how an important aspect of the Victims Law, the "decentralization" of the institutions responsible for victims support, "is likely to become an extensive barrier to victims").

¹¹⁸ Moreno, *supra* note 115. Moreno describes the basic premise of the Justice and Peace Law as a balance between demobilization of armed groups and their offer to guarantee victims' rights. See *id.* The current critique of Colombia's reconciliation effort is the lack of balance. See *id.* Armed conflict continues, and many of the combatants who agreed to take part in the reconciliation process are reaping the benefits of a reduced prison sentence but have failed to contribute to the Victims' Reparation Fund. *Id.*; see also Nicolas Bedoya, *Criminal Politicians Fail to Repair Colombia's Victims of Paramilitary Violence*, COLOMBIA REPORTS (Oct. 1, 2014), <http://colombiareports.co/parapoliticians-handing-money-colombias-victims-reparation-fund/> (concluding that victimizers

Implementation of Kenya's truth commission's reparations recommendations stalled in the National Assembly. Because the "National Assembly's inaction has had huge repercussions on the lives of hundreds of victims who bear the scar of past serious human rights abuse," the National Victims Survivors Network petitioned the National Assembly in 2015 for implementing action.¹²⁰ The petition highlighted the "lack of a framework for implementing the recommendations of the *Truth, Justice and Reconciliation Commission*" and recited how the failure of follow-up "undermined victim's ability to obtain closure and restart their lives."¹²¹

B. The Chasm

Victims and families anxiously await promised reparative action. Their deep disappointment with unfulfilled promises, particularly for economic justice, threatens entire initiatives. Initial optimism over commission investigations and victim story-telling morphs into bitterness about the process itself.¹²²

currently owe \$650 million to the Victims' Reparation Fund, but so far, only \$1.5 million has been paid); Victoria McKenzie, *FARC Victims Form Federation to Defend Interests During Peace Talks*, COLOMBIA REPORTS, <http://colombiareports.co/farc-victims-form-national-federation/> (last visited Aug. 10, 2016) (describing the recent formation of a national federation of Colombian victims developed to promote 33 fundamental demands and concerns related to the ongoing peace talks with FARC); *Hope for Colombia's Peace Process*, N.Y. TIMES (Mar. 9, 2015), <http://nyti.ms/1HptV98> (describing recent negotiations between the Colombian government and FARC and noting that "[a]fter five decades of war, the prospect of a negotiated deal, not surprisingly, has many critics particularly among those whose family members have been killed or maimed in the conflict . . . Some worry that guerrilla leaders who have committed atrocities could escape punishment").

¹¹⁹ See Summers, *supra* note 116, at 233 (detailing the difficulties imposed by the continuing armed conflict and the issues related to the law's guarantee of "security of the returned victims and the prevention of re-victimization").

¹²⁰ *Kenyan Victims Demand*, *supra* note 13.

¹²¹ *Id.*

¹²² See *supra* Part II.B.

Taken together, this disillusionment signals a deep chasm between extensive truth commission mandates to develop detailed recommendations, including individual assistance and major societal reforms, and the dismissal or only limited implementation of these recommendations by governments and businesses.¹²³ The reasons for this chasm vary from economic vagaries to leadership turnover to evolving geopolitical relationships.¹²⁴ Whatever the reasons, for some and perhaps many reconciliation initiatives the enormity of the chasm threatens prospects for genuine social healing.

This clouded picture of the reparative justice process is coming sharply into view. According to Tolbert, president of the International Center for Transitional Justice, even with the global growth of truth and reconciliation initiatives, “the international community appears to be backsliding on its human-rights commitments. The world’s powers lack any sense of urgency in addressing abuses, preferring the pursuit of narrower, short-term interests to investing in long-term peace and justice.”¹²⁵ Tolbert acknowledges that some countries are pursuing genuine redress as a cornerstone of democracy.¹²⁶ But the recalcitrance of others, “especially the emerging powers, threatens to end the world’s all-too-brief era of accountability.”¹²⁷

Yet, countries and communities persist down the reconciliation path—possibly because of still-envisioned societal benefits, or because of the absence of alternative comprehensive approaches to badly needed social healing. What, then, is needed to bridge the chasm separating aspiration and

¹²³ Neil Kritz, *Policy Implications of Empirical Research on Transitional Justice*, in *ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH* 13, 17 (Hug Van der Merwe et al. eds., 2009).

¹²⁴ See *infra* Section V (discussing limiting forces). See generally Kim & Seldon, *supra* note 88; Kim, *supra* note 88, at 158-59.

¹²⁵ Tolbert, *supra* note 21.

¹²⁶ *Id.*

¹²⁷ *Id.*

realization? What is needed to recalibrate and rejuvenate reconciliation in concept and in practice?

South Africa's approach to reconciliation through its truth commission generated the template for later reconciliation initiatives.¹²⁸ It coalesced moral imperatives.¹²⁹ It structured initiatives.¹³⁰ And it deployed language and imagery that highlighted possible common ground for initial political action.¹³¹

Although giving public voice to numerous victims of apartheid violence and initially garnering widespread praise, the South Africa reconciliation initiative failed to generate a pervasive sense of real social healing over time¹³²—the chasm unbridged.¹³³ The South Africa reconciliation process thus embodied reparative action that was both bright—uplifting and illuminating—and dark—quarrelous and possibly illusory.¹³⁴

Policymakers and the public tend to focus on the salutary, to believe that once a truth commission's work is finished, the country will be reconciled and the victims will naturally bestow forgiveness.¹³⁵ But truth commissions in operation are only a “part of a larger transitional justice process rather than integral, one-time solutions in themselves.”¹³⁶ Closely related, criminal

¹²⁸ See Kritz, *supra* note 123, at 13-14.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *supra* notes 104-110 and accompanying text.

¹³³ Yamamoto & Mackintosh, *supra* note 104, at 9 (exploring reconciliation initiatives, and specifically the unfulfilled economic justice programs, of Peru and South Africa).

¹³⁴ See *South Africa: Impunity, Political Interference Emerge Below Veneer of a Celebrated Reconciliation Process*, INT'L CTR. TRANSITIONAL JUST. (Feb. 19, 2016), <http://www.ictj.org/multimedia/audio/south-africa-impunity-nokuthula-simelane-justice> (describing one South African family's 33 year wrenching “pursuit of truth and accountability” for the abduction, torture, and disappearance of an anti-apartheid activist).

¹³⁵ González et al., *supra* note 26.

¹³⁶ *Id.* For Professor Hun Joon Kim, “[t]he work of any truth commission does not end with the mere completion of its mandate. Rather, that end is simply another beginning, as we have seen in many international and domestic examples.” Kim, *supra* note 88, at 167.

prosecutions or amnesty along with piecemeal legislative or executive actions, though important, do not and cannot fully repair the damage of injustice.¹³⁷ Those kinds of actions, like truth commissions inquiries, serve at best as a starting point for a much broader societal effort toward social healing.¹³⁸

Reparative justice scholars and advocates thus are beginning to extend the theoretical framework for reconciliation to better account for practical on-the-ground post-commission realities.¹³⁹ Section V shapes this work into a more fully delineated, new fourth step follow-up in the reconciliation process—an Assessment, Implementation, and Oversight Task Force. As the foundation for that fourth step, Section IV describes and critiques the prevailing reconciliation template’s three steps.

IV. THE PREVAILING TEMPLATE

Post-World War II Holocaust reparations by Germany and private businesses profiting from Jewish slave labor laid the early foundation for reconciliation initiatives.¹⁴⁰ In 1988, US redress for the internment of Japanese Americans offered a multi-faceted process for healing wounds of mass civil liberties violations and repairing damage to those incarcerated and American society itself—a congressional truth finding investigation, a presidential apology, individual reparations payments, and a public

¹³⁷ See, e.g., *Timeline: Transitional Justice Mechanisms in Colombia Since 2005*, INT’L CTR. TRANSITIONAL JUST. (2013), http://ictj.org/colombia-timeline/index_eng.html (describing Colombia’s sometimes piecemeal reconciliation process).

¹³⁸ See generally Kim, *supra* note 111, at 97; Melish, *supra* note 2, at 1.

¹³⁹ See *infra* Section V; see generally González et al., *supra* note 26, at 2 (urging drafters and other stakeholders to pay more attention “to realities on the ground”).

¹⁴⁰ See generally Ariel Colonomos, *German Reparations to the Jews after World War II: A Turning Point in the History of Reparations*, in *THE HANDBOOK OF REPARATIONS*, (Pablo de Grieff ed., 2006) (explaining that the German-Israeli reparations program after World War II was “the largest, most comprehensive reparations program ever implemented”).

education fund.¹⁴¹ These and other reconciliation experiences, particularly South Africa's, shape a prevailing reconciliation template. This section briefly articulates the template's theoretical foundation, describes and critiques its basic structure, and charts benefits and troubling limitations.

A. Reconciliation Theory

A selective description of reconciliation theory sheds light on the philosophical grounding for the prevailing template's integrated structural components.¹⁴² The description surfaces discordant theoretical debates that at times mirror volatile reconciliation experiences on the ground.

In theory, social healing embraces democratic notions of participation in the social, economic, and political life of a polity.¹⁴³ A breach in the polity by wrongly excluding some from the community is repaired by fostering reintegration and full participation.¹⁴⁴ In practice, repairing the breach—or reconciling—means salving psychological and economic wounds by lifting barriers to liberty and equality in education, housing, medical care, employment, cultural preservation, and political governance.¹⁴⁵

The South African concept of *ubuntu* reflects those social healing precepts.¹⁴⁶ Ubuntu is the notion of interconnectedness—"people are people through other people"—and emphasizes healing through reconfiguring the

¹⁴¹ See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 19, at 311-75 (describing the multi-step process of redress and reparations).

¹⁴² The descriptions here are truncated. They do not cover the field and are not attentive to nuance or variation. Nevertheless, they provide a basic understanding of the theoretical underpinnings of many on-the-ground reconciliation efforts.

¹⁴³ See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 19, at 9-13 (describing the complex areas of social healing and reconciliation, especially as they relate to interracial justice).

¹⁴⁴ *See id.*

¹⁴⁵ See generally Daniel Bar-Tal & Gemma H. Bennink, *The Nature of Reconciliation as an Outcome and as a Process*, in *FROM CONFLICT RESOLUTION TO RECONCILIATION* 21 (Yaacov Bar-Siman-Tov ed., 2004).

¹⁴⁶ See Lynne Duke, *Witness to a Celebration*, *WASH. POST*, July 10, 1994, at W8 (discussing the concept of ubuntu).

damaged polity.¹⁴⁷ People suffering are not healed solely as individuals but through incorporation into a collective body.¹⁴⁸ Ubuntu “is far more restorative [than retributive]—not so much to punish as to redress or restore a balance . . . [it is] restorative of the dignity of the people” as part of a common humanity.¹⁴⁹ For this reason, Archbishop Desmond Tutu, former chair of South Africa’s TRC, emphasized that his country could not be built anew without repairing the individual and communal damage of apartheid.¹⁵⁰ Drawing upon theological and human rights precepts, reparative justice meant reintegration of the community, and reintegration meant “affirming the legitimacy of victims’ claims [along with reparations to] bring back into the polity those who had concluded that this government has nothing to offer them.”¹⁵¹ Reintegration also meant bringing back those who atoned for heinous crimes—those who confessed, expressed contrition, and offered restitution.¹⁵² The aim was a functioning, new or restored community.¹⁵³

¹⁴⁷ *Id.* (noting that ubuntu is the “Xhosa phrase ‘ubuntu ungamntu ngabanye abantu,’ which means ‘people are people through other people’”).

¹⁴⁸ *See id.* (explaining that “unlike rugged individualism, the centerpiece of Western culture, ubuntu values relations between humans: the spirit of sharing, of collectivism, of mutuality”).

¹⁴⁹ Tina Rosenberg, *Recovering from Apartheid*, NEW YORKER, November 18, 1996, at 90 (quoting Tutu); *see also* Mark Gevisser, *Profile: Tutu’s Test of Faith*, AFRICA NEWS SERVICE, April 12, 1996 (quoting Tutu’s description of ubuntu: “you must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That’s why African jurisprudence is restorative rather than retributive”).

¹⁵⁰ Harold Wells, *Theology of Reconciliation*, in THE RECONCILIATION OF PEOPLES: CHALLENGE TO THE CHURCHES 30, 38 (Greg Baum & Harold Wells eds., 1997); Gevisser, *supra* note 149 (quoting Tutu’s description of ubuntu).

¹⁵¹ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.C.-L.L. REV. 323, 391 (1987).

¹⁵² Guided by ubuntu and political pragmatism, South African President Nelson Mandela both exhorted and cautioned that the survival of many South African groups was dependent on, to an important extent, reconciliation with the others. *See generally* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 19, at 165-66. The transitional South African constitution, entitled “National Unity and Reconciliation,” reflected this perspective. *Id.* The interim constitution’s post-amble envisioned healing among racial groups as a key to the peaceful coexistence of South Africans: “There is a need for understanding but not for vengeance, a need for reparation

1. Communitarian Ethos

Ubuntu thus shaped South Africa's reparative efforts through notions of co-responsibility, interdependence, and enjoyment of rights by all.¹⁵⁴ More broadly, those notions generally embrace communitarian theory that envisions citizens gathering to assess their condition and "cultivate solidarity and civic engagement".¹⁵⁵ A communitarian approach through law and politics strives to build or rebuild communities, both physically and through a sense of connectedness and belonging.¹⁵⁶ Cast in this aspirational

but not for retaliation, a need for ubuntu but not victimization." *Id.* In light of apartheid-inflicted social wounds, the post-amble stressed that "national unity, the well-being of all South Africans and peace required reconciliation between the people of South Africa." *Id.* Taking a cue from the post-amble, South Africa's judiciary embraced ubuntu and reconciliation as part of South African constitutional jurisprudence. *Id.* Linking social inclusion to healing, the South Africa Supreme Court highlighted South Africa's need in the rebuilding process to integrate into the polity those marginalized by apartheid. *Id.*

¹⁵³ See *supra* note 152 and accompanying text.

