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COMING TO TERMS WITH WARTIME COLLABORATION: POST-CONFLICT PROCESSES & LEGAL CHALLENGES

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INTRODUCTION

Situations of armed conflict almost invariably involve collaboration by civilians or combatants with an opposing side. Parties to an armed conflict will seek to gain the upper hand by turning their opponents' people against them, while individuals may cooperate with the enemy out of conviction, desperation, or under coercion.[1] Although the precise meaning of the term collaboration is contested,[2] common practices—such

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1. *See generally* U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL 1056–57 (2015); U.K. MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF ARMED CONFLICT 63 (2004).

2. Stathis N. Kalyvas, *Collaboration in Comparative Perspective*, 15 EUR. REV. OF HIST.—REVUE EUROPÉENNE D'HISTOIRE 109, 109 (2008); Henrik

as disclosing information to an opposing side, defecting and fighting for the enemy's forces, engaging in propaganda for the enemy's benefit, or providing administrative support to an occupying power—can be considered wartime collaboration.[3] International humanitarian law applicable in armed conflicts does not expressly forbid such activity or the recruitment of collaborators.[4] It does, however, prohibit the use of coercion for such purposes, specifically against prisoners of war or civilians in occupied territories.[5] The law applicable in situations of armed conflict also condemns the ill-treatment and abuse that is frequently meted out to alleged collaborators during situations of armed conflict.[6] The consequences for individuals who collaborate with an enemy during wartime, however, might only manifest after the end of armed conflict, when evidence of their actions comes to light, power dynamics shift, and relative stability returns, allowing for a calling to account.

The post-conflict reckoning for those that may have served the opposing side during wartime is often violent, as revenge is regularly taken against alleged collaborators. In the immediate aftermath of the Second World War, there was a "brutal settling of scores" by victims against fellow nationals who were

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Dethlefsen, *Denmark and the German Occupation: Cooperation, Negotiation or Collaboration?*, 15 SCANDINAVIAN J. HIST. 193, 198–200 (1990).

3. *See, e.g.,* ISTVÁN DEÁK, EUROPE ON TRIAL: THE STORY OF COLLABORATION, RESISTANCE, AND RETRIBUTION DURING WORLD WAR II (2015); TIMOTHY BROOK, COLLABORATION: JAPANESE AGENTS AND LOCAL ELITES IN WARTIME CHINA (2005); HILLEL COHEN, ARMY OF SHADOWS: PALESTINIAN COLLABORATION WITH ZIONISM, 1917-1948 (Haim Watzman trans., 2008); WERNER RINGS, LIFE WITH THE ENEMY: COLLABORATION AND RESISTANCE IN HITLER'S EUROPE 1939-1945 (J. Maxwell Brownjohn trans., 1982).

4. *See generally* SHANE DARCY, TO SERVE THE ENEMY: INFORMERS, COLLABORATORS AND THE LAWS OF ARMED CONFLICT (2019).

5. Geneva Convention Relative to the Treatment of Prisoners of War, art. 17, Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 31, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

6. *See, e.g.* Rep. of the Int'l. Comm'n. of Inquiry on Darfur to the U.N. Secretary-General Established Pursuant to Resolution 1564 (Sept. 18 2004), ¶402, (Jan. 25, 2005); Rep. of the Office of the U.N. High Comm'r for Hum. Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, ¶26, U.N. Doc. A/HRC/30/61 (Sept. 16, 2015); *see also generally* Amnesty Int'l, *Sierra Leone: The Extrajudicial Execution of Suspected Rebels and Collaborators*, AFR 51/02/92 (1992); B'TSELEM, COLLABORATORS IN THE OCCUPIED TERRITORIES: HUMAN RIGHTS ABUSES AND VIOLATIONS (1994).

considered to have worked on behalf of the Axis Powers.[7] As will be discussed, retribution against collaborators has also been pursued through formal legal processes, primarily criminal trials, lustration measures, and denaturalization proceedings. As with transitional justice processes more broadly, the coming to terms with wartime collaboration by states, societies, and individuals has involved a range of measures and mechanisms, both official and unofficial, along with a number of distinct challenges.[8]

This article explores the formal processes that have been employed to address the phenomenon of collaboration post-conflict, focusing principally on trials, denaturalization efforts, amnesties, and truth commissions. Drawing on relevant international law in this context, including the obligation of states to ensure respect for human rights and the rights associated with a fair trial, this article also considers key legal challenges arising in the post-conflict processes that address wartime collaboration.

Part I of this article focuses on post-conflict measures of retribution that have been directed against collaborators, and it does so in three parts. It begins in the first section with an examination of the purges of collaborators that followed the Second World War. During this period, thousands of suspected collaborators were subjected to revenge killings, violence, and public humiliation.[9] Many more faced trials, denial of civil rights, and removal from their posts, in what has been described as "one of the greatest social and demographic upheavals in history."[10] The trials of prominent collaborators after the Second World War, such as those of Vidkun Quisling in Norway and William Joyce in England, as well as more recent post-conflict trials, have given rise to particular legal challenges, which are explored in the second section. This article considers how post-conflict trials of collaborators have addressed the rule

7. IAN KERSHAW, TO HELL AND BACK: EUROPE 1914-1949 479 (2016).

8. On transitional justice see generally Rep. of the S.C., U.N. Doc. S/2004/616 (2004); Rep. of the S.C., U.N. Doc. S/2011/634 (2011); RUTI TEITEL, TRANSITIONAL JUSTICE (2000); TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH V. JUSTICE (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); RUTI TEITEL, GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS (2014).

9. DEÁK, *supra* note 3, at 191.

10. *Id.*

of non-retroactivity of criminal law, the meaning of allegiance, and the scope of the defense of duress as raised by those who cooperated with an opposing side during conflict. The final section of Part I considers the potential denial of refugee status under international law to those suspected of collaboration and the subsequent withdrawal of citizenship of persons found to have collaborated during the Second World War.

Part II of this article explores measures taken outside or alongside criminal justice efforts and aimed at addressing wartime collaboration, as well as violence perpetrated against collaborators and their ostracization from society. While the postwar response to collaboration during armed conflict has often been characterized by recrimination and retribution, state authorities have also resorted to other less punitive or non-punitive measures in an effort to reconstruct war-torn societies, promote peace and reconciliation, and rehabilitate individual collaborators. The first section of Part II will examine the granting of amnesty to collaborators who may thus avoid prosecution for their activities during an armed conflict, notwithstanding certain tensions arising with international law in this context.[11] The second section then considers the role of truth commissions as an increasingly prominent feature of the transitional justice landscape.[12] Although the phenomenon of collaboration has not been a significant feature of their work, as it may defy the victim-perpetrator dichotomy that often prevails before such bodies,[13] some truth commissions have made valuable contributions to addressing the phenomenon. They have

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11. *See generally* MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 13 (2010); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991); Diane Orentlicher, *"Settling Accounts" Revisited: Reconciling Global Norms with Local Agency*, 1 INT'L J. TRANSITIONAL JUST. 10 (2007); LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS (2008).

12. *See generally* PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2011); MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2007); TRUTH COMMISSION AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH (William A. Schabas & Shane Darcy eds., 2005).

13. *See* Ron Dudai, *Informers and the Transition in Northern Ireland*, 52 BRIT. J. CRIMINOLOGY 32, 48 (2012); Ron Dudai & Hillel Cohen, *Triangle of betrayal: Collaborators and Transitional Justice in the Israeli–Palestinian Conflict,* 6 J. HUM. RTS. 37 (2007).

achieved this through establishing facts relating to the practice of collaboration during armed conflict, exploring its context, and elaborating on the consequences that may arise both during and after conflict. As the persecution of collaborators may be "a serious hindrance to the process of reconciliation,"[14] several truth commissions have made specific recommendations as to how states can take measures to address the enduring and often negative impact of collaboration following an armed conflict.

Part III of this article offers some conclusions and touches on how the various processes examined can, to differing degrees, meet some of the interrelated legal, social, and practical challenges facing post-conflict or transitional societies seeking to come to terms with the legacy of wartime collaboration.

I. REVENGE, PROSECUTION, AND PUNISHMENT

Both official and unofficial responses to wartime collaborators in the aftermath of armed conflict have often been retributive and vengeful. As examined in this section, collaborators have been subject to revenge killings, retaliatory violence, criminal trials, denial of civil rights, and lustration proceedings to remove them from their posts. The first subsection considers the great purges of the Second World War, which saw thousands of collaborators held to account in various ways for activities considered to be in service of the enemy. The second subsection then considers the trials of collaborators and, in particular, how relevant judicial bodies examined key legal challenges, including the rule of non-retroactivity of criminal law, the meaning of allegiance, and the scope of the defense of duress. The potential immigration consequences for those suspected of collaboration, including the denial of refugee status under international law and withdrawal of citizenship, are addressed in the third subsection.

A. Post–Second World War Purges

Before the Second World War had ended, the major Allied Powers had decided against proposals that the leaders of Nazi Germany be executed outright if captured. Instead, they agreed to subject the Nazi leadership to criminal trials before the In-

14. 5 THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 307 (1998).

ternational Military Tribunal, which would sit at Nuremberg.[15] Justice Robert H. Jackson, the Chief Prosecutor for the United States at Nuremberg, saw this as "one of the most significant tributes that Power has ever paid to Reason," as the four Allies, "flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law."[16]

Nationals of the Allied Powers who had collaborated with Germany were subject to national, rather than international criminal proceedings; in the words of one member of the United Nations War Crimes Commission, "[t]he trial of quislings would be left exclusively to the National Governments."[17] The defeated nations were in some instances required to cooperate in bringing to account wartime collaborators for their actions. The peace agreement between Italy and the Allied Powers, for example, required the former to take "all necessary measures" to apprehend and surrender for trial both suspected war criminals and "[n]ationals of any Allied or Associated Power accused of having violated their national law by treason or collaboration with the enemy during the war."[18]

Many thousands of collaborators were submitted to "the judgment of the law" by the Allied nations, yet aggrieved populations in those countries also took the law into their own hands. Significant numbers of alleged traitors were attacked and killed towards the end of the Second World War and in its immediate aftermath.[19] Retribution against collaborators, alt-

15. ROBERT H. JACKSON, REPORT OF THE UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 18 (1949).

16. Second Day, Wednesday, 11/21/1945, Part 04 *in* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 1 (1947).

17. THE UNITED NATIONS WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 114 (1948).

18. Treaty of Peace with Italy art. 45, Feb. 10, 1947, 61 Stat. 1245, 49 U.N.T.S. 747.

19. *See generally* JON ELSTER, RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY (2006); THE POLITICS OF RETRIBUTION IN EUROPE: WORLD WAR II AND ITS AFTERMATH (István Deák et al. eds., 2000); BENAJMIN FROMMER, NATIONAL CLEANSING: RETRIBUTION AGAINST NAZI COLLABORATORS IN POSTWAR CZECHOSLOVAKIA (2005); DEÁK, *supra* note 3; HENRY L. MASON, THE PURGE OF DUTCH QUISLINGS: EMERGENCY JUSTICE IN THE NETHERLANDS (1952).

hough not necessarily such violent reprisals, had much public support in post-war Europe according to István Déak:

> Just as accommodation to the wishes of the occupier had been popular in most occupied countries, so now did the prosecution of collaborators meet with widespread public approval. It was as if Europeans hoped to rid themselves of the memory of their compromises and crimes by decimating their own ranks.[20]

Not only were significant numbers of persons punished individually for their active cooperation with Nazi Germany, entire ethnic groups were also punished on the basis of a claimed collective responsibility for their perceived collaboration.[21] This led to killings, imprisonment, and mass expulsions, particularly in Eastern Europe.[22]

Across Europe, retaliatory violence saw thousands of alleged collaborators killed towards the end of the war by civilian mobs and organized resistance.[23] Italian partisans "carried out arbitrary executions of Fascist grandees, functionaries, collaborators and informers," while in France, around 9,000 prominent Vichy regime supporters were killed either extrajudicially or following cursory court-martials (although some estimates put the figure several times higher).[24] United States soldiers in liberated France had to save suspected collaborators from being summarily executed by their fellow citizens.[25] Women were frequently targeted at the end of the Second World War for their alleged associating with the enemy:

> Women condemned as "horizontal collaborators"—seen as guilty of sleeping with the enemy—often became scapegoats of the pent-up anger of entire communities in western Europe. In France, Italy, Denmark, Holland and the Channel Islands such women were turned into social outcasts and ritually humiliated in public by having their hair shorn, being stripped naked, and sometimes having their bodies daubed with excrement. In France alone about twenty thousand

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20. Deák et al., *supra* note 19, at 3.

21. *Id*. at 4.

22. *Id*.

23. KERSHAW, *supra* note 7, at 473.

24. *Id*. *See* PETER NOVICK, THE RESISTANCE VERSUS VICHY: THE PURGE OF COLLABORATORS IN LIBERATED FRANCE 71–72, 78, 202–08 (1968); *see also* DÉAK, *supra* note 3, at 200.

25. NOVICK, *supra* note 24, at 68.

> women were subjected to degradation in front of large crowds—overwhelmingly male—from their local population.[26]

Reprisal attacks against alleged collaborators may have been motivated at times by personal enmity, ethnic hatred, or to cover up one's own collaboration with the enemy during the war.[27] These violent episodes in Europe eventually gave way to many states deploying more formal mechanisms to hold individual collaborators to account.[28]

Thousands of individual prosecutions for collaboration took place after the Second World War. In Norway, Denmark, Holland, Belgium, and France, for example, it is estimated that 170,000 collaborators were given prison sentences after being tried before regular courts, 11,000 were sentenced to death, and 2,500 were executed.[29] Over 90,000 Norwegians were tried for treason, around four percent of the population, with 17,000 imprisoned and thirty executed.[30] Those tried and executed in Europe included high-ranking individuals, such as former heads of state and prime ministers from a number of countries; the Communist government in Bulgaria, for example, executed the previous prime minister, twenty-four members of the cabinet, and sixty-eight members of parliament for treason and "crimes against the people."[31]

Collaborator trials that took place in Eastern Europe and the Soviet Union saw prosecutions on the basis of an extremely broad understanding of collaboration. This definition embraced those who had actively served the Axis Powers, as well as prisoners of war considered traitors for having been captured and civilians who merely happened to be present in territories occupied by Germany.[32] Several hundred thousand alleged col-

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26. KERSHAW, *supra* note 7, at 474. *See also* Anthony Beever, *An Ugly Carnival*, GUARDIAN, (June 4, 2009), https://www.theguardian.com/lifeandstyle/2009/jun/05/women-victims-d-day-landings-second-world-war.

27. DÉAK, *supra* note 3, at 181; KERSHAW, *supra* note 7, at 473.

28. NOVICK, *supra* note 24, at 61–63.

29. RINGS, *supra* note 3, at 323.

30. DEÁK, *supra* note 3, at 204.

31. *Id.* at 192.

32. CHERIF M. BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 157–58 (2011); DEÁK, *supra* note 3, at 193–207; Tanja Penter, *Local Collaborators on Trial: Soviet war crimes trials under Stalin (1943-1953),* 49 CAHIERS DU MONDE RUSSE 341, 351 (2008).

laborators were executed in the Soviet Union.[33] Tanja Penter considers that, in the Soviet context, "the postwar settlement with collaborators was much more intense and bloodier than the prosecution of German war criminals."[34] In most jurisdictions in Asia, treason trials for locals accused of having collaborated with the Japanese forces "were conducted more promptly than the war crimes trials of Japanese."[35] The British held collaborator trials in Hong Kong pursuant to a defense regulation known as the "Quisling Directive," as well as under the United Kingdom's Treason Act of 1351.[36] Around 25,000 alleged collaborators with Japan were tried by the Chinese authorities in the two years following the end of the Second World War.[37]

Collapsed or compromised criminal justice systems presented an obstacle to the trial of alleged collaborators after the Second World War. Judges may have continued to serve under regimes of occupation or even aligned themselves with the Nazi party, with the result that novice judges or those who were "politically tainted" sat in a number of trials.[38] Revolutionary courts were established by the resistance to try collaborators in newly liberated territories in Europe, but they were eventually divested of power and trials were conducted by regular courts—although courts in Eastern Europe remained "consistently revolutionary" and continued to operate against real or imagined enemies of Communism after having targeted fascists and alleged collaborators.[39]

In France, André Philip, who served as Minister of the Interior for the Free French, made the case for pursuing justice for

33. MAX HASTINGS, THE SECRET WAR: SPIES, CODES AND GUERILLAS 1939-1945 20 (2015); VADIM J. BIRSTEIN, SMERSH, STALIN'S SECRET WEAPON: SOVIET MILITARY INTELLIGENCE IN WORLD WAR II 174–75 (2011).

34. Penter, *supra* note 32, at 342–43.

35. Kerstin von Lingen and Robert Cribb, *War Crimes Trials in Asia: Collaboration and Complicity in the Aftermath of War*, *in* DEBATING COLLABORATION AND COMPLICITY IN WAR CRIMES TRIALS IN ASIA, 1945-1956 1, 8 (Kerstin von Lingen ed., 2017). *See also generally* Margherita Zanasi, *Globalizing Hanjian: The Suzhou Trials and the Post-World War II Discourse on Collaboration*, 113 AM. HIST. REV. 731 (2008).

36. Suzannah Linton, *Rediscovering the War Crimes Trials in Hong Kong, 1946-1948,* 13 MELBOURNE J. INT'L L. 1, 52–53 (2012).

37. Dongyoun Hwang, *Wartime Collaboration in Question: An Examination of the Postwar Trials of the Chinese Collaborators,* 6 INTER-ASIA CULTURAL STUD. 75, 75 (2005).

38. DEÁK, *supra* note 3, at 203.

39. Deák et al., *supra* note 19, at 10–11.

collaborators through regular judicial processes rather than by way of vengeful acts outside the law:

> If we heeded the appeal of our heart and our indignation, all of us would go as far as some of our colleagues desire, and shoot the guilty out of hand. How understandable that would be, when we think of the torture which our comrades in France are undergoing. How legitimate and excusable it would be for us to use the same procedure as our enemies. But we aren't Vichy, we aren't the Germans. We stand for liberty, respect for the law, and belief in human dignity; it was to affirm these beliefs that we have struggled and resisted. [. . .] Our true grandeur will lie in maintaining and respecting our national traditions . . . in our unshakable devotion to justice and respect for individual rights, even those of the most despicable criminals.[40]

Most countries had to adapt their legal processes in some way in order to accommodate collaborator trials on such a scale; for example, military courts were used in Belgium and special courts in Holland, both of which were made up of a combination of civil and military judges.[41] In Belgium, over 50,000 prisoners were awaiting trial in 1945 in jails "designed to house a tenth of that number."[42] In some European countries, the volume of trials was reduced by accused collaborators agreeing to admit their guilt and accept a penalty as proposed by the prosecution.[43]

Criminal prosecution and punishment of those accused of assisting an opposing belligerent were not the only means envisaged by the relevant authorities seeking to hold collaborators to account. The Charter of the French National Council of the Resistance, for example, emphasized both "the punishment of traitors and the eviction from the administration and professional life of all those who have dealt with the enemy or have actively associated themselves with the policy of the governments of collaboration."[44] In terms of criminal trials of collaborators in France, Peter Novick estimates that over 6,500 death

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40. NOVICK, *supra* note 24, at 141.

41. *Id.* at 213–14.

42. RINGS, *supra* note 3, at 70.

43. DAVID LITTLEJOHN, PATRIOTIC TRAITORS: A HISTORY OF COLLABORATION IN GERMAN-OCCUPIED EUROPE, 1940–1945 127 (1972); NOVICK, *supra* note 24, at 213–14.

44. NOVICK, *supra* note 24, at 38.

sentences were handed down, of which 767 were carried out, while there were 2,702 sentences of life imprisonment with hard labor, 10,637 terms with hard labor, 2,044 sentences of solitary confinement, and 22,883 sentences of imprisonment.[45] Around 50,000 individuals had "[n]ational degradation" visited upon them, meaning they were punished by the denial of certain civil and political rights.[46] This penalty arose for those found guilty of the newly-created concept of "national indignity," described as "a kind of low-grade treason, involving active participation in the Vichy government, membership in groups supporting it, or propaganda in its favor."[47]

Lustration also occurred in post-war France, with an administrative purge that saw several thousand police, judges, and civil servants removed from their posts for collaboration of varying degrees.[48] Pursuant to the administrative process established in France, individuals could be reprimanded, dismissed without pension, or referred for possible criminal proceedings.[49] Similar processes were adopted in other countries; in the Netherlands, for example, around half the town mayors and 2,000 police officers were dismissed upon liberation, while around 60,000 individuals were deprived of their Dutch citizenship and had their property seized for "entering foreign military service."[50] Around 20,000 women who were married to such collaborators also lost their citizenship,[51] and in Norway, laws were introduced to deny citizenship rights to children born to Norwegian women of German fathers.[52] A denazification process was also undertaken in Germany itself after the war, as well as the prosecution of those who had informed on their fellow citizens by denouncing them to the authorities, particularly the Gestapo.[53]

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45. *Id.* at 186.

46. *Id.*

47. Jon Elster, *Redemption for Wrongdoing: The Fate of Collaborators after 1945*, 50 J. CONFLICT RESOL. 324, 326 (2006).

48. NOVICK, *supra* note 24, at 79–93.

49. *Id.*

50. LITTLEJOHN, *supra* note 43, at 127; *see also* DEÁK, *supra* note 3, at 205.

51. LITTLEJOHN, *supra* note 43, at 128.

52. DEÁK, *supra* note 3, at 204.

53. *See* FRANCIS GRAHAM-DIXON, THE ALLIED OCCUPATION OF GERMANY: THE REFUGEE CRISIS, DENAZIFICATION AND THE PATH TO RECONSTRUCTION (2013); ANDREW SZANAJDA, INDIRECT PERPETRATORS: THE PROSECUTION OF INFORMERS IN GERMANY, 1945–1965 (2010).