¹⁵⁴ See generally YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 19, at 165-66.

¹⁵⁵ Michael Sandel, a leading exponent of communitarian theory, maintains that public spaces, where citizens can gather and interpret their condition to "cultivate solidarity and civic engagement," unify a community and create a stronger society. See MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT* 349-50 (1996) (describing communitarian theory). Creating public spaces, like the TRC did in South Africa, allows parties to "weave the various strands of their identity to a coherent whole." *Id.* These narratives allow people to "make sense of their condition and interpret the common life they share" and to move forward collectively. *Id.*; see also AMITAI ETZONI, *THE SPIRIT OF COMMUNITY* 254-55 (1993).

¹⁵⁶ The communitarian framework for reconciliation identifies several characteristics of a complex society in conflict.

(1) historical wrongs committed by one group, (2) which harmed, and continue to harm, both the material living conditions and psychological outlook of another group, (3) which, in turn, has damaged present-day relations between the groups, and (4) which ultimately has damaged the larger community, resulting in divisiveness, distrust, social disease—a breach in the polity. Within this framework, reparations by the polity and for the polity are justified on moral and political grounds—healing social wounds by bringing back into the community those wrongly excluded.

Eric K. Yamamoto, *Racial Reparations*, 19 B.C. THIRD WORLD L.J. 477, 522 (1998-99); see also ETZONI, *supra* note 155, at 247 ("[Communitarianism is a] social movement

fashion, reconciliation initiatives aim to achieve social harmony in societies marred by painful past conflict.¹⁵⁷ Through “collective acts of public apology and forgiveness, reparation and restoration are imparted and the writhing conflict of the past is substituted for by the ‘overlapping consensus’ of community.”¹⁵⁸

Generally stated, the communitarian ethos links to human rights norms of reparative justice.¹⁵⁹ This ethos shapes reconciliation initiatives through

aim[ed] at shoring up the moral, social, and political environment. Part change of heart, part renewal of social bonds, part reform of public life.”); Bar-Tal & Bennink, *supra* note 145, at 33.

¹⁵⁷ See *supra* Section II (describing various global reconciliation initiatives).

¹⁵⁸ Alexander Keller Hirsch, *Introduction: The Agony of Reconciliation*, in *THEORIZING POST CONFLICT RECONCILIATION: AGONISM, RESTITUTION AND REPAIR 1* (Alexander Keller Hirsch ed., 2012). Prophetic theology, in concert with communitarian political theory, also undergirds some reconciliation initiatives, South Africa’s in particular. See generally Wells, *supra* note 150; DONALD W. SHRIVER, *AN ETHIC FOR ENEMIES* (1995); MARTIN LUTHER KING JR., *STRENGTH OF LOVE* (1963); CORNEL WEST, *PROPHECY AND DELIVERANCE* (1982); *THE KAIROS COVENANT* (Willis H. Logan ed., 1988); JAMES CONE, *BLACK THEOLOGY AND BLACK POWER* (1969).

¹⁵⁹ Reparative justice is deeply rooted in international human rights norms that not only seek to prevent gross violations but also to repair the damage already inflicted. The 1966 International Covenant on Civil and Political Rights mandates that anyone whose human rights have been violated “shall have an effective remedy.” International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), at 52, 21 U.N. GAOR Supp. No. 16, art. 2(3), U.N. Doc. A/6316 (Mar. 23, 1976). Effective remedies for human rights violations shape reparative justice through reparations that “involve restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, and changes to relevant laws and practices.” See Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in *INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 325 (Louise Henkin ed., 1981) (describing the range of potentially “effective remedies” for human rights violations); Ignacio Alvarez et al., *Conference: Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U. L. REV. 1375, 1386 (2007) (describing a wide range of non-monetary reparative measures).

In 2005, the United Nations Human Rights Commission approved the “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law.” C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005). The human rights “Basic Principles and Guidelines” specify forms of reparative justice, aimed at social healing, including restitution, compensation, rehabilitation, and guarantees of

engagement by all with some role in human rights transgressions in fashioning a more inclusive community.¹⁶⁰ It also encourages joint construction of a new, unifying justice narrative—from multiple, often-dissonant narratives—about the causes and consequences of the conflict.¹⁶¹ Finally, it uplifts the significance of conflicting groups' commitment to peaceable and possibly productive future relations.¹⁶²

2. A Critique of Reconciliation's Communitarian Ethos

A primary critique of reconciliation's communitarian underpinnings emerges from recent academic debates. That critique, *agonism*, finds that communitarian values tend to serve majoritarian interests by skewing characterization of the injustice and remedial needs in ways that most

non-repetition. *See* Cunneen, *supra* note 52 (broadly addressing approaches to reparative justice emphasizing reconstruction and reparation).

Restitution means restoring a victim to the original situation, such as return of property, while rehabilitation includes medical and psychological care as well as legal and social services. Satisfaction comprises several possible measures: from apologies, full and public disclosure of the truth, and victim commemoration, to judicial and administrative sanctions. Guarantees of non-repetition are equally varied, including legal reform and human rights training programs.

Thomas M. Antkowiak, *A Dark Side: The Inter-American Court and Reparations for Indigenous Peoples*, DUKE J. COMP. & INT'L L. 7, 9 (2014); *see also* Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contents*, in OUT OF ASHES: REPARATIONS FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 11 (K. De Feyter et al. eds., 2005).

¹⁶⁰ *See generally* Bar-Tal & Bennink, *supra* note 145, at 21.

¹⁶¹ *Id.*

¹⁶² *See generally id.*; COLLEEN MURPHY, A MORAL THEORY OF POLITICAL RECONCILIATION (2010) (analyzing the moral problems of political relationships already under the strain of civil conflict and repression and identifying the types of repair and transformation needed); Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violence and Empathetic Means of Human Problem Solving*, UNBOUND: HARV. J. LEGAL LEFT 79 (2012-2013); Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 PEPP. DISP. RESOL. L.J. 35 (2013); Rachel Lopez, *The (Re)Collection of Memory After Mass Atrocity and the Dilemma for Transitional Justice*, 47 N.Y.U. J. INT'L L. & POL. 799 (2015).

benefit those with the largest places at the reconciliation table.¹⁶³ And the call for communitarian social harmony tends to obscure, or even erase, the conflict's still-contested history and consequences.¹⁶⁴

Agonist theory posits the impossibility of genuine consensus in a complex society and views a reconciliation mandate of societal harmony as dangerously exclusionary.¹⁶⁵ An overriding goal of harmony drowns out dissenting voices and perpetuates repression of those of lesser power, not as part of the original transgression, but later in attempting to rectify it.¹⁶⁶ When assertive minorities are labeled uncooperative and, therefore, detrimental to harmony, they are quickly dismissed, or even excluded, from reparative processes.¹⁶⁷

Agonist theory thus seeks to reconceive reconciliation not along purely communitarian lines but as a deliberate accommodation of perpetual conflict in a multidimensional society.¹⁶⁸ The theory aims to enable groups

¹⁶³ See generally Hirsch, *supra* note 100, at 1-6; Muldoon, *supra* note 102. Other branches of political theory critique are rhetorical and narrative. See, e.g., Doxtader, *supra* note 102, at 268; Ross, *supra* note 102, at 210.

¹⁶⁴ See Hirsch, *supra* note 100, at 3; accord Bashir, *supra* note 100, at 48-49 (“[T]he task of accommodation is made even more difficult when there are not only diversities of values, languages, cultures, and identities, but also persistent and unresolved issues of historical injustice.”). But see Philip Selznick, *Communitarian Jurisprudence*, in TO PROMOTE THE GENERAL WELFARE: A COMMUNITARIAN READER 3 (David E. Carney ed., 1999) (“A communitarian ethos calls for integration, but also demands protection of diversity and reconciliation of interests . . . The most important expression of civility is the virtue we call justice. Justice speaks civilly to the inevitable diversity of passions and interest. Differences are adjudicated, not erased.”); James A. Gardner, *Federalism and the Problem of Political Subcommunities*, in TO PROMOTE THE GENERAL WELFARE: A COMMUNITARIAN READER 295 (David E. Carney ed., 1999) (“Communitarianism . . . sees the self as situated in . . . the social conditions which it finds itself, yet capable through personal reflection and dialogic engagement with others of thinking critically, if not transcendently, about its goals, its moral views, and ultimately its own identity.”).

¹⁶⁵ Jonathan R. Cohen, *Coping with Lasting Social Injustice*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 259, 268-69 (2007).

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* at 268-69.

¹⁶⁸ See Little, *supra* note 99, at 198.

to exist peaceably in the same polity amid tensions and conflict, rather than to compel groups to try unsuccessfully to leave behind the painful past.¹⁶⁹ It endorses differences “that cannot simply be managed, forgotten, or transcended and a commitment to equality that resists the kinds of seamless narratives of national belonging that have been so effective at silencing [minority] claims.”¹⁷⁰ At bottom, it promotes conflictual engagement in hopes of producing a new society born and sustained amid discord.¹⁷¹

B. Basic Structure

In light of marked differences among initiatives, a singular, universally accepted reconciliation structure does not exist.¹⁷² Nevertheless, a basic, generally recognized reconciliation structure emerges. That structure—the prevailing template—tracks South Africa’s truth and reconciliation process.¹⁷³ Its path-forging Truth and Reconciliation Commission (TRC) anchored the negotiated peaceful transition from apartheid to democracy.¹⁷⁴ Inspired by Nelson Mandela and chaired by Archbishop Tutu, South Africa’s legislatively created TRC significantly advanced social healing by

¹⁶⁹ See Bashir Bashir & Will Kymlicka, *Introduction: Struggles for Inclusion and Reconciliation in Modern Democracies*, in *THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES* 1-24 (Will Kymlicka & Bashir Bashir eds., 2008).

¹⁷⁰ Balfour, *supra* note 99, at 96. See also Little, *supra* note 99, at 198.

¹⁷¹ See Cohen, *supra* note 165, at 268-69.

¹⁷² See generally Bashir & Kymlicka, *supra* note 169.

¹⁷³ See Yehudith Auerbach, *The Role of Forgiveness in Reconciliation*, in *FROM CONFLICT RESOLUTION TO RECONCILIATION* 149 (Yaacov Bar-Siman-Tov ed., 2004) (describing attempts to “redress past injustice and bring about peace within torn societies” and citing the “best known example of . . . a truth commission is in South Africa initiated by Nelson Mandela with the blessing of Desmond Tutu”).

¹⁷⁴ See generally Yamamoto & Mackintosh, *supra* note 104. The National Party—composed exclusively of white South Africans—only agreed to give up military power if there was a process that granted whites amnesty and allowed them to keep their property. See *id.*

acknowledging historic and persistent suffering and initiating reparative programs.¹⁷⁵

Three overlapping committees opened paths toward social healing.¹⁷⁶ One committee focused on truth telling by investigating the gross human rights violations and by hearing the stories of those harmed.¹⁷⁷ Another committee considered amnesty for those who confessed to political crimes.¹⁷⁸ A third recommended forms of economic justice.¹⁷⁹ Together they set the stage for the tripartite structure of reconciliation initiatives globally.¹⁸⁰

Significantly, South Africa's TRC signaled to the world that, in response to historic injustices, there "is a need for understanding, but not for

¹⁷⁵ See Kenneth Christie, *South African Truth Commission Performs Vital Role*, STRAITS TIMES, Apr. 25, 1996, at 39.

¹⁷⁶ Alexandra Zavis, *Panel Faces Truth, Fear, and Anger: Apartheid's Past Is Confronted*, HOUSTON CHRONICLE, Mar. 2, 1996, at 23; Arno Mayer, *South Africa Begins Digesting the Apartheid Era*, DEUTSCHE PRESSE-AGENTUR, Dec. 3, 1995.

¹⁷⁷ See John Battersby, *South Africans Weigh Exposing Apartheid Crimes*, CHRISTIAN SCI. MONITOR, May 18, 1994, at 1 (describing how the TRC aims to foster healing through storytelling and amnesty).

¹⁷⁸ See *id.* (describing how the TRC aims to foster healing through storytelling and amnesty); Rosenberg, *supra* note 149, at 87.

¹⁷⁹ See John Yeld, *Apartheid Profiteers 'Must Pay Reparation'*, AFRICA NEWS SERVICE, May 12, 1997; *TRC to Host Forum on Economic Justice and Reconciliation*, SOUTH AFRICAN PRESS ASS., Mar. 14, 1997.