Hundreds of thousands of individuals paid the price for collaboration with Germany, Japan, and their allies during the Second World War. Innocent individuals were at times the targets of mob violence, criminal prosecution, or administrative purges.[54] Relatives and even entire ethnic groups also suffered the consequences of collaboration by association.[55] Even when collaborators were dealt with judicially, there were often shortcomings with the trials undertaken. Trials in France, for example, were criticized on the grounds of selectivity, delay, and inconsistencies in sentencing.[56] Serious fair trial concerns have been raised regarding Soviet collaborator trials, including insufficient notice to defendants of charges, inexperienced officials, and arbitrary sentencing.[57]

Not all collaborators received harsh punishment. Economic collaborators were at times treated more leniently on the basis that they had to make a living.[58] Civil servants and police in Holland involved in the persecution of Jews and the suppression of resistance were treated lightly.[59] Although harsh sentences and sanctions were imposed on significant numbers of individuals who had supported the Axis Powers, pardons, commutations, and amnesties were widely used in Europe. As such, few collaborators called to account in the immediate aftermath of the Second World War continued to suffer the consequences of their actions, at least formally, within a couple of decades.[60] As Ian Kershaw observed, "[c]ourts became more lenient as the immediacy of the war receded. Everywhere, rebuilding a functioning state took priority over punishment and retaliation for wartime behaviour, other than in the direst cases."[61] Collaborator trials that were held following the Second World War and since that time have been confronted by a number of recurring legal issues, which are examined in the next section.

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54. NOVICK, *supra* note 24, at 78.

55. Penter, *supra* note 32, at 343.

56. NOVICK, *supra* note 24, at 157, 162–63, 168, 172.

57. *See* Penter, *supra* note 32, at 342–51.

58. NOVICK, *supra* note 24, at 162.

59. KERSHAW, *supra* note 7, at 480. *But see* LITTLEJOHN, *supra* note 43, at 129.

60. NOVICK, *supra* note 24, at 92, 187–88; LITTLEJOHN, *supra* note 43, at 128; KERSHAW, *supra* note 7, at 480.

61. KERSHAW, *supra* note 7, at 481.

B. Trials for Collaboration

Criminal trials have been a frequent feature of the post-conflict landscape of countries emerging from war. While the trial of individuals for international crimes has garnered much attention, it is likely that as many, if not more trials have been held in the aftermath of armed conflict for domestic criminal offenses relating to the conflict. Those that collaborate with an adversary during an armed conflict may be responsible for international crimes, such as war crimes or crimes against humanity, as well as relevant offenses under national law.[62] It is interesting to note that neither of the major post–Second World War trials in Nuremberg nor Tokyo included charges against German or Japanese officials for the ill-treatment of collaborators during the war. As noted in the *Justice* case, such conduct did not fit the prevailing definition of war crimes, although it could have been captured by crimes against humanity or certain domestic offenses, as occurred in a small number of cases.[63]

Challenging legal questions have arisen in the post-conflict trials of collaborators, specifically concerning non-retroactivity, the meaning of allegiance, and the applicability of relevant defenses or mitigating factors. This section explores a number of central legal issues arising in the trials of collaborators, drawing on key post–Second World War and subsequent trials, as well as relevant international standards, including the principle of legality.

1. Crime and Punishment

Trials for collaboration have at times given rise to tension with the principle of legality, in particular its requirements of strict interpretation of penal statutes and the non-retroactivity of criminal law. The Permanent Court of International Justice

62. *See* DEÁK, *supra* note 3, at 74; ERIC LICHTBLAU, THE NAZIS NEXT DOOR: HOW AMERICA BECAME A SAFE HAVE FOR HITLER'S MEN 48–49 (2014); Penter, *supra* note 32, at 344.

63. *See* SZANAJDA, *supra* note 53, at 40–43; "The Justice Case" *in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1090, 1095, 1118–28 (1951); *see generally* W.L. Cheah, *Dealing with Desertion and Gaps in International Humanitarian Law: Changes of Allegiance in the Singapore War Crimes Trials*, 8 ASIAN J. INT'L L. 350 (2018); For reliance on the concept of war crimes see generally Kononov v. Latvia, 2010 - IV Eur. Ct. H.R. 35.

described the principle of legality as a "well-known" maxim in 1935:

> The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case. A penalty decreed by the law for a particular case cannot be inflicted in another case. In other words, criminal laws may not be applied by analogy.[64]

The rule against retroactive criminal laws, which is common to all national legal systems, also finds expression in various international instruments, such as the 1948 Universal Declaration of Human Rights, which proclaims that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."[65] Rebecca West's observation that the law "is always vainly racing to catch up with experience," can be applied to both the prosecution of international crimes and the trials for wartime collaboration after the Second World War.[66] A number of European countries that sought to try wartime collaborators were faced with issues of retroactivity, as the differing degrees and forms of collaboration that offenders engaged in during the war were not all captured by existing legislation on treason or similar crimes.[67] Similarly, some states that sought to have the death penalty available for high-profile cases had previously abolished capital punishment.[68]

With regard to criminal offenses, serious instances of collaboration with the enemy usually amount to the crime of treason, which national criminal law invariably treats as an especially grave crime, "since [it] strike[s] at the very foundation of the State and its social organizations."[69] The United States Consti-

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64. Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65, at 14 (Dec. 4).

65. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71, art.11 (Dec. 10, 1948); *see also* Rome Statute of the International Criminal Court, arts. 22–24, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

66. REBECCA WEST, THE MEANING OF TREASON 63 (1947).

67. NOVICK, *supra* note 24, at 209–12.

68. I*d*.

69. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 236 (4th ed., 2003).

tution establishes that "[t]reason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."[70] These terms capture many acts of collaboration, although the offense of treason is broader and not always limited to assisting the state's enemies, as it might also include "attempting by force of arms or other violent means to overthrow the organs of government."[71] With the crime of treason generally confined to times of war or armed rebellion, it is necessary to distinguish the offense from so-called "war treason," which has been understood as offenses committed by the inhabitants of an occupied territory against the occupying power.[72]

Despite the significant rhetorical and moral force attached to the crime of treason, and the frequent use of the term in political discourse, the crime is prosecuted less and less. There have been few, if any, modern prosecutions for treason in the United States.[73] Moreover, the period surrounding the Second World War accounted for the last treason trials in many Western democracies. The decline may be partly attributable to treason as a political offense, one which, as Hersh Lauterpacht noted, has served "as an instrument of despotism and oppression."[74]

Prominent post-war trials for collaboration, notably that of William Joyce, have been based solely on the crime of treason.[75] Others, such as the trial of Vidkun Quisling, have seen treason

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70. U.S. CONST. art. III, § 3, cl. 1.

71. *See* Constitution of Ireland 1937 art. 39. *See also* Mary Connery, *Hung, Drawn and Quartered? The Future of the Constitutional Reference to Treason,* 5 TRINITY COLLEGE L. REV. 56 (2002).

72. YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 43 (2009); L. Oppenheim, *On War Treason,* 33 L. Q. REV. 266 (1917); J.H. Morgan, *War Treason, in* 2 THE GROTIUS SOCIETY: PROBLEMS OF THE WAR 161 (1916).

73. *See generally* Captain Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43 (1965); George P. Fletcher, *The Case for Treason* 41 MD. L. REV. 193 (1982); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem,* 154 U. PA. L. REV. 863 (2006).

74. Hersh Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens,* 9 CAMBRIDGE L.J. 330, 334 (1947); *See generally e.g.* L.J. Blom-Cooper, *The South African Treason Trial: R. v. Adams and Others*, 8 INT'L COMP. L. Q. 59 (1959); KENNETH S. BROUN, SAVING NELSON MANDELA: THE RIVONIA TRIAL AND THE FATE OF SOUTH AFRICA (2012).

75. R. v. Joyce [1945] 2 All ER 673 (Eng.).

charged alongside various other crimes.[76] Offenses such as "assisting the enemy" or "intelligence with the enemy" have also formed the basis for post-war prosecution of collaborators, as well as crimes specifically developed after a conflict, including the French "national indignity" offense.[77] There was a challenge after the Second World War concerning where to draw the line of criminality, for as Kerstin von Lingen and Robert Cribb noted, the distinction "between innocuous engagement, which amounted to no more than sustaining daily life, and collaboration, which actively assisted the enemy, was nowhere clear or certain."[78]

A wide range of activity could be conceived of as aiding the enemy, as confirmed by this interpretation by the Dutch Court of Cassation:

> [That] every intentional co-operation with strivings of the enemy, which strivings are directly or indirectly connected with the war, and in which the enemy sees profit in connection with his warfare, by which co-operation the position of the enemy is morally or materially strengthened, has to be considered as assistance to the enemy, and as such endangers the safety of the State.[79]

In post-liberation France, treason and the offense of "intelligence with the enemy" under the French Penal Code were used to prosecute high-ranking French collaborators.[80] Philippe Pétain, the head of the Vichy regime who had famously first used the term "collaboration" to describe cooperation with the German occupiers, was tried before the *Haute Cour de Justice*, which had been specially created for the purpose of trying leading collaborators.[81] Pétain's claims that his collaboration was for the benefit of France did not prevent a guilty verdict on the charge of "intelligence with the enemy," for which he received a death sentence, albeit with a jury recommendation that it not

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76. *See* HANS FREDRIK DAHL, QUISLING: A STUDY IN TREACHERY (1999).

77. *See* NOVICK, *supra* note 24, at 146–48.

78. Von Lingen & Cribb, *supra* note 35, at 2. For a discussion of whether bureaucratic collaboration should constitute a criminal offense see MICHAEL L. GROSS, THE ETHICS OF INSURGENCY 112 (2015).

79. B.V.A. Röling, *The Law of War and the National Jurisdiction Since 1945*, *in* 100 RECUEIL DE COURS 411 (1960).

80. *See* Code Pénal 1810 [C. Pén.][French Penal Code] Articles 75-78 (Fr.).

81. *See* NOVICK, *supra* note 24, at 154–56.

be carried out.[82] Pierre Laval, the Prime Minister of Vichy France, was also convicted on similar charges, and was executed by firing squad (shortly after having ingested poison).[83] The journalist Robert Brassilach was convicted of, and executed for, the offense of "intelligence with the enemy" for his writings and editorship of a pro-Nazi newspaper during the German occupation.[84]

A number of Vichy officials were prosecuted for crimes against humanity decades after the Second World War, following a change in France's domestic law. Maurice Papon, a senior police official in the Vichy regime, was found complicit in sending hundreds of Jews to concentration camps and sentenced to ten years imprisonment in 1997.[85] A life sentence was handed down to Paul Touvier, an official of the paramilitary organization, Milice, which had collaborated in the persecution of French Jews. Touvier was convicted in absentia for treason and providing intelligence to the enemy after the war, subsequently pardoned, but ultimately found guilty of crimes against humanity around fifty years after their commission.[86]

While offenses such as treason and "intelligence with the enemy" were established crimes under French law, there had been concerns as to how they would be applied to Vichy officials or other collaborators, and whether they could lead to the prosecution of "too few and too harshly."[87] The French government adopted legislation providing interpretations of the relevant offenses for the use of the courts, while the concept of "national indignity" was introduced to ensure that collaborators whose acts did not constitute already existing offenses could be re-

82. *Id.* at 176.

83. *Id.* at 177. *See generally* J. KENNETH BRODY, THE TRIAL OF PIERRE LAVAL: DEFINING TREASON, COLLABORATION AND PATRIOTISM IN WORLD WAR II FRANCE (2010).

84. *See generally* ALICE KAPLAN, THE COLLABORATOR: THE TRIAL & EXECUTION OF ROBERT BRASSILACH (2000).

85. *See* Nancy Wood, *Memory on Trial in Contemporary France: The Case of Maurice Papon*, 11 HIST. & MEMORY 41 (1999); *see also* Papon v. France, App. No. 4210/00, Eur. Ct. H.R. (2002).

86. *See* Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 LAW & SOC. INQUIRY 191 (1995); *see also* Touvier v. France, App. No. 29420/95, Eur. Ct. H.R. (1997).

87. NOVICK, *supra* note 24, at 143–45.

moved from certain positions. The rationale behind the latter was as follows:

> The criminal conduct of those who collaborated with the enemy did not always take the form of a specific act for which there could be provided a specific penalty . . . under a strict interpretation of the law. Frequently it has been a question of antinational activity reprehensible in itself. Moreover, the disciplinary measures by which unworthy officials could be removed from the administration are not applicable to other sections of society. And it is necessary to bar certain individuals from various elective, economic, and professional positions which give their incumbents political influence, as it is to eliminate others from the ranks of the administration.
>
> Any Frenchman who, even without having violated an existing penal law, has been guilty of activity defined as antinational, has degraded himself; he is an unworthy citizen whose rights must be restricted in so far as he has failed in his duties.[88]

The courts were to determine the appropriate penalty and whether there were any extenuating circumstances, although questions were raised regarding the impartiality of the jury panels whose members were drawn largely from the Resistance.[89]

Reliance on retroactive laws and exceptional courts weakened the system of justice deployed against French collaborators, even if understandable in light of the unique situation prevailing at the time.[90] When faced with similar concerns of retroactivity regarding the prosecution of crimes against peace, the Nuremberg Tribunal concluded that, for an aggressor who must have known that he was doing wrong, "far from being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[91] The European Court of Human Rights has also acknowledged, albeit implicitly, the tension between the principle of legality and "laws which, in the wholly exceptional

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88. *See id.* at 147.

89. *Id.* at 148–53.

90. *Id.* at 156. *See also Wartime Collaborators: A Comparative Study of the Effect of their Trials on the Treason Law of Great Britain, Switzerland and France*, 56 YALE L. J. 1210, 1233 (1946-1947).

91. *International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946*, 41 AM. J. INT. L. 172, 217 (1947) [hereinafter *Nuremberg Judgment*].

circumstances at the end of the Second World War, were passed in order to punish war crimes, treason, and collaboration with the enemy."[92] Although the principle of legality had yet to be enshrined in international human rights law, it was already recognized in national legal systems,[93] though ultimately it did not constitute an insurmountable obstacle to the application of laws with retroactive effect during the post-war period.

The principle of legality was also at issue where sentences of capital punishment were handed down in countries that had abolished the death penalty prior to the Second World War. Both Denmark and Holland adopted legislation to reintroduce the death penalty for "extreme cases of collaboration or crimes against humanity," and several dozen convicted persons were executed in both countries after the war.[94] The application of the death penalty was challenged in the trial in Norway of Vidkun Quisling, one of the Second World War's most infamous collaborators. The Nuremberg Judgment described Quisling as "the notorious Norwegian traitor,"[95] and his surname is commonly used in contemporary discourse to describe "a person who helps an enemy who has taken control of his or her country."[96] Norway had shown "a consistent harshness towards its own citizens who had committed treason,"[97] prosecuting thousands for collaboration with Germany, thirty of whom were executed, Quisling included.

Although the question of retroactivity has been raised in relation to the crimes for which Quisling was convicted,[98] the principle of legality was most clearly infringed by the application of capital punishment. As Paul Hayes explained:

> Before the war the Norwegian penal code had included no death penalty. The government in London had sought to rem-

92. Kononov v. Latvia, App No. 36376/04, Eur. Ct. H.R. ¶ 115 (2008).

93. *See generally* KENNETH GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE LAW 46–65 (2010).

94. LITTLEJOHN, *supra* note 43, at 82, 127; DEÁK, *supra* note 3, at 204.

95. *Nuremberg Judgment, supra* note 91, at 204.

96. OXFORD ADVANCED LEARNER'S DICTIONARY: QUISLING NOUN, https://www.oxfordlearnersdictionaries.com/us/definition/english/quisling.

97. Sigrid Redse Johansen, *The Occupied and The Occupier: The Case of Norway*, *in* SEARCHING FOR A "PRINCIPLE OF HUMANITY" IN INTERNATIONAL HUMANITARIAN LAW, 206, 227 (Kjetil Mujenović Larsen et al. eds., 2013).

98. JOHN LAUGHLAND, A HISTORY OF POLITICAL TRIALS 96 (2008).

> edy this omission by promulgation of its law regarding treason on 15 December 1944. For those who wished to dispose of Quisling by legal means this raised yet another formidable stumbling-block, for beside the other difficulties, there existed the question of the legality of the retrospective imposition of the treason law.[99]

Quisling was charged with a range of offenses, including treason and assisting the enemy, and as was the case in other collaborator trials, the impartiality of certain judges was questioned on account of their activities and experiences during the war.[100] Found guilty at trial, Quisling appealed his conviction and sentence to the Supreme Court of Norway, which upheld the verdict and sentence while dismissing his arguments concerning retroactivity.[101] Quisling was executed by firing squad on October 24, 1945.[102] While the application of the sentence was not in conformity with the principle of legality, it was in keeping with a strong public demand for the death penalty; several of the guards responsible for Quisling's safety during his trial had even gone so far as to secretly agree to kill him if the Court did not hand down a sentence of death.[103]

2. Allegiance

That an occupying power must respect the duty of allegiance owed by citizens to their own state is inscribed in international humanitarian law. For example, Article 45 of the 1907 Hague Regulations prohibits compelling the local population to take an oath of allegiance to an occupying power.[104] Although international law does not forbid citizens from breaching their duty

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99. PAUL M. HAYES, QUISLING: THE CAREER AND POLITICAL IDEALS OF VIDKUN QUISLING 1887-1945 299 (1971) (footnote omitted); *see also* DAHL, *supra* note 76.

100. *Id.* at 299–300.

101. *Id.* at 302–03. *See also* DAHL, *supra* note 76, at 398–400; Public Prosecutor v. Reidar Haaland (August 9, 1945) *reprinted in* 12 ANN. DIG. AND REP. OF PUB. INT'L L. CASES: YEARS 1943-1945 444, 445 (Hersh Lauterpacht ed. 1949).

102. *Quisling Executed by Firing Squad*, N.Y. TIMES, Oct 24, 1945, at A1.

103. DAHL, *supra* note 76, at 393.

104. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 45, Oct. 18, 1907, 36 Stat. 227. *See also* Geneva Convention III, *supra* note 5, arts. 87, 100; Geneva Convention IV, *supra* note 5, arts. 68, 98, 105, 107, 135.

of allegiance voluntarily, national law invariably does. The crime of treason comprises an offense against the state entailing a breach of this duty of allegiance, which the state treats as the corollary of the protection it is required to afford its citizens.[105] Trials for collaboration after the Second World War at times gave rise to questions regarding the duty of allegiance of particular individuals who were not nationals of the state in question. Treason trials held by the British in Hong Kong, for example, claimed an obligation of allegiance on the part of colonial subjects.[106] The issue of allegiance was the key legal concern in the most prominent post-war trial held in the United Kingdom—that of William Joyce, known as "Lord Haw Haw," who was found guilty of high treason and executed for his contribution to the propaganda broadcasts of Nazi Germany.[107]

Following the Second World War, British authorities detained over 120 alleged collaborators in the United Kingdom, comprised of either civilians who had lived abroad during the war, or captured members of the armed forces who had divulged information to the enemy, around half of whom were released without trial.[108] The prosecuting counsel in the case against Joyce was Attorney General Hartley Shawcross, who had been the British Prosecutor at Nuremberg.[109] He was advised by Hersch Lauterpacht, who had worked with him on the Nuremberg trial.[110] Lauterpacht later wrote that the trial of Joyce was "concerned to a large extent with matters of interest for international law," touching as it did on questions of allegiance by aliens, jurisdiction over the acts of aliens committed abroad, and diplomatic protection.[111] He had also prepared a memorandum that contemplated the prosecution of Joyce as a major war criminal under the London Agreement establishing

105. REBECCA WEST, THE NEW MEANING OF TREASON 361 (1964).

106. Von Lingen & Cribb, *supra* note 35, at 6–8. *See also* Cheah, *supra* note 63, at 356.

107. *See generally* WEST, *supra* note 105; PETER MARTLAND, LORD HAW HAW: THE ENGLISH VOICE OF NAZI GERMANY (2003); COLIN HOLMES, SEARCHING FOR LORD HAW-HAW: THE POLITICAL LIVES OF WILLIAM JOYCE (2016); S.C. Biggs, *Treason and the Trial of William Joyce*, 7 UNIV. TORONTO L. J. 162 (1947).

108. *Wartime Collaborators*, *supra* note 90, at 1212.

109. SIR ELIHU LAUTERPACHT, THE LIFE OF HERSCH LAUTERPACHT 275 (2010).

110. *Id.*

111. Lauterpacht, *supra* note 74, at 330.

the Nuremberg Tribunal, although this was not pursued because of the successful domestic conviction for treason.[112]

The prosecution of Joyce hinged on his relationship with the United Kingdom at the time he engaged in Nazi propaganda broadcasts during the Second World War. Although born in the United States and having lived in Ireland for a number of years, Joyce had moved to England and acquired a British passport in 1933, before leaving for Germany in 1939 and seemingly acquiring German nationality the following year.[113] A key question to be addressed was whether Joyce owed allegiance to the King of England as an American citizen by birth who had obtained a British passport under false pretenses and then assumed the nationality of an enemy state.[114] There was no doubt that he was an avowed fascist and anti-Semite who willfully participated in Nazi Germany's propaganda efforts during the Second World War.[115] However, there was little attention paid to these activities during the trial. Instead, the tribunal focused on whether a non-resident alien who held a British passport could commit the crime of treason abroad.[116] Without owing allegiance to the British Crown, no act of treason could be committed.

Ultimately, Joyce was charged with three counts of high treason for his propaganda activity and for seeking to become a naturalized subject of Germany.[117] Two of the counts were unsuccessful, as they were based on the incorrect assumption that he was a British subject at the relevant times, but he was convicted of high treason on the following count:

> William Joyce, on September 18, 1939, and on divers other days thereafter and between that day and July 2, 1940, being then [—] to wit on the several days [—] a person owing allegiance to our Lord the King, and whilst on the said several days an open and public war was being prosecuted and carried on by the German Realm and its subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist

112. LAUTERPACHT, *supra* note 109, at 280.

113. WEST, *supra* note 105, at 10–11; Lauterpacht, *supra* note 74, at 333.

114. WEST, *supra* note 105, at 12–13.

115. HOLMES, supra note 107, at 83, 171–98.

116. *Wartime Collaborators*, *supra* note 90, at 1215.