¹⁸⁰ See Desmond Tutu, *Truth and Reconciliation Commission, South Africa (TRC)*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa> (describing how South Africa's TRC "attracted global attention, as it was the first commission to hold public hearings in which both victims and perpetrators were heard." Additionally, because South Africa's TRC took a different approach from the Nuremberg Trials, the TRC was "hailed as an innovative model for building peace and justice and for holding accountable those guilty of human rights violations." *Id.* Since the South Africa TRC, "[m]any other countries dealing with postconflict issues have instituted similar methodologies for such commissions." *Id.* See also *South Africa: Impunity*, *supra* note 134 (describing South Africa's TRC as "something of a poster child for transitional justice"). Cf. Luciana Bertoia, *The Model Is Argentina, Not South Africa*, BUENOS AIRES HERALD (Oct. 19, 2014), <http://www.buenosairesherald.com/article/172513/the-model-is-argentina-not-south-africa> (positing that Argentina's TRC is the prevailing model, not South Africa's).

vengeance, a need for reparation, but not for retaliation.”¹⁸¹ For the TRC, healing individuals, communities, and society¹⁸² entailed both truth-telling and material changes in social, economic, and political institutions.¹⁸³

More broadly, the TRC focused on ways to repair the persisting damage to people (physical, psychological, and financial), communities (schools, businesses, housing, infrastructure, and healthcare), and society (divisions, guilt, shame, and lack of moral standing).¹⁸⁴ Drawing from communitarian philosophy, many supporters of South Africa’s TRC believed that its investigation and recommendations would lead to institutional changes and eventually to new communities marked by racial equality.¹⁸⁵

In sum, the prevailing reconciliation template featured three practical steps: (1) the country creates a truth-seeking commission to address past or ongoing injustice¹⁸⁶—investigating atrocities and hearing victim stories—and to make findings of responsibility and recommendations for reparative action;¹⁸⁷ (2) the judiciary or a tribunal rules on either criminal prosecution or amnesty,¹⁸⁸ and (3) the executive and legislative branches undertake

¹⁸¹ Robert Block, *Apartheid Sinners Confront the Truth*, THE INDEPENDENT (London), May 19, 1995, at 14; see Eric K. Yamamoto, *Race Apologies*, 1 IOWA J. GENDER RACE & JUST. 50 (1997) (quoting Justice Minister Dullah Omar, an author of the Reconciliation Legislation).

¹⁸² See *supra* Sections II & IV.A.

¹⁸³ See *supra* Sections II, III & IV.A.

¹⁸⁴ See *supra* Sections II & IV.A.

¹⁸⁵ See generally Adrien K. Wing, *Towards Democracy in a New South Africa*, 16 MICH. J. INT’L L. 689 (1995) (describing the transition from apartheid to a constitutional democracy); Rosenberg, *supra* note 149, at 87.

¹⁸⁶ See INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 122-40 (David Bloomfield et al. eds., 2003), <http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf> (explaining that “one of the most popular transitional mechanisms in recent years is . . . the truth commission”).

¹⁸⁷ See *id.* at 125.

¹⁸⁸ See *id.* at 97-111 (noting that “reconciliation processes are ineffective as long as the vicious circle of impunity is not broken”); Yaacov Bar-Siman-Tov, *Dialectics Between Stable Peace and Reconciliation*, in FROM CONFLICT RESOLUTION TO RECONCILIATION 65, 74 (Yaacov Bar-Siman-Tov ed., 2004) (observing that “new beliefs should refer to

reconstructive and reparative implementing actions¹⁸⁹ based on the commission's recommendations.¹⁹⁰

1. Truth Seeking

The reconciliation template's first step, and the heart of a truth commission's hands-on work, is "to seek the truth about past abuses in order to recognize the dignity of victims, uphold human rights, and contribute to social change."¹⁹¹ The commission's truth seeking serves multiple aims, and truth itself has several meanings: a forensic or factual truth, a personal or narrative truth, and a healing and restorative truth.¹⁹²

The key to this first step is public testimony to commissioners and, through media, to local and global audiences. South Africa's truth-telling

the conflict with more objective attitudes, and even with self-criticism that includes recognition of one's responsibility for the misdeeds throughout the conflict and acceptance that both sides are victims of the conflict").

¹⁸⁹ See *supra* Section II (detailing the last two of the 4Rs in the *social healing through justice* framework).

¹⁹⁰ See INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *supra* note 186, at 145-61. The International Center for Transitional Justice acknowledges that an "idealized, legalistic model" would place these three steps (truth telling, prosecution/amnesty, and reconstruction/reparation) "in parallel, because reparations, truth seeking, and criminal justice respond to specific victims' rights that are demanded immediately." González et al., *supra* note 26, at 90. The reality, however, reflects that accountability, and more broadly social healing, is a "long-term process in which each transitional justice measure will have stages of different intensity and where different institutions will establish sequences with one another, sometimes causally." See *id.* The prevailing model, then, accounts for this reality where truth telling is more of a first step followed by prosecutions/amnesty and reparation/reconstruction.

¹⁹¹ Kofi Annan, *Foreword to Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?*, INT'L CENTER TRANSITIONAL JUST. 1, 1 (June 2014), <https://ictj.org/sites/default/files/ICTJ-Report-KAF-TruthCommPeace-2014.pdf>; see also Nadim N. Rouhana, *Reconciling History and Equal Citizenship in Israel: Democracy and the Politics of Historical Denial*, in THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES 75 (Will Kymlicka and Bashir Bashir, eds., 2008) (emphasizing the importance of truth revelation and rejection of historical denial).

¹⁹² See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA VOL. 1, at 110 (1998), <http://www.justice.gov.za/trc/report>.

committee enabled victims to recount stories of horrific politically motivated violence, including imprisonment, torture, rape, and neighborhood destruction.¹⁹³ By creating a receptive forum and documenting and disseminating victim accounts, the TRC helped generate “a new global ‘truth’ about the personal horrors of apartheid through cathartic victim storytelling.”¹⁹⁴

South Korea’s TRCK also encouraged truth telling, although through a more staid process in which victims submitted individual applications, investigators examined claims, and commissioners made determinations about the “truth.”¹⁹⁵ The TRCK received 11,174 applications, confirmed the facts of 8,468 claims, and published seven interim reports and a 1,100 page final report.¹⁹⁶ The TRCK extended its investigation into causes, reviewing

¹⁹³ See Suzanne Daley, *Apartheid Torturer Testifies, As Evil Shows Its Banal Face*, N.Y. TIMES (Nov. 9, 1997), <http://www.nytimes.com/1997/11/09/world/apartheid-torturer-testifies-as-evil-shows-its-banal-face.html?pagewanted=all> (describing the stories told by both the victims and the perpetrators of the Apartheid atrocities); Yamamoto & Mackintosh, *supra* note 104, at 9.

¹⁹⁴ Yamamoto & Mackintosh, *supra* note 104, at 12; see also Yamamoto et al., *supra* note 24, at 47; Jasmine Wright, *South Africa Frees Apartheid-Era Death Squad Leader ‘Prime Evil,’* PBS NEWSHOUR (Jan. 30, 2015), <http://www.pbs.org/newshour/rundown/south-africa-frees-notorious-apartheid-era-killer-prime-evil/> (describing how Eugene de Kock’s pending release from prison serves as an interest in national reconciliation, despite his prosecution, conviction, and prison sentence for twenty years).

¹⁹⁵ Kim, *supra* note 88, at 125, 142-44, 163 (noting that the TRCK announced “state responsibility” for 1,340 civil deaths from the Yeosu-Suncheon Revolt in 2010 and confirmed cases from the Korean War in 2009). According to Professor Kim, however, the TRCK focused on factual or forensic truth, rather than “personal or narrative truth, social or ‘dialogue’ truth, and healing and restorative truth.” *Id.* at 163. Because of this, it failed to construct a single overarching historical narrative. *Id.* For Kim, this is the fundamental reason why the TRCK recommendations and implementation of those recommendations were insufficient. *Id.* See also TRUTH AND RECONCILIATION IN SOUTH KOREA: BETWEEN THE PRESENT AND FUTURE OF THE KOREAN WARS (Jae-Jung Suh ed., 2013) (describing the truth and reconciliation efforts in South Korea after the Korean War).

¹⁹⁶ See Kim, *supra* note 88, at 152 (detailing that out of the applications received, “290 cases were related to the independence movement, 8,175 to civilian massacres, and 2,709 to human rights abuses” by either South Korea or South Korea’s enemies); see also *Truth*

confidential government files and conducting interviews with officials and witnesses to generate a forensic truth.¹⁹⁷

Some perceive the truth-revealing component of a reconciliation initiative to be of paramount importance.¹⁹⁸ The International Center for Transitional Justice observes, “more and more commissions are being created with the expectation that their foremost task” is truth revelation.¹⁹⁹ Others are more cautious, even critical. Human rights scholar Tara Melish cites unrealistic assumptions about the effect of victim testimonies.²⁰⁰ She notes that some “presuppose a direct causal connection between truth-telling and the broader goals of transitional justice, uncritically concluding that the public airing of truths about the past will in fact bring about institutional learning, official acknowledgement, and social healing, causing victims and perpetrators to come together in reconciliation and forgiveness.”²⁰¹ Instead, Melish posits that broader civil society and institutional actors must actively and persistently pursue reconciliation beyond initial testimonies to engender real transformation.²⁰² From this vantage point, truth telling is a crucial first step, but only one step, toward genuine reconciliation.

Commission: South Korea 2005, U.S. INST. OF PEACE (Apr. 18, 2012), <http://www.usip.org/publications/truth-commission-south-korea-2005>.

¹⁹⁷ See Kim, *supra* note 88, at 152 (noting that the TRCK could “issue a warrant to call witnesses for an interview and investigation” but that a warrant lacked “strong enforcement mechanisms, with only a fine not exceeding 10 million won for noncompliance (8,800 USD)”).

¹⁹⁸ See INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *supra* note 186, at 122-40 (noting that “historical accounting via truth-telling is one of the most important steps in the reconciliation process”). See also Bar-Tal & Bennink, *supra* note 145, at 208.

¹⁹⁹ González et al., *supra* note 26, at xii.

²⁰⁰ Tara J. Melish, *Truth Commissions Impact: A Participation-Based Implementation Agenda*, 19 BUFF. HUM. RTS. L. REV. 273, 279-81 (2012).

²⁰¹ *Id.* As discussed later, Melish’s assessment calling for more active civil society engagement as the answer to truth commission shortcomings is itself narrow and, in important ways, shortsighted. See *infra* notes 371-72 and accompanying text.

²⁰² Melish, *supra* note 200, at 279.

2. Criminal Prosecution or Amnesty

The reconciliation template's second step seeks acknowledgement of malfeasance through either prosecution and punishment or amnesty in exchange for confessions of political crimes.²⁰³ After the Cold War, many governments and international organizations created new justice frameworks to deal with the consequences of violence.²⁰⁴ Colombia's national courts, for instance, developed new criminal law standards that were more stringent than international human rights norms.²⁰⁵ By contrast, the United Nations-backed international and hybrid criminal tribunals adjudicated, albeit slowly, accountability for atrocities in the Balkans, Rwanda, Sierra Leone, Cambodia, Lebanon, and beyond.²⁰⁶

²⁰³ Some truth and reconciliation processes, however, skip this step because the truth commissions lack legal authority from constricted mandates. *See, e.g.,* Kim, *supra* note 111, at 106 (discussing South Korea's TRCK structure). South Korea's TRCK, for instance, "had no authority to punish perpetrators, even when they were positively identified and their wrongdoing plainly established." *See id.* It also did not have authority "to offer immunity to alleged perpetrators in exchange for their testimony or confessions, as had been done in the case of South Africa's TRC." *Id.*

²⁰⁴ Tolbert, *supra* note 21.

²⁰⁵ *See* Annan, *supra* note 191, at xi. Colombia's "human rights defenders [therefore] make extensive use of litigation." *Id.* The Colombia government also recently acknowledged that negotiations with opposition forces almost certainly contemplate "the prosecution of those most responsible for international crimes." *Id.*

²⁰⁶ Most of these international courts, including the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the Special Tribunal for Lebanon, and the Appeals Chambers of International Criminal Tribunal for Rwanda, are located in The Hague, Netherlands. *See About the Court*, INT'L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx (last visited Nov. 15, 2016); *About the ICTY*, UNITED NATIONS INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Nov. 15, 2016); *The ICTR in Brief*, UNITED NATIONS MECHANISM FOR INT'L CRIMINAL TRIBUNALS, <http://unictr.unmict.org/en/tribunal> (last visited Nov. 15, 2016); *About the STL*, SPECIAL TRIBUNAL FOR LEBANON, <https://www.stl-tsl.org/en/about-the-stl> (last visited Nov. 15, 2016). Other hybrid tribunals, including the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, are located within the countries where the atrocities occurred. *See* SPECIAL COURT FOR SIERRA LEONE: RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org/index.html> (last visited Nov. 15, 2016); *About ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA,

Special prosecutor investigations sometimes adequately address significant issues for a post-conflict society, including political violence, economic exploitation, and corruption.²⁰⁷ Negotiated peaceful transitions, however, sometimes require the political compromise of amnesty—an effective pardon for political crimes publically confessed.²⁰⁸ African National Congress’ leaders finally agreed to amnesty as part of the future South Africa TRC process when they realized that amnesty was a key sticking point in the negotiated peaceful transition to democracy.²⁰⁹ The only other option envisioned by those leaders: ramped up violent confrontations with the White National Party controlling the military.²¹⁰

The South Africa TRC’s amnesty committee administered the amnesty compromise by insisting on perpetrators’ full, detailed political confessions on the public record.²¹¹ The amnesty committee created a highly structured public forum for truth knowing that might not have otherwise

<https://www.eccc.gov.kh/en/about-eccc> (last visited Nov. 15, 2016). And the International Criminal Court, with jurisdiction over 122 member states, considers cases referred to it by the governments or the United Nations Security Council. *See About the Court*, INT’L CRIMINAL COURT, *supra*.

²⁰⁷ Annan, *supra* note 191.

²⁰⁸ *See* INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *supra* note 186, at 97-111.

²⁰⁹ *See* Yamamoto & Mackintosh, *supra* note 104, at 10.

²¹⁰ *See id.*

²¹¹ *Truth and Reconciliation Commission*, SOUTH AFRICA HIST. ONLINE, <http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc> (last visited Feb. 11, 2015). The amnesty committee “was empowered to grant amnesty to those charged with atrocities during Apartheid as long as two conditions were met: The crimes were politically motivated and the entire and whole truth was told by the person seeking amnesty.” *Id.*; *see Truth Seeking: Elements of Creating an Effective Truth Commission*, INT’L CTR. TRANSITIONAL JUST. 12 (Eduardo González & Howard Varney eds., 2013), <http://ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf> (noting that South Africa’s TRC “allowed victims to participate in amnesty proceedings where perpetrators confessed their crimes” and “encouraged several instances of direct contact between victims’ groups and offenders in an attempt to foster dialogue and understanding”).

materialized.²¹² And it compelled wrongdoers to assume an important degree of moral responsibility²¹³—but at the expense of criminal law accountability.²¹⁴

For this latter reason, some point to amnesty as an anathema to victim healing,²¹⁵ saying it neglects victims’ need for criminal justice.²¹⁶ Moreover, they warn that amnesty proponents mistakenly “try to legitimize [amnesty] by pointing to the [South Africa TRC] experience . . . as a so-called ‘tradeoff of rights’” but with a “warped and partial understanding of the complex mechanism used in that context and its consequences.”²¹⁷

Others cast a skeptical eye on criminal prosecutions. The International Center for Transitional Justice, for instance, challenges those who assume that criminal prosecutions could happen regularly, let alone generate just outcomes. International Center President Tolbert observes that international criminal courts are “losing their momentum”²¹⁸ and that national criminal courts struggle to “address adequately troubled pasts without the support of international institutions,” rendering the fight for human rights systematically through criminal law “virtually impossible.”²¹⁹

²¹² *Truth Seeking*, *supra* note 211, at 12.

²¹³ See *supra* Sections II & IV.A (detailing the conceptual underpinnings of moral responsibility).

²¹⁴ See González et al., *supra* note 26, at 91.

²¹⁵ In the “absence of a firm commitment to human rights, powerful spoilers may pressure the parties to cheat victims of their rights by, for example, immunizing perpetrators through blanket amnesties or proposing a truth commission[] in order to impede criminal investigations.” *Id.*

²¹⁶ See *id.* at xii.

²¹⁷ *Id.*

²¹⁸ David Tolbert highlighted the lack of international community support, mounting pressure, and slowing momentum stems partly from the reality that “[s]everal countries have attacked the ICC; [and] African Union members want heads of state to be immune from prosecution, thus undermining a fundamental principle of the court.” Tolbert, *supra* note 21.

²¹⁹ *Id.*

For some, a rigorous truth-confession requirement as a precondition to selectively conferred amnesty for political crimes reflects a path between ineffectual large-scale criminal prosecutions on the one hand and blanket amnesty on the other. South Africa's TRC walked that path.²²⁰ Another hybrid path, negotiated in Colombia in 2015 between the rebels and government, pursued prosecutions of higher-level leaders and orchestrators of crimes against humanity while bestowing amnesty to qualifying frontline fighters.²²¹ In these ways, criminal prosecution or selectively conferred amnesty, or some hybrid, is a second step in the reconciliation template.

3. Reconstruction and Reparation (Including Economic Justice)

The prevailing reconciliation template's third step is *reconstruction* and *reparation*. While *recognition* and *responsibility* mainly entail words and understandings, *reconstruction* (recasting institutions and formal relationships partly to prevent recurrence of transgressions) and *reparation* (repairing the damage to people and communities) require executive and legislative (and often business) actions. Combined with words and understandings, those reparative actions aim to generate material changes in institutional structures and living conditions.²²²

Reconstructive and reparative actions might encompass presidential or legislative apologies and commemoration projects; changes in laws to require security force transparency and accountability in preventing abuse repetition; changes in institutional control over public resources that affect daily living conditions; broad-based public education and continuing human

²²⁰ See generally Yamamoto, *supra* note 181.

²²¹ See *A Big Leap Toward Peace in Colombia*, ECONOMIST, Sept. 26, 2015, at 37 (describing three-year negotiated peace agreement between FARC and the government, emphasizing the hybrid amnesty-prosecution provision).

²²² See generally INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *supra* note 186, at 145-48.

rights research; and individual payments, economic capacity-building, and community development.²²³

As part of reconstruction and reparation efforts, South Africa's economic justice committee, aiming to empower black South Africans, generated a plan for immediate, long-term individual and community reparations to address apartheid's widespread economic damage.²²⁴ The plan responded to "the widening gap between the rich and poor to the 'historic benefit' enjoyed by apartheid businesses."²²⁵ Central to its plan were recommendations that private businesses, many of which profited greatly from apartheid, contribute to reparations funds and broader economic development.²²⁶

South Africa's government initially responded proactively—it delivered urgent interim reparations to those in dire need²²⁷ and partially improved the

²²³ *See id.*

²²⁴ Yamamoto & Mackintosh, *supra* note 104, at 9; *see also* INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *supra* note 186, at 154. The plan consisted of five components:

- (a) urgent interim reparation payments for people in urgent need, to enable them to access services and facilities; (b) individual reparation grants for each victim of a gross human rights violation paid over a period of six years; (c) symbolic, legal and administrative reparation measures; (d) community rehabilitation programmes; and (e) institutional reforms.

INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *supra* note 186, at 154.

²²⁵ Yamamoto & Mackintosh, *supra* note 104, at 10.

²²⁶ *Id.*

²²⁷ Simon Allison, *President's Fund: Where Is the Money for Apartheid Victims Actually Going?*, DAILY MAVERICK (Oct. 14, 2014), <http://www.dailymaverick.co.za/article/2014-10-14-the-presidents-fund-where-is-the-money-for-asheid-victims-actually-going/>.

More than 16,000 individuals—those who appeared before the TRC or were named in TRC reports—were given a one-off payment of R30,000 each, beginning in 2003. Although this is far below the amount recommended by the TRC (which averaged out to R21,000 per person annually for six years) this money has at least been disbursed. According to the justice department, there

nation's infrastructure by building roads, water works, and schools in black communities.²²⁸ The government also enacted the Black Economic Empowerment (BEE) legislation.²²⁹ This legislation and other post-apartheid legislative economic measures sought to employ "direct intervention in the distribution of assets and opportunities" to lessen economic disparities.²³⁰ The BEE aimed for capacity building to "ensure broader and meaningful participation in the economy by black people to achieve sustainable development and prosperity."²³¹ And, related, the

are only 20 people yet to receive their claims, and that's because the department can't find them.

Id.

²²⁸ Yamamoto & Mackintosh, *supra* note 104, at 11; *see also* Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in *THE HANDBOOK OF REPARATIONS* 176, 189 (Pablo de Greiff ed., 2006); Eddy Maloka, *Chapter 4: The Fruits of Freedom*, *SOUTH AFRICAN HIST. ONLINE*, <http://www.sahistory.org.za/archive/chapter-4-fruits-freedom> (last visited May 2, 2014) (describing South African measures post-apartheid to improve access to water, electricity, health care, education, and employment for black South Africans).

²²⁹ BEE has been defined as:

[A]n integrated and coherent socio-economic process. It is located within the context of the country's national transformation programme, namely the RDP (Reconstruction and Development Programme). It is aimed at redressing the imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa's financial and economic resources to the majority of the citizens. It seeks to ensure broader and meaningful participation in the economy by black people to achieve sustainable development and prosperity.

See Daron Acemoglu, Stephen Gelb & James A. Robinson, *Black Economic Empowerment and Economic Performance in South Africa*, at 4 (Aug. 2007)

[http://www.treasury.gov.za/publications/other/growth/06-Procurement%20and%20BEE/02-](http://www.treasury.gov.za/publications/other/growth/06-Procurement%20and%20BEE/02-BLACK%20ECONOMIC%20EMPOWERMENT%20AND%20ECONOMIC%20PERFORMANCE%20IN%20SO.pdf)

[BLACK%20ECONOMIC%20EMPOWERMENT%20AND%20ECONOMIC%20PERFORMANCE%20IN%20SO.pdf](http://www.treasury.gov.za/publications/other/growth/06-Procurement%20and%20BEE/02-BLACK%20ECONOMIC%20EMPOWERMENT%20AND%20ECONOMIC%20PERFORMANCE%20IN%20SO.pdf) (citing 2001 BEE Commission Report, p. 2).

²³⁰ BEE was designed to "[r]edress [] the imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa's financial and economic resources to the majority of the citizens"—the previously disenfranchised black population. *See id.*

²³¹ *See id.*

executive branch established a President's Fund to emphasize the importance of monetary payments to apartheid victims.²³²

South Korea's TRCK, too, made important—albeit limited—recommendations for reconstructive and reparative actions. These recommendations included publicly apologizing, correcting government records, revising history textbooks and government publications, amending health laws, educating about human rights, supporting memorial projects, compensating selected individuals, and retrying those wrongly convicted.²³³ Especially important for victims and their families, the TRCK made three notable policy recommendations: (1) the enactment of a special law to provide individual reparations to victims of civilian massacres during the Korean War,²³⁴ (2) the establishment of a permanent research foundation to further investigations and reconciliation; and (3) the proper burial of victims' remains after unearthing mass murder sites.²³⁵ The national government's elective branches undertook initial implementing actions.

C. Unfulfilled Promises

In some situations, however, including the TRCK's, external political influences limit the breadth and depth of truth commission

²³² See Allison, *supra* note 227 (referencing the establishment of the “President’s Fund” in 2005).

²³³ Kim, *supra* note 88, at 157 (explaining the recommendations were divided into four categories, including “(1) measures to restore the honor of victims; (2) measures to prevent the recurrence of human rights violations; (3) measures to achieve reconciliation and to promote democracy; and (4) measures to educate about and publicize the past.”); see also TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, TRUTH AND RECONCILIATION: ACTIVITIES OF THE PAST THREE YEARS 33 (2009) [hereinafter THREE YEAR REPORT]; REPUBLIC OF KOREA TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, COMPREHENSIVE REPORT, VOL.1, PT. 1, 199-200 (2010) [hereinafter Final TRCK Report 2010].

²³⁴ The recommendations for reparations did not cover all atrocities, an example being Japan's occupation of South Korea. See Kim, *supra* note 88.

²³⁵ Kim, *supra* note 88, at 157 (citing Final TRCK Report 2010); Final TRCK Report 2010, *supra* note 233, at 211.

recommendations.²³⁶ Moreover, as previously noted, even strong commission recommendations sometimes remain largely unimplemented by political branches and private businesses.²³⁷

Indeed, as South Africa approached 20 years post-apartheid in 2014, former TRC chair Archbishop Tutu characterized its reconciliation process as having “fallen tragically short.”²³⁸ Despite South Africa’s salutary initial efforts, its entire reconciliation initiative teetered on the edge of failure.²³⁹ Tutu cited the lack of government follow-through on TRC recommendations as a major shortcoming.²⁴⁰ He lamented, “[b]y choosing not to follow through on the commission’s recommendations, [the] government not only compromised the commission’s contribution to the process, but the very process itself.”²⁴¹ Most important, the government’s failure to implement TRC reparations recommendations forestalled the sense of reconciliation achieved.²⁴²

Unfulfilled truth commission promises, particularly for economic justice, are key indicators of incomplete, stalled, or backsliding reconciliation initiatives.²⁴³ In Colombia, for example, the government made many reparatory promises to the victims.

²³⁶ See *infra* Section V.D.2 (discussing South Korea’s TRCK).

²³⁷ See *supra* Sections II.B & III.

²³⁸ Tutu, *supra* note 6.

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ *Id.*

²⁴² See *id.* (describing how the TRC’s accomplishments must be seen against “a backdrop of a hopelessly inequitable country in which most of the rich have hung on to their wealth, while the ‘freedom dividend’ for most of the poor has been to continue surviving on scraps”).

²⁴³ See, e.g., Moreno, *supra* note 115. Importantly, this sense of “unfulfilled promises” often stems from the overall sense of a stagnant or regressing reconciliation initiative. Nevertheless, this sense may also come from “unrealistic expectations that are often set for truth commissions.” González et al., *supra* note 26, at ix. “Raising expectations among victims that a truth commission will solve all of their urgent demands can create frustration and mistrust, compounding an already difficult situation. Similarly, any

The country told [victims] that each individual crime could and would be clarified through the justice and peace process, promised them that the reparations process would be rapid and effective, and also led society to believe that the criminal process would be able to clarify the deep-rooted causes of the paramilitary phenomenon.²⁴⁴

But the promises remained pending indefinitely.²⁴⁵ Those suffering felt betrayed by government recalcitrance.²⁴⁶

For black South Africans, the combined lack of government follow-through on reparation recommendations and the private sector's harsh refusal to contribute to reparations funds heightened their sense of betrayal.²⁴⁷ Those most damaged by apartheid continue to live in poverty while those profiting from the decades-long oppression flourish.²⁴⁸ Racial divisions remain in a newly insidious form—with whites and a sliver of

suggestion that such a body could solve all of a country's ills only sets up the public for disappointment." *Id.*

²⁴⁴ Moreno, *supra* note 115.