117. Joyce v. Director of Public Prosecutions [1946] AC (HL) 347, 348 (appeal taken from Eng.).

> the said enemies of our Lord the King against our Lord the King and his subjects did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without the Realm of England, to wit, in the Realm of Germany by broadcasting to the subjects of our Lord the King propaganda on behalf of the said enemies of our Lord the King.[118]

During this period of time, Joyce was the holder of a British passport, which he had obtained based on the claim that he was a British subject born in pre-independence Ireland, even though he was a natural born citizen of the United States.[119] The trial judge had instructed the jury that "the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country" while the holder of a British passport, and the jury proceeded to return a guilty verdict that Joyce had adhered to and assisted the King's enemies by his activities.[120] He was sentenced to death on September 19, 1945.[121]

Joyce's appeals to the Court of Criminal Appeal and the House of Lords were unsuccessful, and he was executed on January 3, 1946.[122] The judges of the Court of Criminal Appeal ruled that Joyce had owed allegiance to the Crown at the relevant time even though he had been "beyond the realm," as he held a British passport that "entitled him to all the rights and protection afforded by such a passport, even if the appellant had obtained it by misrepresentation and had no intention of using it."[123] Although Joyce had left England for Germany before the war, by renewing his passport he had "taken every step in his power to safeguard his right of re-entry into England, and meanwhile to ensure his treatment in any foreign country as a British citizen."[124] Such protection demanded allegiance; as Lauterpacht noted, allegiance is "concomitant with the protection of the law which shelters him."[125] The majority in the House of Lords decision took the same view, finding that

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118. *Id.*
119. *Id.* at 348–49.
120. *Id.* at 349–50.
121. *Id.* at 350.
122. *Lord Haw Haw Hanged*, GUARDIAN, (Jan. 4, 1946), https://www.theguardian.com/world/2016/jan/04/lord-haw-haw-executed-william-joyce-1946.
123. R. v. Joyce [1945] 2 All ER 673, at 673–75 (Eng.).
124. *Id.* at 676–77.
125. Lauterpacht, *supra* note 74, at 335.

"by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity."[126] "In these circumstances," Lord Howitt wrote, "I am clearly of the opinion that so long as he holds the passport he is within the meaning of the statute a man who, if he is adherent to the King's enemies in the realm or elsewhere commits an act of treason."[127] As to the jurisdiction of the English courts over a crime committed in Germany, "no principle of comity demands that a State should ignore the crime of treason committed against it outside its territory."[128]

Joyce's conviction and execution for high treason was a relief for the British government, which had put in place a contingency plan to deport him to Germany in the event of an acquittal.[129] There was criticism, however, as Joyce was not a British national when he had contributed to the Nazi war effort, and there was a perception that "the law had been tainted by revenge."[130] The remark by historian A.J.P. Taylor that "Joyce was hanged for making a false statement when applying for a passport, the usual penalty for which is a small fine,"[131] was an oversimplification. It serves, however, to underscore how the proceedings against Joyce were focused primarily on the technical question of whether a legal basis existed for the claimed allegiance on his part. The trial was concerned with the existence of Joyce's duty not to engage in activity that could be considered harmful to the United Kingdom, rather than examining the specific harms that he may have caused by his activities in support of Nazi Germany.

Joyce was the last person to be executed for treason in the United Kingdom, and although the prosecution of treason has waned in Western countries, the duty of allegiance persists and treason remains a crime in most, if not all, jurisdictions.[132] The

126. Joyce v. Director of Public Prosecutions [1946] AC (HL) 347, 371 (appeal taken from Eng.).

127. *Id.*

128. *Id.* at 372.

129. HOLMES, *supra* note 107, at 348.

130. WEST, *supra* note 105, at 37–39.

131. A.J.P. TAYLOR, ENGLISH HISTORY 1914–1945 534 (1965).

132. *See* George P. Fletcher, *Ambivalence about Treason* 82 N. C. L. REV. 1611, 1625–28 (2005); *see also generally* Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of the Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443 (2009).

drafters of the 1949 Geneva Conventions had the trial of Joyce in mind when they took care to ensure that the treaties would not be an obstacle to such domestic prosecutions of suspected collaborators.[133]

3. Victims of circumstances?

Collaboration with the enemy during an armed conflict is not always freely undertaken, reflecting the propensity of parties to an armed conflict to force civilians and prisoners of war to provide valuable information or contribute in other ways to their military and security efforts.[134] It is unsurprising, therefore, that trials for collaboration have seen a range of excuses and justifications put forward by accused persons seeking to defend their actions in the hope of garnering an acquittal or mitigating their sentence. Such excuses have included the defenses of duress or necessity—where acts were committed under severe coercion—to claims of playing a double game of both collaboration and resistance simultaneously, or of engaging in collaboration as a lesser evil in order to lessen the cruelties of the enemy. Werner Rings devised a typology of collaboration in Europe during the Second World War that described the "neutral collaborator" as one who would claim that their attitude was "dictated by circumstances beyond [their] control," while a "tactical collaborator" would have taken the view that "collaboration disguises resistance and is part of the fight."[135] Not all such claims would constitute recognizable defenses to a criminal charge even if substantiated; although, in the trials of collaborators, such claims were at times taken into consideration in determining guilt and rendering the appropriate sentence.

Post-war assessments of criminal liability for acts of collaboration have involved claims that such actions were coerced un-

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133. *See* Geneva Convention IV, *supra* note 5, art. 70; Twenty-Eighth Plenary Meeting (August 4, 1949), *in* 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, 433-434; Thirty-Second Plenary Meeting (August 6, 1949), *in* 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, 480.

134. *See* Hum. Rts. Council, Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, ¶ 1722, U.N. Doc. A/HRC/12/48, (Sept. 25, 2009); JEAN PICTET, COMMENTARY: III GENEVA CONVENTION, RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 163 (Jean Pictet ed., A.P. de Heney trans., 1960); PAUL MCMAHON, BRITISH SPIES AND IRISH REBELS: BRITISH INTELLIGENCE AND IRELAND 1916-1945 46 (2008).

135. RINGS, *supra* note 3, at 73.

der duress or by the necessity of the circumstances. The laws of armed conflict have long acknowledged the existence of such defenses, particularly in relation to the activities of informers and other collaborators. The United States' Lieber Code of 1863, for example, plainly stated that "[n]o person having been forced by the enemy to serve as a guide is punishable for having done so."[136] This influential document, comprising a set of instructions issued to United States forces during the American Civil War, seems to have prompted the Russian delegation to propose the following provision on guides at the 1874 Brussels Conference:

> An inhabitant of a country, who has "voluntarily" served as a guide to the enemy, is guilty of high treason; he is not, however, liable to punishment from the moment he has been "compelled" by the enemy to serve in such capacity.[137]

It was observed at the Second Hague Peace Conference in 1907 that an individual's guilt "is not established by any code if his offence has been committed under the domination of an irresistible compulsion."[138] The Rome Statute of the International Criminal Court includes the defenses of duress and necessity, although these have rarely been used in trials before the various international criminal tribunals.[139] The widely accepted Rome Statute definition provides that criminal responsibility will not arise where:

> The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a

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136. FRANCIS LIEBER, LIEBER CODE, art. 94, *reprinted in* INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 29 (1898) [hereinafter Lieber Code].

137. 1875, Vict., c. 1128, Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare, 18, 202 (U.K.).

138. FOURTH MEETING OF THE SECOND COMMISSION: FIRST SUBCOMISSION, 31 JULY 1907, *in* 3 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCES OF 1907, 133 (1921).

139. *Cf.* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Appeals Chamber (Int'l Crim Trib. for the Former Yugoslavia Oct. 7, 1997), http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf.

> greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
>
> (ii) Constituted by other circumstances beyond that person's control.[140]

In addition to an assessment of the necessity and proportionality of the criminal acts engaged in, the element of imminent threat is central. The International Criminal Court has contended that a duress claim based on a threat of subsequent disciplinary measures, however harsh, would unlikely succeed.[141]

Although international law readily accepts the defenses of duress and necessity for international crimes, and states acknowledge the relevance of these defenses to acts of collaboration during wartime, the admissibility of the defense of duress to charges of treason under national criminal law has been contested. In England and Wales, according to David Ormerod and Karl Laird, "it would be wrong to suppose that threats, even of death, will necessarily be a defense to every act of treason" given the various forms and degrees of seriousness of the crime.[142] Similarly, the United States Manual for Courts-Martial excludes the defense of duress for the offense of "killing an innocent person," and for other offenses it requires "a reasonable apprehension that the accused or another innocent person would immediately be killed or would immediately suffer serious bodily injury if the accused did not commit the act."[143] The defense was admitted in *R v. Purdy*, the trial of a British prisoner of war who had divulged information while detained during the Second World War, engaged in propaganda for Nazi Germany, and worked as an interpreter for the SS.[144] Purdy claimed that he had only been in the service of the SS because of a threat to carry out a death sentence for espionage

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140. Rome Statute, *supra* note 65, art 31(d).

141. Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/14, Decision on the Confirmation of Charges, ¶ 152–155 (Mar. 23, 2016) https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF.

142. DAVID ORMEROD & KARL LAIRD, SMITH AND HOGAN'S CRIMINAL LAW 406 (14th ed. 2015). *See also* EIMEAR SPAIN, THE ROLE OF EMOTIONS IN CRIMINAL LAW DEFENCES: DURESS, NECESSITY AND LESSERS EVILS 217–20 (2011).

143. U.S. DEP'T OF DEFENSE, MANUAL OF COURTS-MARTIAL UNITED STATES 117 (2016).

144. *R. v. Purdy*, 10 J. CRIM. L. 182, 182–83 (1946).

that he had previously received in Germany.[145] The judge in *Purdy* instructed the jury that they could consider the defense of duress in relation to this charge: "If you believe, or if you think that it might be true, that he only did that because he had the fear of death upon him, then you will acquit him on that charge because to act in matters of this sort under threat of death is excusable."[146] Purdy was ultimately found guilty and sentenced to death, although subsequently reprieved.[147]

In the Netherlands, post-war cases saw "the plea of duress . . . less easily accepted," given the "extended national duties" that arise for the population of occupied territories in a context of "total war."[148] Notwithstanding the degree of uncertainty regarding their application to treason or murder, the defenses of duress and necessity involve exacting standards that are not always readily met, even by those accused of collaboration with the enemy under extreme circumstances.

During both the Korean and Vietnam wars, captured United States prisoners of war cooperated with the opposing side in various ways, often in the context of highly coercive circumstances involving torture, starvation, and brutal camp conditions.[149] Criticized for their selectivity and politicization, United States Army courts-martial for collaboration that were held after the Korean war had to contend with the defense of duress and the conditions faced by the accused in Korean camps.[150] Over a dozen returnees were charged with aiding the enemy, which constituted a capital offense,[151] although other potential cases of wrongdoing were not pursued on account of "substan-

145. *Id*. at 185.

146. *Id*. at 186–87.

147. For an account of other cases in the United Kingdom involving duress see *Coercion: A Defense to Misconduct while a Prisoner of War*, 29 IND. L. J. 603, 609–10 (1954).

148. Röling, *supra* note 79, at 436–37.

149. *See generally* CHARLES S. YOUNG, NAME, RANK, AND SERIAL NUMBER: EXPLOITING KOREAN WAR POWS AT HOME AND ABROAD (2014); RAYMOND LECH, BROKEN SOLDIERS (2000); Elizabeth Lutes Hillman, *Disloyalty Among Men in Arms: Korean War POWs at Court-Martial*, 82 N.C. L. REV. 1629 (2004).