²⁴⁵ *Id.*

²⁴⁶ See INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, "TO WALK FREELY WITH A WIDE HEART": A STUDY OF THE NEEDS AND ASPIRATIONS FOR REPARATIVE JUSTICE OF VICTIMS OF CONFLICT-RELATED ABUSES IN NEPAL (2014), <http://www.ictj.org/sites/default/files/ICTJ-Report-Nepal-Reparations-2014.pdf> (detailing Nepal's victims' continuing frustration with inadequate reparative action).

²⁴⁷ See *supra* notes 223-32 and accompanying text.

²⁴⁸ *SA United, Despite Divisions: Report*, SOUTH AFRICA.INFO (June 26, 2006), <http://www.southafrica.info/about/people/nation-making-260606.htm#U2Q8ofldVqU> (detailing a government report released in 2006, which "stresses that economic divisions within the country remain set along the racial fault-lines created by apartheid"); see also Yamamoto, *supra* note 181, at 205 ("The fight for reparations has also had the unfortunate consequence of sidelining the responsibility of other role players besides the government. The complicity of foreign corporations and governments in supporting the apartheid regime has only recently entered the discussion."); *Id.* at 199 ("Jubilee South Africa has pointed out that the multinational corporations that helped to finance the apartheid government in its final, most repressive years removed roughly R3 billion (US\$375,000,000) a year between 1985 and 1993 from the country. Jubilee argues that if 1.5 percent of those profits was returned each year for six years, financial reparations at the level of the original TRC recommendations could be paid.").

elite blacks prospering and the vast majority of blacks remaining impoverished.²⁴⁹

South Africa President Jacob Zuma recognized that recommended legislation for black economic capacity building failed to narrow the racial divide—whites continue to earn nearly 10 times more than blacks, and blacks are unemployed at rates five times higher than whites.²⁵⁰ He also acknowledged, “instead of redistributing wealth and positions to the Black majority, [the legislation has] resulted mainly in a few [black] individuals benefitting a lot . . . while the leadership of most big companies [remain] in white hands. The Black masses, the intended beneficiaries, have hardly gained.”²⁵¹ Furthermore, more than a decade after creation of the President’s Fund, most of the funds have yet to be dispersed, and a group representing apartheid victims has observed that new spending plans will not necessarily benefit traumatized communities.²⁵² According to Tutu,

²⁴⁹ See Lydia Polgreen, *In a Divided City, Many Blacks See Echoes of White Superiority*, N.Y. TIMES (Mar. 22, 2012), http://www.nytimes.com/2012/03/23/world/africa/in-cape-town-many-black-south-africans-feel-unwelcome.html?pagewanted=all&_r=0 (describing Cape Town as “the last bastion of white rule” where many blacks feel like second class citizens).

²⁵⁰ Alford, *supra* note 109.

²⁵¹ *Id.*

²⁵² Allison, *supra* note 227. The justice department is now turning toward community reparations, specifically providing health care, mental health care, education and housing. *Id.* But critics point out shortcomings of the new TRC purportedly in line with previous TRC recommendations:

[T]he limited scope of the proposal excludes the vast majority of affected communities; that victims of Apartheid, as envisaged by the TRC, were not consulted properly in the process of drafting the new regulations and will not benefit directly from them; and that the type of infrastructure-heavy projects envisaged are simply to make up for shortfall’s in the government’s own municipal infrastructure grants (in other words, the President’s Fund should not be used to do things that the government should be doing anyways).

Id. (citing the opinion of the Khulumani Support Group, which represents over 90,000 victims of Apartheid). Allison also notes that the justice department, in its plan for community reparations risks, “fail[ed] to adhere to the spirit of the TRC’s

“most of the rich have hung on to their wealth, while the ‘freedom dividend’ for most of the poor has been to continue surviving on scraps.”²⁵³

With lurching economic advances for a few, but not economic justice for all, some now feel that the new democratic South Africa government has forgotten its promises to the people.

Being forgotten and overlooked is very painful. The government here has not followed through on its promise to look after the soldiers and activists who sacrificed their youth, their education and often their lives for the struggle. [The government and private businesses] make promise after promise, but never deliver and I and my fellow forgotten soldiers are still left in poverty.²⁵⁴

Myriad obstacles plague “[a]n apparently] hopelessly inequitable country.”²⁵⁵ Indeed, many now view the entire reconciliation initiative as “falling well short of the goal of national unity through social healing.”²⁵⁶ For Archbishop Tutu, what is needed is something that might “offer South

recommendations, and is in danger of abusing [the] mandate to manage the President’s Fund.” *Id.*

²⁵³ Tutu, *supra* note 6. Tutu describes the current situation in South Africa as follows:

But, today, as we reflect on the commission’s contribution to re-weaving the fabric of our society, we do so against a backdrop of appalling violence being perpetrated, especially against women and children across our country. We do so against a backdrop of a hopelessly inequitable country in which most of the rich have hung on to their wealth, while the “freedom dividend” for most of the poor has been to continue surviving on scraps. We do so against the backdrop of an education system that is failing to prepare our youth adequately to contribute to their own and our nation’s development. We do so against the backdrop of the Marikana massacre and of the public protector’s report into the obscene spending on our president’s property in Nkandla. We do so against the backdrop of a dearth of magnanimity and accountability and ethical incorruptibility.

Id.

²⁵⁴ Yamamoto & Mackintosh, *supra* note 104, at 11 (quoting a former African National Congress soldier).

²⁵⁵ Tutu, *supra* note 6 (quoting Tutu’s description of the current state of South Africa).

²⁵⁶ Yamamoto & Mackintosh, *supra* note 104, at 12.

Africa society as a whole a systematic way of re-visiting [what is yet to be accomplished] and dealing with [repairing the damage] of the apartheid years and of entrenching a human rights culture.²⁵⁷

As developed earlier, these kinds of unfulfilled promises mark nearly all truth and reconciliation efforts throughout the world—from the United States to Canada, South Korea, Columbia, Peru, Kenya, and beyond. What is needed, we submit, is a conceptually sound and practically and politically grounded new implementation fourth step in the reconciliation process.

V. THE PROPOSAL: A NEW FOURTH STEP FOR ASSESSMENT, IMPLEMENTATION, AND OVERSIGHT

As mentioned, none of the prevailing reconciliation template's three steps directly addresses mechanisms for guiding and overseeing the implementation of truth commission recommendations. This missing piece is significant because at times politics and economics generate vastly inconsistent, incomplete, or even regressive implementing actions. The prevailing template also does not account for the reality that truth commission recommendations themselves sometimes are truncated, missing meaningful recommendations for needed economic justice and institutional restructuring.

A. The Need for a Structured Follow-up

The prevailing reconciliation template, then, provides structurally incomplete guidance for ongoing social healing controversies. Some, therefore, are beginning to urge the retooling of the theoretical reconciliation framework to better account for practical on-the-ground realities.²⁵⁸

²⁵⁷ Yamamoto & Serrano, *supra* note 31, at 496.

²⁵⁸ González et al., *supra* note 26, at 2. (questioning “is it possible that in spite of the caveats against the automatic application of best practices, drafters and other stakeholders

What is needed to help bridge the chasm between aspiration and realization is this: a structured implementation fourth step in the expanded reconciliation template. Described more fully below, this envisioned fourth step would be *an independent yet politically attuned follow-up body to assess and update existing recommendations, implement outstanding recommendations, and refashion and oversee future reconstructive and reparative actions to further comprehensive and enduring social healing.*²⁵⁹

This envisioned new fourth step is in its incipient stages of development. Scholars and human rights observers are starting to explore it in depth. In 2014, Professor Eric K. Yamamoto and Miyoko Pettit laid a conceptual foundation for fourth step implementing and oversight bodies generally and supported a concrete proposal for these types of bodies to foster a path forward in the partially stalled South Korea “Jeju Tragedy” reconciliation initiative.²⁶⁰

In 2011, the Buffalo Human Rights Law Review convened scholars to examine the need for reconciliation implementation mechanisms specifically for South Korea.²⁶¹ Human rights scholar Tara Melish highlighted the global need for a “permanent-follow up and orchestration mechanism” to “oversee and independently report on follow-up initiatives, both by government and broader civil society groups.”²⁶² In assessing significant shortcomings of South Korea’s 2005 TRCK, Professor Hun Joon Kim concluded that the reconciliation initiative considered but failed to fully operationalize mechanisms for implementing the commission’s

pay more attention to what appears to be international standards than to realities on the ground?”).

²⁵⁹ See Yamamoto et al., *supra* note 24, at 43-46.

²⁶⁰ See *id.* at 43-80.

²⁶¹ See Melish, *supra* note 2, at 1 (introducing the law review’s symposium on the implementation of truth and reconciliation commission findings and recommendations for South Korea).

²⁶² *Id.* at 65-66.

recommendations.²⁶³ For Kim, a permanent research foundation would have been a needed next step.²⁶⁴ Melish characterized this research foundation as “a permanent follow-up body to the TRCK to take forward its work and to focus on implementation of its recommendations.”²⁶⁵ The TRCK’s Framework Act contemplated a similar body that never became fully operational.²⁶⁶

Kim’s permanent research foundation and Melish’s “permanent follow-up and orchestration mechanism”²⁶⁷ were generally cast more as ideas than conceptually developed proposals.²⁶⁸ They did, nevertheless, signal an incipient call for a fourth step mechanism, highlighting the need for something more than truth commission recommendations and initial government responses.

Others, too, perceive the limitations of the prevailing reconciliation model and call for something more. The ICTJ acknowledged that “truth commissions can contribute toward the implementation of victims’ rights, but the full implementation . . . is beyond the reach of most truth commissions.”²⁶⁹ Other follow up means are needed for governments and TRC participants to respond to unfulfilled promises.²⁷⁰

These broad suggestions, along with the principles underlying social healing through justice, inform the suggested new structured fourth step in the reconciliation process, first in concept and then in operation. None of this would come easily in practice. A follow-through fourth step in the reconciliation process would be fraught with challenge. What is suggested

²⁶³ Kim, *supra* note 88, at 162-63.

²⁶⁴ *Id.*

²⁶⁵ Melish, *supra* note 2, at 22.

²⁶⁶ *Id.* at 22.

²⁶⁷ *Id.* at 65.

²⁶⁸ *Id.*

²⁶⁹ González et al., *supra* note 26, at 91.

²⁷⁰ Moreno, *supra* note 115.

here is not a polished model for post-commission implementation but rather an initially grounded salvo to accelerate its development.

B. A New Fourth Step in Concept

Drawn from the work of justice practitioners and scholars, the needed fourth step is an independent Assessment, Implementation, and Oversight Task Force with four main functions: (1) convening stakeholders in a collaborative ongoing follow-up process; (2) assessing truth commission report findings and recommendations and updating existing recommendations; (3) shepherding implementation of original or newly updated recommendations; and (4) extending or refashioning and then overseeing next reparative steps in light of evolving political, social, and economic conditions.

This follow-up body would be best “taken into explicit account at the [initiative’s] design stage.”²⁷¹ It could also be fashioned after a truth commission completes its work, while the legislative and executive branches undertake implementing actions. In concept, the body would operate with a significant degree of independence. Inevitable realpolitik influences, however, mean that the extent of the body’s actual independence would likely turn on its originating structure (composition and balance of decision-making power), its transparency (observer scrutiny), and the convergence of interests (among stakeholders) in the social healing enterprise.

1. An Assessment, Implementation, and Oversight Body

With this in mind, a fourth step follow-up Assessment, Implementation, and Oversight Task Force would entail mutual engagement by all major actors—government and private organization representatives, victim survivors and families, local community representatives, businesses, and

²⁷¹ See Melish, *supra* note 2, at 19.

researchers. Journalists, scholars, and civil rights and human rights organizations might productively participate as observers and commentators. The Task Force would “include spaces for broad stakeholder participation, ensuring that multiple spaces of leverage and information collection are available to local actors involved in implementation and follow-up work.”²⁷² More broadly, the Task Force would address the critical importance of active government and civil society engagement and entrepreneurship in following up on unimplemented recommendations. These follow-ups would include collecting and disseminating data and generating and employing assessment indicators for perpetual monitoring, all with an eye toward bolstering accountability.²⁷³

In light of these considerations, executive or legislative action would legitimize government participation in the Task Force.²⁷⁴ Additionally, national and local governments along with businesses and foundations could jointly fund Task Force operations, potentially through lump sum grants to a non-profit organization that houses and administers operations.²⁷⁵ As discussed below, formal government approval of the fourth step body, along with participation by victim representatives working with officials, businesses, and community groups, would be essential.

²⁷² *Id.* at 66.

²⁷³ *Id.* at 63.

²⁷⁴ See Yamamoto et al., *supra* note 24, at 43 n.203.

²⁷⁵ See *id.* at 44. Cf. *Morocco Still a Model for Justice in MENA, but Questions Remain*, INT’L CTR. TRANSITIONAL JUST. (Feb. 8, 2016), <https://www.ictj.org/news/morocco-still-model-justice-mena-questions-remain> (noting that the National Council on Human Rights (CNDH), which is a national institution for the protection and promotion of human rights, is responsible for following up on the Equity and Reconciliation Commission’s recommendations and is expected to issue a final report on the implementation of recommendations and unresolved cases in 2016); Danesius Marteh, *Justice Experts Slate Ellen’s TRC Report Implementation*, FRONT PAGE AFRICA (Jan. 27, 2016), <http://www.frontpageafricaonline.com/index.php/news/7343-transitional-justice-experts-slate-ellen-s-trc-report-implementation> (stating that the Independent National Human Rights Commission, a government-created commission, “has prime responsibility for implementing the Truth & Reconciliation Commission report”).

Control by a government agency, however, by locating the Task Force under a bureaucratic agency, would tend to impede proper functioning. Government officials need to participate in, but not control, Task Force endeavors. Achieving the delicate balance of public and private support and participation while ensuring a key measure of Task Force independence would be crucial to effective follow-up operations.²⁷⁶

2. Goals

The Task Force's five main goals would be:

- (1) building upon the truth commission's inquiry (which would likely have been completed earlier and possibly without all responsible parties' full participation) by updating and by filling any gaps in commission findings;
- (2) assessing the completeness, fairness, and efficacy of the truth commission's recommendations, particularly considering new and updated information and thoughtful discordant voices;
- (3) assessing the effectiveness of implementing actions already taken to determine what more is needed to repair the persisting damage (both individual and communal);
- (4) in view of (1), (2), and (3), recommending and overseeing concrete follow-up steps as part of a larger integrated reparative justice plan in light of evolving political, social, and economic conditions; and
- (5) fostering reparative justice in ways that benefit the survivors and descendants of the historic injustice, including their communities; that assure accountability; and that enhance the

²⁷⁶ There are a number of possible organization structures for an "independent" entity. One that integrates government support without undue government control could be a non-profit organization that has operation expenses funded for a defined period by a government block grant—with specific additional programs supported by private funding.

democratic legitimacy of the participating governments and private organizations.²⁷⁷

These broad goals would help a Task Force envision and guide further needed reparative actions in light of the “Four Rs” of *social healing through justice—recognition, responsibility, reconstruction, and reparation*.

C. A Fourth Step in Operation

1. Assessing Truth Commission Findings and Recommendations and Implementing Actions Taken

Assessing the efficacy of truth commission recommendations is integral to a sense of justice done. Truth commission recommendations, usually set forth in a formal commission report, are the foundation for reconciliation initiatives.²⁷⁸ But, as predicted by critiques of reconciliation’s communitarian philosophy, victims or perpetrators sometimes challenge the legitimacy of truth commission inquiries because they view them as either politically motivated or insufficiently backed by evidence.²⁷⁹ While

²⁷⁷ See Yamamoto et al., *supra* note 24, at 45.

²⁷⁸ See, e.g., CHEGA! THE REPORT OF THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN TIMOR-LESTE (CAVR) (2005), <http://www.cavr-timorleste.org/en/chegaReport.htm>; *After 10 Years, CAVR Report Still Resonates in Timor-Leste and Around the World*, INT’L CTR. TRANSITIONAL JUSTICE (Feb. 23, 2016), <https://www.ictj.org/news/10-years-cavr-report-timor-leste-truth> (detailing how the CAVR truth commission report paved the way for an “innovative community reconciliation program” and contributed to grassroots peace in Timor-Leste); The Canadian Press, *Manitoba Tables Bill to Act on Truth and Reconciliation Recommendations*, CTV NEWS (Feb. 25, 2016), <http://www.ctvnews.ca/politics/manitoba-tables-bill-to-act-on-truth-and-reconciliation-recommendations-1.2793053> (indicating that the truth and reconciliation commission recommendations led to the Manitoba government proposing a law that would “lay a path toward reconciliation with Indigenous people”).

²⁷⁹ See, e.g., *Truth Seeking*, *supra* note 211, at 15 (citing the Truth and Reconciliation Commission of the Democratic Republic of Congo as a truth commission perceived as politically motivated because the appointments to the commission occurred before the commission was governed by a legal statute and were dependent on political affiliations to the parties represented at the peace negotiations in 2002).

affording appropriate deference to the commission, a Task Force would assess the completeness of the commission's findings and recommendations. Input from scholars, human rights groups, businesses, nonprofit community organizations, and government officials would bolster the legitimacy of this work.²⁸⁰

Reconciliation initiatives stall, sometimes abruptly, because of weak or incomplete truth commission recommendations.²⁸¹ According to the International Center for Transitional Justice, “recommendations that are too general, not based on the actual inquiry, or lacking the support of authoritative technical expertise [do] not have the credibility to garner the support needed for implementation.”²⁸² At other times, salutary interim recommendations are omitted from final commission recommendations.²⁸³ At still other times, clearly appropriate recommendations—for instance, individual reparations for those still suffering—are missing altogether, undercutting the legitimacy of the overall initiative.²⁸⁴ Thus, a primary objective of a fourth step Task Force would be to assess the efficacy and completeness of original recommendations (and supporting findings) and fill gaps in light of new information.²⁸⁵

Especially important, the fourth step follow-up Task Force would then evaluate implemented actions to date. In particular, it might discern the

²⁸⁰ *See id.* (emphasizing the importance of “meaningful consultation with all interested parties and their involvement,” particularly the participation of “government, civil society, victims groups, and others who may be impacted by the work of the commission”).

²⁸¹ *See supra* Section II.B.

²⁸² González et al., *supra* note 26, at xii.

²⁸³ For example, South Korea's 2005 TRCK made both interim and final recommendations that “appear[ed] to be in tension in many important respects,” and many of its recommendations were inconsistent with those issued by other specialized South Korea truth commissions. Melish, *supra* note 2, at 16.

²⁸⁴ *See supra* Section II.B.

²⁸⁵ *See* Melish, *supra* note 2, at 16 (stating that “these considerations will need to be closely attended by advocates and other stakeholders in the implementation process ahead”).

appropriateness of reconstructive and reparative actions taken—for instance, apologies issued, memorials erected, educational institutions established, and community economic capacity-building initiated. It would do this assessment with an eye on actual consequences for victims,²⁸⁶ communities, and the larger society. And it would approach this task with fairness and balance—by commending salutary efforts, constructively critiquing shortcomings, and suggesting further grounded actions.

2. Shepherding Further Implementation

As part of that task, the fourth step Task Force could sponsor social science studies on cultural and economic impacts. It could monitor national and local governments' and private groups' participation in the implementation process.²⁸⁷ And it might regularly publish summary progress reports on what the government and others have and have not accomplished, along with suggestions for new or revised measures.²⁸⁸ In short, the Task Force might operate as a review and reporting service to track implementation.

The Task Force might also create working groups to interact with businesses, local officials, and community organizations to address politically challenging recommendations. Perhaps most important, those working groups would work with, lobby, or pressure executive and legislative branches of local and national governments to shepherd policy prescriptions into programs, particularly those addressing economic justice. More broadly, the Task Force might encourage governments and private organizations to devote resources for public education campaigns, coalesce survivors' stories into widely publicized public records, and facilitate

²⁸⁶ See Waterhouse, *supra* note 19, at 267-70 (emphasizing the need to design and implement reparative programs from the victims' perspectives).

²⁸⁷ See Yamamoto et al., *supra* note 24, at 45 n.209.

²⁸⁸ See *Truth Seeking*, *supra* note 211, at 67-69.

research on law and policy initiatives aimed at preventing future repetition of past abuses.

3. Refashioning and Overseeing New Paths Forward in Light of Evolving Conditions

Politics, economics, and social norms often influence the implementation of truth commission recommendations.²⁸⁹ These often-shifting realpolitik influences regularly reshape government policies, transform economic prospects, and alter public consciousness about what is right and just.²⁹⁰

The political backdrop affects the operations and perceived legitimacy of the implementation process.²⁹¹ Changing presidential or legislative leadership sometimes undermines reparative actions.²⁹² Conflicts at home

²⁸⁹ *See, e.g., id.* (recognizing that “key recommendations on justice, reparations and archives have not yet been implemented[,] . . . [which] is due principally to problems within the parliamentary system and the politics of Timor-Leste’s relationship with Indonesia” and that the greatest challenge to implementing the truth commission report’s recommendations today is that the implementation of the most important recommendations related to human rights committed by Indonesia is “subject to the politics of the relationship between Dili and Jakarta”).

²⁹⁰ *See generally* THE HANDBOOK OF REPARATIONS (Pablo de Grieff ed., 2008) (addressing the importance of politics in shaping a wide range of reparations initiatives).

²⁹¹ For human rights scholar Tara Melish, “whether a truth commission is effective depends to a large extent upon two critical factors: (1) whether it is able to attract the attention of its constituents, and (2) whether the commission is perceived as legitimate among members of the mass public.” Melish, *supra* note 2, at 24. *See also* Marteh, *supra* note 275 (addressing the politics in Liberia behind the implementation of truth and reconciliation report recommendations and the danger of quantifying, rather than providing qualitatively analyzing, implementation efforts by the government).

²⁹² *See, e.g.,* San Yamin Aung, *Outgoing Parliament Approves Presidential Protection, Immunity Bill*, IRRAWADDY (Jan. 28, 2016), <http://www.irrawaddy.com/burma/outgoing-parliament-approves-presidential-protection-immunity-bill.html> (noting that on the last sitting day of the outgoing Burma Parliament, lawmakers approved the controversial Presidential Security Bill, which “guarantees lifetime personal security and legal immunity for former heads of state” and which was apparently expedited for the benefit of the outgoing President Thein Sein); Marteh, *supra* note 275 (noting that the path to reconciliation shifted upon the election of President Ellen Johnson-Sirleaf, who has championed national reconciliation for Liberia).

and abroad stall sensitive recommendations.²⁹³ Unstable administrations, especially those partly responsible for historic injustices, at times halt implementing actions.²⁹⁴ Excessive control by government officials potentially dampens meaningful—and legitimizing—public participation.²⁹⁵ With ebbing and flowing political and economic tides, the impediments to social healing are numerous and varied.

For instance, according to transitional justice advocate Kim Dong-Choon, political constraints curtailed the implementation of the recommendations of South Korea's 2005 TRCK.²⁹⁶ Those constraints encompassed politicians deploying Cold War anti-communist rhetoric to justify human rights violations, former government officials refusing to cooperate because of involvement in past abuses, and military officials opposing the entire reconciliation undertaking.²⁹⁷

Economic upheavals also weigh heavily on policymaker efforts. Governments sometimes cite recessions, fluctuating markets, or pressing military expenditures as reasons to postpone individual payments, economic capacity-building, and institutional restructuring.²⁹⁸ Careful Task Force

²⁹³ See, e.g., Cristián Correa, *From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia*, INT'L CTR. TRANSITIONAL JUST. (Oct. 2015),

https://www.ictj.org/sites/default/files/ICTJ_Report_ColombiaReparationsChallenges_2015.pdf (discussing the various challenges to implementing recommendations due to the ongoing armed conflicts in Colombia).

²⁹⁴ See, e.g., *After 10 Years*, *supra* note 278 (noting that Timor-Leste, “for pragmatic reasons,” prefers to both ignore the CAVR truth commission report’s recommendations and “argue that its duty of care is being met through its social security, health, and other services”).

²⁹⁵ See, e.g., Kim, *supra* note 111, at 112-22 (indicating that the implementation of TRCK recommendations mainly rested in the hands of the national government with little public participation).

²⁹⁶ See *id.*

²⁹⁷ See *id.*; see also Melish, *supra* note 2, at 18.

²⁹⁸ For example, the International Center for Transitional Justice highlighted how the political and economic relationship between Timor-Leste and Indonesia has impacted implementation efforts as follows:

evaluation of those delay claims, with an assessment of priorities, would be important for fashioning steps forward.

Finally, evolving social norms also shape implementation. Increasing attention to gender, sexual orientation, race, and indigeneity encourages marginalized groups to advocate for heightened recognition and tailored remedies.²⁹⁹ Similarly, evolving concerns about environmental preservation, peace, and responsible economic development sometimes reshape the tenor and specifics of social healing.³⁰⁰ For instance, notions of gender redress now spur reparations advocacy for mass sexual violence, and environmental justice tenets bolster opposition to military base construction where past injustice awaits remediation.³⁰¹

[I]t is important to remind ourselves that Timor-Leste has land and sea borders with its large neighbor [Indonesia] and, as it emerges from deep poverty and trauma and oil prices head south, now depends on Indonesia heavily for investment, educational opportunity, communications, and affordable goods and services. This economic relationship is being extended to military and other forms of cooperation. This leaves little if any wriggle room for justice and reparations for past crimes; both in fact are opposed by Timor-Leste's leaders, even though a number of high-ranking Indonesian military officers have been indicted by the UN-supported serious crimes process. Timor-Leste's policy is also a convenient fig-leaf for the international community, which also prioritizes good relations with Jakarta and has a vested interest in letting bygones be bygones.

After 10 Years, *supra* note 278.