150. On selectivity and politicization see Lutes Hillman, *supra* note 149, at 1632, 1643–47; LECH, *supra* note 149, at 222–26, 254; YOUNG, *supra* note 149, at 3, 87, 142, 145–46, 190; *See also* WINSTON GROOM & DUNCAN SPENCER, CONVERSATIONS WITH THE ENEMY: THE STORY OF PFC ROBERT GARWOOD (1983).

151. LECH, *supra* note 149, at 212–13.

tial evidence of force or duress."[152] For example, a court-martial was not recommended for Colonel Frank Schwable, who had been tortured into signing a confession regarding the United States' use of bacteriological warfare, finding: "Colonel Schwable resisted this torture to the limit of his ability to resist [and he had] reasonable justifications for entering into such acts."[153]

The defense of duress only succeeded in one of the courts-martial, failing in others on account of the absence of immediacy in relation to the threats made of death or ill-treatment.[154] While not amounting to duress, "[b]eatings, intensive interrogations, and deprivation of food, water, medical care, and sleep" could be considered in mitigating the sentence.[155] In *United States v. Fleming*, the Court of Military Appeals reiterated that duress required "a well-grounded apprehension of immediate death or serious bodily harm."[156] The majority found that this standard had not been met, including the threat of confinement to caves where detained prisoners had died, stating, "Although by civilized standards, conditions in the prisoner of war camp were deplorable, we cannot conclude, as a matter of law, that the threat of duress or coercion was so immediate as to legally justify the accused's acts."[157] Fleming was discharged from the Army for his propaganda and other activities that amounted to collaborating, communicating, and holding intercourse "directly with the enemy."[158] His sentence was at the lower end of the spectrum of those handed down to the returning prisoners of war. Other prisoners of war received life or lengthy terms of imprisonment, some with hard labor, reflecting the differing levels of seriousness of the various acts of collaboration.[159] It has been said that a public outcry brought prosecutions to an end and contributed to those found guilty serving only partial terms.[160]

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152. *Misconduct in the Prison Camp: A Survey of the Law and Analysis of the Korean Cases*, 56 COLUM. L. REV. 709, 738 (1956). *See also* LECH, *supra* note 149, at 233, 250; YOUNG, *supra* note 149, at 3, 147–49.

153. LECH, *supra* note 149, at 240–41.

154. *Misconduct in the Prison Camp*, *supra* note 152, at 769.

155. *Id.* at 770.

156. United States v. Fleming, 23 C.M.R. 7, 28 (1957).

157. *Id*. *But see Id.* at 28–29 (Chief Judge Quinn, Concurring).

158. *Id*. at 9.

159. YOUNG, *supra* note 149, at 147; LECH, *supra* note 149, at 246, 267–74.

160. *Id.*

The courts-martial of United States prisoners of war that collaborated during the Korean War also exposed the limited role of motive in the trials for collaboration. Accused persons have occasionally argued that they cooperated with the enemy for benign reasons. Fleming and several others claimed that they had collaborated in order to save the lives of fellow prisoners of war or to contribute to peace.[161] The Court of Military Appeals held, however, that "good motives are not a defense to a crime," though they may be relevant for determining sentence.[162]

The post–Second World War reckoning with collaborators was littered with claims that service for the enemy was either transparently or secretly undertaken for positive reasons. Pétain in France and Quisling in Norway argued unsuccessfully that they were in some ways shielding their countries from the Nazis, while lower-ranking defendants often pleaded that they remained in their posts while under German occupation "to prevent someone more radical than themselves from taking over."[163] Peter Novick has traced the argument that collaborators aided the enemy in order "to make the best of a bad situation," positing:

> From Pétain and Laval down to petty officials, industrialists and journalists, the claim was that by their action they had prevented greater German exactions. It might be a question of substituting Gallic anti-Semitic measures for the *Endlössung*, keeping factories going to prevent the deportation of their workers, carrying out bloodless expeditions against the Resistance instead of leaving it to the tender mercies of the Germans, or simply establishing good relations with the Germans so that they would be amenable to suggestion.[164]

The "double game" argument, that Vichy collaborators were also working for the Resistance, was valid in certain cases, though many collaborators joined the Resistance when Germany's defeat became apparent.[165] Although not defenses to a criminal charge, Jon Elster concludes that during the purges in post-war France, "such *redemptive* acts have been allowed to

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161. *Misconduct in the Prison Camp*, supra note 152, at 773–74.

162. *United States v. Fleming*, 7 C.M.R. at 26–27. *See also* United States v. Batchelor, 19 C.M.R. 452, 466 (1955) *aff'd*, 22 C.M.R. 144 (1956).

163. Deák at al., *supra* note 19, at 11.

164. NOVICK, *supra* note 24, at 170.

165. *Id.* at 88–89, 169–70; DÉAK, *supra* note 3, at 81, 121–22.

play a role in the determination of guilt and in sentencing."[166] The political chief of the French automobile industry, François Lehideux, is said to have successfully defended the charge of "intelligence with the enemy" by claiming to have actively resisted, rather than collaborated, as "the French automobile industry had systematically sabotaged the German war effort by deliberately underproducing."[167]

Former members of the Jewish Councils or Jewish Police in occupied territories, as well as those who served as *Kapos* in the concentration and extermination camps, received varying treatment as potential victims of circumstances when tried after the Second World War. In the Soviet Union, for example, members of the Jewish Councils were sentenced severely, with little by way of mitigation for those convicted.[168] In contrast, the Jewish Honor Courts that operated in occupied Germany accepted the relevance of the coercive context and "generally recognized that the assumption of posts such as a Judenrat member, ghetto policeman or kapo was not a matter of choice, [but] they nevertheless regarded the way in which individuals fulfilled their tasks as a matter of choice for which they could be held accountable."[169] A number of *Kapos* were tried in Israel pursuant to its Nazi and Nazi Collaborators (Punishment) Law of 1950, the drafting of which saw a divergence of views within the Knesset regarding the availability of duress or necessity as a defense or mitigation in the trial of Jewish collaborators.[170] Of the approximately thirty trials that took place, many accused were acquitted or given relatively light sentences.[171]

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166. Elster, *supra* note 47, at 324–25 (emphasis in original).

167. TALBOT IMLAY & MARTIN HORN, THE POLITICS OF INDUSTRIAL COLLABORATION DURING WORLD WAR II: FORD FRANCE, VICHY AND NAZI GERMANY 1–2 (2014).

168. Penter, *supra* note 32, at 353–55.

169. Laura Jockusch, *Rehabilitating the Past? Jewish Honor Courts in Allied-Occupied Germany*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 49, 64 (Laura Jokusch & Gabriel N. Finder eds., 2015).

170. Dan Porat, *Changing Legal Perceptions of "Nazi Collaborators" in Israel, 1950-1972*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 303, 307–08 (Laura Jockusch & Gabriel N. Finder eds., 2015).

171. LAWRENCE DOUGLAS, THE RIGHT WRONG MAN: JOHN DEMJANJUK AND THE LAST GREAT NAZI WAR CRIMES TRIAL 66 (2016). *See also* Orna Ben-Naftali & Yogev Tuval, *Punishing International Crimes Committed by the Persecuted:*

In one of the last of these cases, a former commander of the Jewish Police in German occupied territory, Hirsch Berenblat, had his five year imprisonment sentence set aside by the Supreme Court of Israel, which placed particular emphasis on the coercive context of his collaboration.[172] Chief Justice Olshan stated that the question of what a Judenrat leader should have done in the circumstances "is one for history and not for a court before which a persecuted person is brought to face criminal charges."[173] Justice Landau noted that the cooperation of the Jewish Police was "borne of unprecedented duress and force," and that it would be hypocritical to criticize those who "did not rise to the heights of moral supremacy, when mercilessly oppressed."[174] The Nazi and Nazi Collaborators (Punishment) Law of 1950 could not be interpreted "by some moral standard which only few are capable of reaching."[175] The Supreme Court's judgment effectively brought an end to the trials of Jewish Nazi collaborators and came at a time when they were increasingly seen by the Israeli public as victims more than perpetrators.[176] The fraught question of Jewish collaborators was also touched upon in the context of denaturalization proceedings, which are addressed in the next section.

C. Denial of Refugee Status and Revocation of Citizenship

International organizations mandated to work on the issue of refugees and displaced persons in the aftermath of the Second World War declared from the outset that war criminals and collaborators were not to benefit from the planned system of protection. In one of its earliest resolutions, the United Nations General Assembly emphasized "the necessity of clearly distinguishing between genuine refugees and displaced persons, on the one hand, and war criminals, quislings and traitors . . . on

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The Kapo Trials in Israel (1950s-1960s), 4 J. INT. CRIM. JUST. 128, 150, 160 (2006).

172. For an overview see Porat, *supra* note 170, at 305, 313–18.

173. CrimA 77/64 Hirsch Berenblat v. Attorney General, Supreme Court of Israel, 18 Legal Verdicts, 70 (1964) (Isr.) *available at* https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Berenblat%20v.%20Attorney%20General.pdf.

174. *Id*. at 41.

175. *Id*.

176. *See* Porat, *supra* note 170, at 313–21. On the prosecution of vicim-perpetrators see Mark Drumbl, *Victims Who Victimise*, 4 LONDON REV. INT'L L. 217 (2016).

the other."[177] The General Assembly also stressed that any action taken should not interfere with the surrender, prosecution, and punishment of war criminals and collaborators.[178] The constitutive documents of the International Refugee Organization, the precursor to the Office of the United Nations High Commissioner for Refugees, explicitly stated that war criminals, quislings, and traitors would not be the concern of the Organization.[179] Equally excluded were those persons shown:

> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.[180]

This language was ambiguous and created some uncertainty, which resurfaced in deportation cases many decades later.[181]

The exclusion clause in Article 1(F) of the 1951 Convention Relating to the Status of Refugees drew on these provisions, but perhaps in the interests of clarity, omitted any reference to collaborators. The Refugee Convention protections do not apply to a person where there are serious reasons to believe that:

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.[182]

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177. G.A. Res. 8(I) (Feb. 12, 1946).

178. *Id.* ¶ (d).

179. G.A. Res. 62(I) Constitution of the International Refugee Organization, annex I, part II, ¶ 1 (Dec. 15, 1946). *See further* Economic and Social Council, *Rep. of the Special Committee on Refugees and Displaced Persons,* U.N. Doc. E/REF/75 (June 7, 1946).

180. G.A. Res. 62(1) at 97 annex I, Part II, ¶ 2 (Dec. 15, 1946).

181. Felice Morgenstern, *Asylum for War Criminals, Quislings and Traitors*, 25 BRIT. Y. B. INT'L L. 382, 386 (1948).

182. *See further* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 162–97 (2007); Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses, in* REFUGEE PROTECTION IN INTERNATIONAL

While not explicitly referred to, collaborators could be excluded from the protection of the Refugee Convention if their activities amounted to international crimes.[183] Alternatively, service to an opposing belligerent that did not involve such crimes might amount to treason, which could be considered a political offense.[184] In addition, there is little doubt that wartime collaborators faced serious threats for their activities. There are numerous examples of refugee protection being given to those that cooperated with an opposing side during an armed conflict.