²⁹⁹ See generally Pettit, *supra* note 61, at 278-79 (examining intersectional race-gender sensitive redress with a focus on sexual violence); Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, in *IMPLICIT BIAS ACROSS THE LAW* 265 (Justin D. Levinson & Robert J. Smith eds., 2012) (calling for intersectional race-gender sensitive redress to account for implicit redress bias); Michele Park Sonen, *Healing Multidimensional Wounds of Injustice Intersectionality and the Korean "Comfort Women,"* 22 *BERKELEY LA RAZA L.J.* 269 (2012) (employing an intersectional race-gender redress analysis for Korean comfort women).

³⁰⁰ See, e.g., Yamamoto et al., *supra* note 24, at 75-81 (discussing the devastating damage to Jeju Island's natural environment and calling for attention to economic justice).

³⁰¹ See generally *id.* at 68-78.

Because political, social, and economic conditions sometimes evolve rapidly during implementation, an expanded reconciliation template needs to anticipate and account for realpolitik shifts.³⁰² Thus, a fourth step Task Force would not focus solely on assessing and implementing existing recommendations. It would also evaluate evolving conditions, refashion recommendations as needed, and oversee new social healing paths forward—all toward the goal of recalibrating and reinvigorating the original reconciliation commitment.

To assist in that process, a fourth step Task Force might establish a formal Citizens' Council to better integrate local voices. That Citizens' Council could advise the Task Force about emerging environmental, cultural, and peace-related conditions.³⁰³

A fourth step Task Force might also facilitate accords or settlements, assuring broad stakeholder input into the tenor and substance of reparative agreements. Active Task Force engagement with political decision-makers might obviate problems of legitimacy by preventing politically expedient words of redress without accompanying reconstruction and reparation—for instance, Japan's initial apology to South Korea's World War II military sex slaves.

The latest Japanese apology, which some have seen as part of a strategic geopolitical deal struck between Japan and South Korea, has led to protests among the 46 surviving South Korean victims as well as the victims in other countries occupied by Japan during the war. After working for 15 years on reparations for victims in over 50 countries, [the International Center for Transitional Justice] found that many victims feel that an apology unaccompanied by other forms of reparation does not constitute justice, even as

³⁰² See *supra* Section II.

³⁰³ See, e.g., Yamamoto et al., *supra* note 24, at 68-78 (suggesting a similar sort of Citizens' Council in the context of Jeju 4.3 reconciliation).

material reparations, such as compensation, without a meaningful acknowledgement of responsibility also falls short.³⁰⁴

In sum, an Assessment, Implementation, and Oversight Task Force would serve as a practical fourth step for coalescing recognition and responsibility and for recalibrating and overseeing reconstructive and reparative actions. This implementation fourth step thus would aim to foster comprehensive and sustained social healing—for those harmed and their families in ways that also benefit communities and the larger society.³⁰⁵

D. Two Partial Archetypes

How might a fourth step Assessment, Implementation, and Oversight Task Force look and operate in practice? Two follow-up initiatives offer distinct partial archetypes. They may be viewed as distinct archetypes because their structures reflect two vastly differing foundational approaches. The first involves privately sponsored assessment and recalibration efforts to evaluate post-truth commission reconstruction and reparation. The second reflects a multifaceted initiative mainly under government bureaucratic control to facilitate implementation of specific commission recommendations. The two initiatives are partial because they embody practical follow-up limitations. Both initiatives are concisely described here not as fourth step models but as comparative bases for evaluating and refining the Task Force proposal.

1. The International Center for Transitional Justice's Assessment of Peru's Truth and Reconciliation Process

The International Center for Transitional Justice pioneered the *assessment* and *implementation* functions of a fourth step follow-up when it

³⁰⁴ David Tolbert, *Japan's Apology to Shows What Public Apologies Should (Not) Do*, HUFF. POST (Jan. 29, 2016), http://www.huffingtonpost.com/david-tolbert/japans-apology-to-south-k_b_9111566.html.

³⁰⁵ See Yamamoto et al., *supra* note 24, at 80-81.

assessed Peruvian reconciliation efforts in 2013. After Peru's violent conflict from 1980 to the mid-1990s, the Peruvian government initiated a reconciliation process that encompassed the government and armed opposition groups.³⁰⁶ Both sides committed widespread human rights violations, with over 60,000 disappeared or murdered and with disproportionate harms to indigenous rural peasant communities.³⁰⁷ Reconciliation efforts aimed to surface this truth to facilitate economic justice for victims and to rebuild communities.³⁰⁸ The truth commission thus investigated socioeconomic causes of the conflict, designated limited initial funds for victim capacity-building, and recommended institutional restructuring.³⁰⁹ For some, this broad approach demonstrated the government's commitment to social healing.³¹⁰

³⁰⁶ See Cristián Correa, *Reparations in Peru: From Recommendations to Implementation*, INT'L CTR. TRANSITIONAL JUST. 3-4 (2013), http://www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf. In 1993, the Peruvian government declared victory over the Shining Path and initiated reconciliation efforts. See Jemima Garcia-Godos, *Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation*, 2 INT'L J. TRANSITIONAL JUST. 63, 70 (2008). The legislature provided limited compensation to a few victims. *Id.* at 71. Responding in 2001 to demands for further reconciliation efforts, Peru's then-president and legislature established the Truth and Reconciliation Commission and the Plan Integral de Reparaciones (PIR). Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Rights to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141, 159 (2007).

³⁰⁷ Correa, *supra* note 306, at 3.

³⁰⁸ From 1980 to the mid-1990s, the Shining Path—one of the major opposition groups—engaged in a violent armed conflict with the government. *Id.* at 3-4. Throughout this period, the government and Shining Path forcibly displaced 600,000 people and killed and disappeared 70,000 more. See Garcia-Godos, *supra* note 306, at 68. Widespread human rights violations by both sides included decimation of uninvolved rural communities, which held many indigenous inhabitants. Laplante, *supra* note 306, at 143; see Garcia-Godos, *supra* note 306, at 68. The conflict disproportionately harmed these groups and intensified Peru's painful history of subordinating indigenous peasant communities. See Garcia-Godos, *supra* note 306, at 68.

³⁰⁹ The PIR investigated specific acts and resulting harms and also examined deeper socioeconomic causes. See Yamamoto & Mackintosh, *supra* note 104, at 8. See also Laplante, *supra* note 306, at 160 (noting the PIR's "components include symbolic reparations, attention to physical and mental health, educational opportunities, restitution

Despite these broad initial efforts, criticism emerged about the incompleteness of government implementation.³¹¹ Critics maintained that because the conflict inflicted enduring damage, the reconciliation initiative needed a stronger emphasis on economic redress.³¹² In 2011, in response to continued criticism, the Peruvian government announced a plan to pay individual reparations.³¹³ The money allocated (less than \$100 per person), however, seemed to “many to be too little, too late.”³¹⁴ The government then acknowledged that no one had been fully compensated and promised to complete the reparations process within ten years.³¹⁵ Yet, especially for indigenous communities, the minimal individual reparations and the lack of real economic capacity-building signaled the reconciliation initiative’s overall failure.³¹⁶

At this juncture, the private International Center for Transitional Justice stepped in and conducted an extensive, independent assessment.³¹⁷ Focusing on reconstruction and reparation (in the broader sense of “repair”), the International Center’s assessment evaluated the implementation of the truth commission’s existing recommendations.³¹⁸ That assessment covered the

and rehabilitation of citizen rights, collective reparations and individual economic reparations. Beneficiaries of these measures include both direct and indirect victims.”). It recommended economic justice initiatives, including individual economic capacity-building and payments for those directly injured and institutional reconstruction. Laplante, *supra* note 306, at 160. Part of the plan sought to address the root of the conflict by generating infrastructure for education, health, and jobs. *Id.*

³¹⁰ See Yamamoto & Mackintosh, *supra* note 104, at 8.

³¹¹ See Greiff, *supra* note 85, at 470–71. The government then established a fund for education, health, and economic projects associated with the PIR. See Yamamoto & Mackintosh, *supra* note 104, at 8. These projects, however, were open to only a few. *Id.*

³¹² See Greiff, *supra* note 85, at 470–71.

³¹³ Angel Pez, *Rights-Peru: No Reparations for Families of Civil War Victims*, INTERPRESS SERV. (July 27, 2010), <http://ipsnews.net/news.asp?idnews=52284>.

³¹⁴ *Id.*

³¹⁵ See Cabitza, *supra* note 86.

³¹⁶ See *id.*

³¹⁷ See Correa, *supra* note 306.

³¹⁸ See *id.*

recommended victims' registry, economic reparations (individual and collective), political changes (including recognition of civil and political rights), and other reparative measures (relating to education, physical and mental health, housing, memorials, the search for victim remains, and the court access for victims' civil claims).³¹⁹ Overall, the International Center's follow-up work, although not broadly participatory and without formal government approval or participation, illustrated a key aspect of the envisioned assessment and implementation roles of a fourth step follow-up Task Force.³²⁰

As part of its assessment, the International Center worked toward an objective evaluation—detailing both productive steps forward and backsliding—of each major truth commission recommendation.³²¹ It commended the Peruvian reconciliation initiative for taking “significant steps to address the severe and massive human rights violations committed during the country's internal conflict.”³²² And it recognized that the reconciliation measures “strengthen[ed] democracy and human rights protections and prevent[ed] the recurrence of violence.”³²³ The assessment, as mentioned, also constructively critiqued constrained Peruvian government reparative actions, revealing salutary steps as well as salient omissions.

The International Center's assessment thereby illuminated gaps in the Peruvian government's efforts. Notably, the assessment shed light on the

³¹⁹ See generally *id.* By 2012, the victims' registry had registered 160,429 individual victims, 7,678 communities, and 32 organizations of displaced people. *Id.* at 10. The International Center's assessment group commended the victims' registry for its “flexible guidelines for evaluating different types of violations eligible for reparations” and for its efforts to make its services accessible to people in rural areas. *Id.* at 9. But the assessment group also noted that not all of the people registered would qualify for compensation, leaving the “unqualified” feeling left out and ignored. *Id.*

³²⁰ See generally *id.*

³²¹ See *id.*

³²² See *id.*

³²³ See *id.*

government's "trend of providing isolated measures" to address systematic abuses.³²⁴ It observed that as a result of the government's piecemeal efforts, "reparations will lack the comprehensiveness that the Truth Commission recommended and that the Reparations Law and its implementing decree envisioned."³²⁵ Most important, in uplifting perspectives of those suffering, the International Center identified a glaring reparations gap between victim expectations and government actions.³²⁶ "Victims must still continue to wait – even after having suffered a serious violation sometimes twenty or more years ago and having navigated the long victim-registration process to finally achieve some recognition as right bearers. . . . [t]his process is inconsistent with the message that a reparations policy should carry."³²⁷ Overall, the International Center called for full implementation of original truth commission recommendations.³²⁸ It also pointed toward additional actions needed to further reconciliation efforts, including better accommodation of indigenous communities' voices and needs.³²⁹

The International Center thus articulated compelling critiques of the social healing process, both salutary dimensions and failings.³³⁰ In doing so, it highlighted the assessment and implementation functions of a fourth step mechanism, spelling out what governments, independent researchers, scholars, advocates, human rights organizations, businesses, and community advocates might undertake as primary follow-up steps.

Yet, the International Center stated some of its recommendations subtly.³³¹ Political realities may have counseled caution in proactively generating pointed directives. The International Center, without active

³²⁴ *See id.*

³²⁵ *See id.*

³²⁶ *See id.*

³²⁷ *See id.*

³²⁸ *See generally id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

government participation and formal oversight authority, lacked the power to guide follow-through prescriptions for needed reconstruction and reparation.³³²

2. South Korea TRCK's Follow-up Board

In contrast with the International Center's assessment, the South Korea TRCK's follow-up mechanism entailed substantial government involvement. But extensive government agency control and changes in national political leadership likely dampened or even undermined follow-up efforts.

South Korea's TRCK policymakers and administrators contemplated two follow-up bodies for implementing specific recommendations.³³³ First, within the TRCK, policymakers created a "Reconciliation Committee . . . to administer reconciliation and memorial efforts, establish a road-map for settling the past, investigate psychological damages and development of review programs for reconciliation, and to search for methods to improve recommendations for each individual case."³³⁴ Second, the TRCK's Framework Act contemplated a government administrative Recommendations Follow-up Board.³³⁵ The Act, however, did not bestow upon the follow-up board the authority to implement commission

³³² *Id.*

³³³ Melish, *supra* note 2, at 24 (citing the Framework Act for the 2005 TRCK and its Three Year Plan).

³³⁴ See generally THREE YEAR REPORT, *supra* note 233.