Following the Second World War, the international community took the stance that suspected war criminals and collaborators were not to benefit from the legal protections afforded to "genuine refugees," yet Nazi collaborators successfully sought refuge outside of Europe and, in some cases, were actively assisted by officials of the Allied Nations. A large number of collaborators were admitted to the United States, some of whom received assistance from United States officials, and others were even recruited as spies and informers by the CIA and FBI during the Cold War.[185] Since that time, the United States Department of Justice has undertaken denaturalization proceedings against a number of such individuals on the basis that they obtained visas under false pretenses. Criminal proceedings could not be taken against such persons on account of the rule of non-retroactivity, as their alleged crimes did not violate United States law at the time of their commission.[186]

LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 426 (Erika Feller et al. eds., 2003).

183. Convention Relating to the Status of Refugees July 28, 1951, 189 U.N.T.S 137. *See further* JOSEPH RIKHOF, THE CRIMINAL REFUGEE: THE TREATMENT OF ASYLUM SEEKERS WITH A CRIMINAL BACKGROUND IN INTERNATIONAL AND DOMESTIC LAW (2012); John S. Willems, *From Treblinka to the Killing Fields: Excluding Persecutors from the Definition of "Refugee,"* 27 VA. J. INT'L L. 823 (1987).

184. *See, e.g.* L.C. Green, *Political Offences, War Crimes and Extradition,* 11 INT'L COMP. L. Q. 329 (1964).

185. *See* LICHTBLAU, *supra* note 62; CHRISTOPH SCHIESSEL, ALLEGED NAZI COLLABORATORS IN THE UNITED STATES AFTER WORLD WAR II (2016); Kevin Conley Ruffmer, *Eagle and Swastika: CIA and Nazi War Criminals and Collaborators*, 1, 7 (CIA, working paper, 2003).

186. JUDY FEIGIN, U.S. DEP'T OF JUSTICE, THE OFFICE OF SPECIAL INVESTIGATIONS: STRIVING FOR ACCOUNTABILITY IN THE AFTERMATH OF THE HOLOCAUST 541 (Mark M. Richard ed., 2009); *see also* Matthew Lippman, *The*

Aleksandras Lileikis, the head of Lithuania's secret police in Vilnius during the German occupation, faced such denaturalization proceedings. He had been granted entry to the United States in 1955, but was later found to have acted "in concert with the Gestapo" in its persecution of Lithuanian Jews.[187] The Central Intelligence Agency sought to prevent his deportation, though the case eventually proceeded and he was deported to Lithuania in 1996 to face trial, but died at the age of ninety-three before the verdict was issued.[188] A similar denaturalization proceeding failed against Soviet citizen Tscherim Soobzokov, who had joined the SS during the Second World War, because United States officials were aware of his activities when he was granted entry into the United States.[189] Soobzokov subsequently died after a bomb attack on his home that was linked to a Jewish militant group.[190] In all, the Department of Justice Office of Special Investigations denaturalized and deported around three dozen Nazi collaborators.[191] Canada also revoked the citizenship of several Nazi collaborators for failing to disclose their activities in support of the Nazis to Canadian authorities, but not necessarily on the basis that they had participated in crimes.[192]

One of the more famous denaturalization cases in the United States was that of John Demjanjuk, a Ukrainian national who had served in the Red Army, but then worked as a guard in a number of German concentration and extermination camps

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Denaturalization of Nazi War Criminals in the United States: Is Justice Being Served?, 7 HOUS. J. INT'L L. 169 (1985).

187. LICHTBLAU, *supra* note 62, at 213–28.

188. *Id.* at 222–26. *See also* Maura Reynolds, *Nazi Collaborator Alexandras Lileikis Dies at 93 in Lithuania*, WASH. POST (Sept. 30, 2000), https://www.washingtonpost.com/archive/local/2000/09/30/nazi-collaborator-aleksandras-lileikis-dies-at-93-in-lithuania/fd7c4294-4b3b-405d-b40a-4a015cd33905/.

189. LICHTBLAU, *supra* note 62, at 121–23.

190. *Id.* at 175–79. *See also* Judith Cummings, *F.B.I. Says Jewish Defense League May Have Planted Fatal Bombs*, N.Y. TIMES, Nov. 9, 1985, at A1.

191. DOUGLAS, *supra* note 171, at 113.

192. *See* Minister of Citizenship and Immigration v. Fast, [2003] F.C. 1139, ¶98 (Can.); Kirk Makin & Jane Taber, *Ottawa Strips Two Nazi Suspects of Citizenship*, GLOBE AND MAIL (May 24, 2007), https://www.theglobeandmail.com/news/national/ottawa-strips-two-nazi-suspects-of-citizenship/article20397970/; Canada (Minister of Citizenship and Immigration) v. Oberlander, [2000] F.C.14968 (Can.).

while a prisoner of war.[193] Demjanjuk was subject to two sets of denaturalization proceedings in the United States; after the first, he was deported to Israel, tried and convicted of crimes against the Jewish people and crimes against humanity, but subsequently acquitted by the Supreme Court in what was seemingly a case of mistaken identity.[194] Following a second denaturalization proceeding in the United States, he was deported to Germany where he was tried, convicted, and sentenced to five years imprisonment for being an accessory to the murder of Jews at the Sobibor extermination camp in Poland.[195] Demjanjuk was not a high-ranking or especially prominent individual—he has been described as "a run-of-the-mill auxiliary in the Nazi system of atrocity"—but the case was significant, as it offered one of the few examples where Germany tried non-nationals for their collaboration in the crimes of the Second World War.[196] The defense of duress was also at issue in the proceedings because Demjanjuk had been recruited into the *Trawnikis*, a notorious group of Soviet prisoners of war involved in thousands of murders by the SS.[197]

During the denaturalization proceedings against Demjanjuk in the United States, the courts had to address the relevance of the argument that his service as a concentration camp guard was involuntary. The Court of Appeals for the Sixth Circuit held that he was ineligible for a visa under the Displaced Persons Act of 1948 for having served as a Nazi concentration camp guard, irrespective of whether such service was voluntary or involuntary.[198] The Act relied upon the definition used in the Constitution of the International Refugee Organization, which had excluded those who "assisted the enemy in persecuting ci-

193. DOUGLAS, *supra* note 171, at 15.

194. *See* Lisa J. del Pizzo, *Not Guilty – But Not Innocent: An Analysis of the Acquittal of John Demjanjuk and its Impact on the Future of Nazi War Crimes Trials*, 18 B.C. INT'L & COMP. L. REV. 137 (1995).

195. DOUGLAS, supra note 171, at 66–67.

196. *Id.* at 2, 133. *See also* RICHARDS PLAVNIEKS, NAZI COLLABORATORS ON TRIAL DURING THE COLD WAR: VICTOR ARĀJS AND THE LATVIAN AUXILIARY SECURITY POLICE 252 (2018).

197. DEÁK, *supra* note 3, at 72. *See* Peter Black, *Foot Soldiers of the Final Solution: The Trawniki Training Camp and Operation Reinhard*, 25 HOLOCAUST AND GENOCIDE STUD. 1, 5 (2011).

198. United States v. Demjanjuk, 367 F.3d 623 (6th Cir. 2004).

vilian populations" or "voluntarily assisted the enemy forces . . . in their operations."[199]

The question of voluntariness under the Act had previously been addressed by the Supreme Court in *Fedorenko v. United States*, which held that assisting in the persecution of civilians, such as by serving as a concentration camp guard, rendered one ineligible for a visa regardless of whether such service was voluntary or involuntary.[200] In that case, Feodor Fedorenko, a former Soviet citizen of Ukraine, had not disclosed that he had been an armed guard at the Treblinka extermination camp in Poland following his capture by the Germans, which would have rendered him ineligible for a visa or United States citizenship.[201] While the District Court had found that Fedorenko had been forced to serve as a guard, the Supreme Court determined this to be irrelevant under the Displaced Persons Act.[202] Supreme Court Justice Stevens dissented, unable to share the view that "any citizen's past involuntary conduct can provide the basis for stripping him of his American citizenship."[203] The Court's holding, he argued, would have unacceptably prevented *Kapos* from being eligible for citizenship.[204]

Fedorenko was subsequently deported to the Soviet Union where, in 1986, he was convicted of treason and murder and ultimately executed by firing squad.[205] Similarly, Demjanjuk was deported to Germany to face trial after the Supreme Court found that his entry to the United States was unlawful and his naturalization "illegally procured."[206] German investigators had not previously investigated so-called *Trawnikis* such as Demjanjuk on the assumption that involuntariness or duress might successfully be argued as a defense.[207] Laurence Douglas has pointed out that the possibility of desertion from the SS would undermine such a claim for Demjanjuk: "once he found himself serving, he chose to stay put, and that choice, even if

199. Displaced Persons Act of 1948, 62 Stat. 1009 § 2 (1948).
200. Fedorenko v. United States, 449 U.S. 490, 512 (1981)
201. *Id.* at 513–14.
202. *Id.* at 500–01.
203. *Id.* at 533.
204. *Id.* at 534–35. *See however* DOUGLAS, *supra* note 171, at 48.
205. *Nazi Expelled by U.S. Executed: Fyodor Fedorenko Dies by Soviet Firing Squad*, L.A. TIMES (July 27, 1987), https://www.latimes.com/archives/la-xpm-1987-07-27-mn-4129-story.html.
206. *Demjanjuk*, 367 F.3d at 637.
207. DOUGLAS, *supra* note 171, at 224.

constrained by circumstance, was voluntary. Constrained choice, after all, is crucially different than no choice whatsoever."[208] Demjanjuk was found guilty as an accessory to the murder of 28,060 Jews at the Sobibor death camp and sentenced to five years imprisonment, but he was later released pending appeal.[209] He died before the appeal was heard.[210]

The United States Department of Justice was far more hesitant to proceed with denaturalization against Jewish prisoners alleged to have collaborated with the Nazis, as they could also be considered victims.[211] However, in the case of Jacob Tannenbaum, the infamous *Kapo* at the Gorlitz concentration camp, dozens of survivors sought his prosecution and gave accounts of him "brutalizing and physically abusing prisoners," even when SS personnel were not present.[212] While Tannenbaum claimed that he had acted to save his own life and had spared the lives of prisoners, he was subject to denaturalization proceedings, which lead to an agreement that he would give up his United States citizenship and admit to his abuse of Jewish prisoners.[213] He was allowed to stay in the United States, however, because of his poor health.[214] As to the dilemma of victims that collaborated with their oppressors, Judge Glasser, who sat in the proceedings, stated:

> I dreaded the day when this case was to come to trial . . . I have often wondered how much moral and physical courage we have a right to demand or expect of somebody in the position of Mr. Tannenbaum . . . I sometimes wonder whether I might have passed that test.[215]

Some of Tannenbaum's victims were less conciliatory, demanding vengeance, "not compassion or understanding," and the same punishment as other Nazis had received.[216]

The advanced age and ill-health of some Nazi collaborators, such as Tannenbaum, prevented their deportation, although

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208. *Id*. at 228.
209. *Id*. at 252–53.
210. *Id*. at 257.
211. LICHTBLAU, *supra* note 62, at 196.
212. Robert D. McFadden, *A Jew Who Beat Jews in a Nazi Camp Is Stripped of His Citizenship*, N.Y. TIMES, Feb. 5, 1988, at B1.
213. FEIGIN, *supra* note 186, at 106–16.
214. *Id.* at 112–13.
215. *Id.* at 112.
216. LICHTBLAU, *supra* note 62, at 198; FEIGIN, *supra* note 186, at 112–13.