³³⁵ The Framework Act provided that "any case approved for investigation must be reported to the Recommendation Follow-up Board on measures for restoration of the victims' honor, reconciliation of the victims and offenders, the prevention of incident repetition, the revision, abolishment, or creation of related laws, policies, and practices, and the education and promotion for building historical consciousness." Framework Act on Clearing up Past Incidents for Truth and Reconciliation, Law No. 7542, Article 34, paragraph 4, May 31, 2005 [hereinafter Framework Act], *reprinted in* THREE YEAR REPORT, *supra* note 233, translation available at http://www.jinsil.go.kr/English/Information/legal/read.asp?num=76&pageno=1&stype=&sval=&data_years=2012&data_month=.

recommendations. South Korea's legislative and executive branches retained control.³³⁶ And supervisory agencies lacked any legal and systemic duty to implement recommendations.³³⁷

To activate the Framework Act's plan for implementation, South Korea's president issued a presidential decree for "Regulations on the Establishment and Operation of the Recommendations Follow-Up Board."³³⁸ The decree officially created the Recommendations Follow-up Board—a high-level interagency system for implementing specific TRCK recommendations.³³⁹ This envisioned follow-up administrative body was placed initially under the Office of the Prime Minister and later under the Ministry of Public Administration and Security.³⁴⁰ The body was comprised of several committees tasked with managing the implementation of TRCK recommendations, including drafting implementation agenda, reviewing progress, and announcing results.³⁴¹

The board would adhere to a firm timeline for specific action.³⁴² In response to TRCK recommended measures, the board would interact with the heads of government agencies.³⁴³ These political administrators would generate implementation plans and submit them to the board.³⁴⁴

The board would transmit the implementation plans to a working committee,³⁴⁵ led by the Vice Minister of Public Administration and

³³⁶ THREE YEAR REPORT, *supra* note 233, at 32.

³³⁷ *Id.* at 32.

³³⁸ Presidential Decree No. 195, Aug. 27, 2007, *reprinted* in THREE YEAR REPORT, *supra* note 233, at 107.

³³⁹ Melish, *supra* note 2, at 24 (citing the Framework Act for the 2005 TRCK and its Three Year Plan).

³⁴⁰ THREE YEAR REPORT, *supra* note 233, at 107.

³⁴¹ *Id.* at 32.

³⁴² *Id.*

³⁴³ *Id.* at 33.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

Security and comprised of high-ranking officials of related ministries.³⁴⁶ This working committee would further refine the implementation agenda.³⁴⁷ During preliminary deliberations, TRCK members could provide input.³⁴⁸ The working committee would then pass the implementation agenda to a “Deliberation Council,” led by the Minister of Public Administration and Security and comprised of vice ministers of related ministries.³⁴⁹ The Council would hold quarterly meetings to update government actors of implementation tasks.³⁵⁰

The Recommendations Follow-Up Board thus would work with government leaders and specific government agencies to facilitate implementation of specific TRCK recommendations. It would notify the TRCK about progress.³⁵¹ Overall, the board and TRCK would collaborate to “regularly examine and analyze the planning and implementation processes of recommendations in order to revise inefficiencies in the relevant policies, systems, or procedures.”³⁵²

Despite the carefully calibrated structure and timeline, the board’s implementing operations stalled. The Recommendations Follow-Up Board initially received 49 findings and recommendations from the TRCK for implementation.³⁵³ According to former TRCK Standing Commissioner Kim Dong-Choon, “despite the creation of these new [follow-up] institutions, implementation of the TRCK’s recommendations has been slow and highly uneven.”³⁵⁴ He noted that the government implemented “relatively easy measures—those not politically sensitive or financially

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 112.

³⁵³ Kim, *supra* note 111, at 113.

³⁵⁴ *Id.*

burdensome.”³⁵⁵ Other and more significant recommendations—the revision of historical records, compensation of damages, and peace and human rights education—remained untouched.³⁵⁶

Although promising in theory, with its multi-tiered bureaucratic structure, the Follow-up Board apparently proved ineffective in practice. The interagency implementation system, operated entirely by government actors, largely avoided difficult, important recommendations and failed at “directly involving petitioners or other concerned stakeholders in the monitoring and implementation process.”³⁵⁷ The ebbs and flows of the national government’s political will and government officials’ control over the Follow-up Board and its committees undermined active victim and community participation. In short, the follow-up mechanism lacked sufficient independence to function as a collaborative body that included government participation in, but not full control over, the process.

Indeed, when President Lee Myung-bak’s conservative party assumed power in 2008, the TRCK and the Follow-up Board faced increasing roadblocks.³⁵⁸ TRCK supporters blamed this shift in political power for the Follow-up Board’s ineffectiveness and eventual dissolution,³⁵⁹ asserting that President Lee’s administration was “uncomfortable with the scrutiny of the country’s past” and wanted the TRCK “shut down.”³⁶⁰ The TRCK dissolved in 2010.³⁶¹ The Follow-Up Board also significantly scaled back its work and apparently later disbanded, leaving many important

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ Melish, *supra* note 2, at 46.

³⁵⁸ Ashley Rowland & Hwang Hae-rym, *Time Running Out on South Korea’s Truth and Reconciliation Commission*, STARS & STRIPES (Jan. 19, 2010), <http://www.stripes.com/news/time-running-out-on-south-korea-s-truth-and-reconciliation-commission-1.98156>.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* Rising tensions with North Korea may have also shifted the South Korea government’s attention away from addressing past government injustices. *Id.*

recommendations, especially those politically or financially sensitive, as “unfinished business.”³⁶²

E. Structurally Integrating Government and Civil Society

Just as too much, or sole, government control over implementation bodes ill for genuine social healing, so too does too little government involvement. Public participation is crucial, but as integral component, not as sole mover.

With the government-controlled TRCK follow-up experience partly in mind, some scholars focus on public participation as the primary component of an implementation fourth step. Justice scholars John Ciorciari and Jaya Ramji-Nogales view civil society as “unofficial implementing agencies” of truth commission recommendations.³⁶³ Professor Tara Melish predicts that organizations comprising “civil society” could find ways to “construct, monitor, and police an accountability framework in which concrete responsibilities can be distributed among stakeholders, who can then be held answerable for following through on their commitments.”³⁶⁴

In essence, rather than a formal implementation body, Ciorciari, Nogales, and Melish suggest that unofficial civil society “agencies” might serve as the critical follow-up fourth step in the reconciliation process, apparently through lobbying, consciousness raising, and strategic pressuring of government decision-makers. Without this kind of engagement, “political resistance and entrenched interests will ensure that reforms are superficial if

³⁶² There appears to be no English paper trail for the Recommendations Follow-Up Board. The current Ministry of Public Administration and Security’s website does not mention or have any archival material on the Recommendations Follow-Up Board or its involvement in the TRCK implementation process. There appears to be no mention of the Recommendations Follow-Up Board in English beyond the last TRCK report published in 2007. Much of the account in this article about the Follow-Up board is drawn from Kim, *supra* note 111, at 113.

³⁶³ John D. Ciorciari & Jaya Ramji-Nogales, *Lessons from the Cambodian Experience with Truth and Reconciliation*, 19 BUFF. HUM. RTS. L. REV. 193, 194 (2012).

³⁶⁴ Melish, *supra* note 2, at 63.

undertaken at all.”³⁶⁵ By contrast, active civil society control would shape reparative actions according to real community needs and priorities.³⁶⁶ In this way, civil society would help translate high expectations into concrete implementation plans and actions.³⁶⁷

The civil society approach aptly highlights the essential participation of non-governmental organizations, community advocates, journalists, and the general populace. And political organizing is critical for raising public consciousness and applying pressure for official responses.³⁶⁸ But experience shows public engagement is not enough *after* a commission makes recommendations to compel needed implementation.³⁶⁹

A generally stated civil society approach to implementation³⁷⁰ appears to leave unaddressed four realities about post-commission follow-up. First, it assumes that civil society would find ways to coalesce around implementation without an overarching organizing authority.³⁷¹ Second, it

³⁶⁵ See *id.* at 23.

³⁶⁶ See *id.* at 64.

³⁶⁷ For example, public organizations and community groups would have a pivotal role in providing continued “effective support to victims who may find the truth-seeking process an onerous and challenging journey.” González et al., *supra* note 26, at x.

³⁶⁸ See generally González et al., *supra* note 26 and accompanying text.

³⁶⁹ See *supra* Sections II.B. & III.A (describing unimplemented truth commission recommendations). Reasons may vary for lesser sustained post-commission collective efforts for implementation—people have already been given a recognized voice through public hearings; causes have been investigated; some recommendations have been acted upon; collective political energy is directed elsewhere. This subject warrants further inquiry.

³⁷⁰ That lack of specificity may simply reflect a primary focus on the idea of the need for an implementing mechanism.

³⁷¹ Melish suggests generally that implementation of recommendations by a “permanent follow-up body” is “fundamentally a responsibility of all social stakeholders, responsibly supported by the international community and other human rights actors across the globe.” Melish, *supra* note 200, at 315. Melish’s suggestion delegates the bulk of responsibility for implementation to civil society (although undefined, this apparently means mainly non-governmental organizations, media watch-dogs and community activists) without fully accounting for the important role of government officials and private businesses. See *id.* More specifically, Melish anticipates that individuals and non-governmental organizations that comprise civil society will unite on their own to

downplays the need for structure—effective monitoring and policing require organization, coordination, and regular funding, both for operations and for oversight, including some form of government participation.³⁷² Third, it looks past the need for stature—recognition or even legal standing with policymakers, bureaucrats, businesses, and community groups helps transform plans into actions, particularly those tapping the public fisc.³⁷³ And fourth, it assumes that a loosely organized civil society, without a strong organizational structure, can function effectively as a follow-up implementation body that is accountable for its actions (and inactions).³⁷⁴

undertake implementing and oversight actions without an overarching organizing and funding authority. *See id.* But mutual engagement by all, especially by those governments formerly complicit in or directly responsible for historic injustices, would be essential to a achieving a sense of “justice done.”

³⁷² Government representatives, as well as scholars and private business and public institutional representatives, would need to collaborate with civil society representatives in creating, operating, and partially funding a fourth-step mechanism. Their participation would also be essential to devising and carrying out implementation and oversight activities and ensuring that each stakeholder assumes appropriate financial and substantive responsibility. A crucial structural piece of the implementing and oversight body would be shared power so that government participation contributes to but does not control agendas and tasks.

³⁷³ Melish’s approach overlooks the need for formal recognition and some degree of legal standing of a follow-up body with policymakers, administrators, and the public, which would be essential to prospects of actualizing *responsibility* for assessment, implementation, refashioning and oversight actions. The potential for civil society programs, protests, and journalist exposés would be an important part of the mix. But experiences in many venues show that they might be effective in challenging illegitimate authority but are not, alone, nearly enough to fashion and administer concrete steps toward *reconstruction* and *reparation*. *See, e.g.,* Matthew Vadum, *George Soros Funds Occupy Wall Street*, HUMAN EVENTS (Oct. 21, 2011), <http://humanevents.com/2011/10/21/george-soros-funds-occupy-wall-street/> (referencing the organizational and funding problems with the social movement, Occupy Wall Street). Government and private sector representatives would also contribute to tempering the political and economic forces that otherwise, at times, impede reconciliation efforts. Victims and community advocates would play a central collaborative role. And *responsibility*, essential to *social healing through justice*, would be appropriately attributed to key stakeholders in ways that enhance democratic legitimacy.

³⁷⁴ The idea that civil society would function as a follow-up mechanism imbues “civil society” with a structure that does not exist. A fourth step follow-up would likely be a

The envisioned fourth step Assessment, Implementation, and Oversight Task Force would embrace active civil society participation but not rely primarily upon it. Rather, a Task Force would aim to integrate participation by civil society organizations at all stages of its implementation work and look to those organizations for generating public input and support. Moreover, the Task Force’s operating structure would not replicate the TRCK follow-up board’s near-full control by political leaders and bureaucrats. But it also would not jettison government participation, instead favoring active involvement without overriding control. The Task Force would build in a crucial mix of interested participants not only to uplift varying perspectives but also to provide checks and balances. That balance of power would need to be carefully calibrated at the outset in the Task Force’s originating structure.

The Task Force, then, would be informed less by a pure communitarian ethos than by a *realpolitik* sense that social healing is a multi-faceted, often conflictual struggle that entails continual recalibration and reinvigoration—but a struggle nevertheless worth the candle for those still suffering, their communities, and the larger society.

VI. CONCLUSION

The aim of this article’s proposed integrated Assessment, Implementation, and Oversight Task Force is not to fashion a cure-all for reconciliation ills. Rather, its aim is to squarely address what is currently missing from stalled or incomplete reconciliation initiatives almost everywhere: a fourth step implementation bridge over the chasm between aspiration and realization.

specific, cognizable body that not only “speaks and acts” with authority but would also be accountable for its actions and inactions. The diverse and diffuse aspects of “civil society” would therefore participate *through* this fourth-step assessment, implementation, and oversight body, but primary or sole reliance on civil society would not be pragmatically effective.

It might be a pathway over the “institutionalized attempts to frustrate the goals and functionality of the truth commission” of South Korea.³⁷⁵ Or a route forward for sorely disappointed indigenous Peruvians demanding “badly needed and long-delayed economic justice” after minimalist follow through on truth commission reparations recommendations.³⁷⁶ Or a spotlight on South Africa government’s and businesses’ choice not to “follow through on commission recommendations,” compromising not only the “commission’s contributions but the very process [or reconciliation] itself.”³⁷⁷ Or a portal to self-determination for the United States to “make right the wrong” to Native Hawaiians by fulfilling its long-standing commitment to reconciliation that “has been thus far denied.”³⁷⁸

In these and other ways reconciliation’s needed assessment, implementation, and oversight fourth step, in concept and in practice, potentially channels often-fractious political and social interests further down a mutually beneficial path toward social healing through justice.

³⁷⁵ See *supra* Sections III.A, IV.B and V.C & D (describing the South Korea Truth and Reconciliation Commission process and impacts).

³⁷⁶ See Melish, *supra* note 2.

³⁷⁷ See *supra* notes 5 and 6 and accompanying text.

³⁷⁸ See *supra* notes 7, 8, and 39 and accompanying text.