the United Nations Human Rights Committee rejected a claim that revocation proceedings in Canada against a former collaborator would violate the prohibition of torture or cruel, inhumane, or degrading treatment or punishment.[217] Prosecuting someone in poor health might be incompatible with Article 7 of the International Covenant on Civil and Political Rights, the Committee held, but "[n]o such circumstances exist in the present case, in which the citizenship revocation proceedings were provoked by serious allegations that the author participated in the gravest crimes."[218]

After the Second World War, state authorities sought to prevent collaborators from benefiting from refugee protection, even revoking citizenship entitlements previously granted. More recently, such authorities have recognized that the risks faced by persons who have collaborated with a particular side during an armed conflict can be considered persecution within the meaning of refugee law. For example, in the context of the United States led invasion and occupation of Iraq in 2003, the United Kingdom granted asylum to a number of Iraqis on this basis. With regard to an Iraqi interpreter who had worked with United States forces in Mosul, the United Kingdom's Asylum and Immigration Tribunal held that:

> [A] person who has worked as a translator or in any other way such as to be regarded by insurgents as a collaborator with the multi-national force and who has been targeted by a significant insurgent group, is a person who at present faces a real risk of persecution on account of perceived political opinion in his home area in Iraq.[219]

In 2006, the Refugee Review Tribunal of Australia similarly accepted that the claim by a Palestinian triggered Australia's obligations under the 1951 Refugee Convention on the basis that, "if he is forced to return to the occupied territories he will be at risk of serious harm by Hamas, and other individuals or

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217. U.N. Human Rights Committee, Walter Obodzinsky (deceased) and his daughter Anita Obodzinsky v. Canada, Comm. No. 1124/2002, ¶ 9.2, CCPR/C/89/D/1124/2002 (Mar. 19, 2007) *available at* https://digitallibrary.un.org/record/600218.

218. *Id.*

219. NS (Iraq: perceived collaborator: relocation), Iraq CG [2007] UKAIT 00046 ¶ 40 (UK). *See also BA (Returns to Baghdad Iraq CG)* [2017] UKUT 18 (IAC) (Jan. 23, 2017) (UK).

groups, because he is suspected of collaborating with the Israeli authorities."[220]

In contrast, a claim for asylum by an Afghan national who worked as an interpreter at the British embassy in Kabul and acted as an informer was rejected by the United Kingdom authorities in 2015.[221] The collaboration in that instance was considered low-level, with a consequent lower risk of harm from the Taliban.[222] In a separate case, the European Court of Human Rights found that returning two Afghan nationals to Afghanistan, after one had worked as a driver for the United Nations and the other an interpreter for United States forces, did not violate the European Convention on Human Rights because the Afghan nationals had not shown that a real risk existed of a violation of the prohibition of torture, inhuman or degrading treatment, or punishment under Article 3.[223] The United States authorities have granted asylum to informers not only on account of the serious risks that they would face if returned to countries such as Palestine, Mexico, or the Philippines, but also to avoid discouraging others from collaborating when such activities support the United States' interests.[224] Indeed, the United States has introduced a visa program specifically for interpreters and translators who assisted its forces in Iraq and Afghanistan.[225] The dogmatic, exclusionary approach of inter-

220. RRT Case No. 060793720, [2006] RRTA 197, Australia: Refugee Review Tribunal, Nov. 21, 2006, *available at* https://www.refworld.org/cases,AUS_RRT,47a7080bd.html (Austl.).

221. *See e.g.,* Haroon Faizi v. Secretary of State for the Home Department, Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: AA/05285/2014, ¶ 9–15 (Sept. 16, 2015).

222. *Id*.

223. Case of H & B v. United Kingdom, App Nos. 70073/10 and 44539/11 ¶102–16 Eur. Ct. H.R. (2013).

224. *Son of Hamas Founder Granted Asylum in the US*, TELEGRAPH (June 30, 2010), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/7864876/Son-of-Hamas-founder-granted-asylum-in-US.html; Natasha Mozgovaya, *U.S. Court Grants Asylum to 'Son of Hamas'*, HAARETZ (June 30, 2010), https://www.haaretz.com/1.5141763; MOSSAB HASSAN YOUSEF, SON OF HAMAS 261 (2014). *See also* Ramirez-Peyro v. Holder, 574 F.3d 893, 900–01 (8th Cir. 2009); Mejia v. Ashcroft, 298 F.3d 873, 879–80 (9th Cir. 2002).

225. Special Immigrant Visas (SIVs) for Iraqi and Afghan Translators/Interpreters, U.S. Dept. of State – Bureau of Consular Affairs, https://travel.state.gov/content/visas/en/immigrate/iraqi-afghan-translator.html (last visited Mar. 11, 2019). *See further* Ben Juvinall, *Heaven*

national refugee law towards collaborators of the post–Second World War period has given way to the recognition that such individuals may require protection on account of their wartime activities.

II. RECONSTRUCTION, REHABILITATION AND RECONCILIATION

In a post-conflict context, it might be neither possible nor desirable to meet popular demands for revenge, retribution, and punishment of collaborators. This is particularly the case where retaliation in kind is called for or where a criminal justice system lacks sufficient capacity. Criminal trials are without doubt an important means of accountability and justice in the aftermath of armed conflict, but they may also suffer from "inherent limitations" in effectively coming to terms with the past.[226] Authorities may choose to pursue other options alongside trials that are aimed at reconstructing society and restoring the status quo through rehabilitating and reintegrating combatants and collaborators into society. Following the Second World War, for example, most Western European countries "made great efforts to rehabilitate the condemned collaborators, in part so as to relieve overcrowding in the prisons, in part to increase the workforce."[227]

As explored in the following sections, states have also resorted to transitional justice mechanisms other than criminal trials and lustration to address past collaboration with an opposing side during armed conflict. The first part of this section considers the use of amnesty in relation to wartime collaborators and explores how this contested instrument may exclude potential beneficiaries if they have engaged in especially serious crimes. The second part looks at how truth commissions have engaged with the phenomenon of collaboration. The published reports of various commissions have contributed to establishing the truth, contextualizing the phenomenon of collaboration during armed conflict, and making recommendations for addressing both the activities of collaborators and the stigma they may face. More so than criminal justice processes, such bodies have

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or Hell? The Plight of Wartime Interpreters of the Iraq and Afghanistan Conflicts living in the U.S., 21 MICH. STATE INT'L L. REV. 205 (2013).

226. Rep. of the S.C., at ¶¶ 39, 47, U.N. Doc. S/2004/616 (2004).

227. DEÁK, *supra* note 3, at 204. *See also* Helen Grevers, *Re-education in Times of Transitional Justice: the Case of the Dutch and Belgian Collaborators After the Second World War*, 22 EUR. REV. HIST. 711 (2015).

addressed accountability with a view to advancing rehabilitation and reconciliation in the interests of societal reconstruction.

A. Amnesty

The granting of amnesty is a common, if controversial, means of dealing with those who may have participated in hostilities and engaged in unlawful conduct during an armed conflict. Mark Freeman defines amnesty as:

> an extraordinary legal measure whose primary function is to remove the prospects and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offences irrespective of whether the persons concerned have been tried for such offences in a court of law.[228]

Amnesties may come about because of a political agreement between parties to a conflict, may be necessary because of the inability of a justice system to process accused persons, or may be considered an appropriate mechanism for reintegrating conflict participants into society. Additional Protocol II to the 1949 Geneva Conventions contains one of the few references to amnesty in an international treaty, suggesting that once hostilities in a non-international armed conflict are over, "the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict."[229]

The controversy associated with amnesties is that they may allow impunity, as persons implicated in serious crimes may evade criminal responsibility.[230] International courts and human rights bodies are increasingly of the view that amnesty for international crimes—including genocide, crimes against humanity, and war crimes—is contrary to international law.[231] Though such a stance is not supported by customary interna-

228. FREEMAN, *supra* note 11, at 13.

229. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 6(5), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

230. *See, e.g.* Orentlicher, *supra* note 11.

231. *See, e.g.* Marguš v. Croatia, App no 4555/10 Eur. Ct. H.R. ¶ 74(2012); Barrios Altos v. Peru Case 10.480 ¶ 52 (Inter-Am. Ct. H.R., Mar. 14, 2001).

tional law,[232] it has little bearing on amnesty for domestic offenses, such as sedition or treason, that do not amount to international crimes. Amnesty for wartime collaboration would generally not be problematic from an international law perspective unless such activities involved complicity in international crimes, although a failure to prosecute even domestic offenses may not satisfy post-conflict demands for justice and accountability at times.

Amnesty has served as a tool both for recruiting informers or other collaborators during armed conflict and for addressing their activities following the end of conflict. The 2015 United States Law of War Manual considers amnesty as an inducement that could be used "to gain the cooperation of captured enemy persons."[233] In Northern Ireland, the Irish Republican Army occasionally claimed to grant amnesty to informers who confessed to their actions, with the motive being to encourage informers to cease cooperating with the police, the British army, or security forces in Northern Ireland.[234]

At the end of an armed conflict, it would seem appropriate that collaborators who were coerced into serving the enemy, or whose collaboration was minimal in nature, should benefit from amnesty. The 1994 Gaza-Jericho Agreement contemplated amnesty for the Palestinian residents of the Gaza Strip village of Dahaniya, many of whom had collaborated with Israeli authorities during its occupation, which commenced in 1967.[235] For serious acts of collaboration, parties have also supported amnesty, even for high-ranking individuals; the Lieber Code

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232. *See generally* FREEMAN, *supra* note 11; MALLINDER, *supra* note 11; VERA VRIEZEN, AMNESTY JUSTIFIED? THE NEED FOR A CASE BY CASE APPROACH IN THE INTERESTS OF HUMAN RIGHTS 52 (2012); Azanian People's Org. (AZAPO) and others v. Pres. of the Rep. of South Afr. and others 1996 (8) BCLR 1015 (CC) ¶4 (S. Afr.).

233. LAW OF WAR MANUAL, *supra* note 1, at 1057.

234. *See* Dudai, *supra* note 13, at 35; Ron Dudai, *Underground Penality: The IRA's Punishment of Informers*, 20 PUNISHMENT & SOC'Y 375 (2018); Kiran Sarma, *Informers and the Battle Against Republican Terrorism: A Review of 30 Years of Conflict*, 6 POLICE PRACT. & RES. 165, 175–76 (2005).

235. Agreement on the Gaza Strip and Jericho Area Annex I, art. IV(5)(6), May 4, 1994, Isr.-Palestinian Liberation Organization, 33 I.L.M. 622 Annex I: Protocol Concerning Withdrawal of Israeli Forces and Security Agreement, Article IV(5)(6).

contemplated the trial of rebel leaders for high treason "unless they are included in a general amnesty."[236]

After the Second World War, distinctions were drawn between those who had collaborated with the German authorities in violation of their national laws of allegiance and those that did so while also engaging in serious violent crimes. The latter were often not covered by an applicable amnesty; a 1946 Italian Presidential Decree, for example, included an amnesty for "collaboration with the occupying Germans," but excluded persons who were complicit in serious crimes, such as large scale murders.[237] In the *Tossani* case, in which an Italian national successfully appealed his conviction for collaborating with the enemy and was found to warrant amnesty, Italy's Supreme Court of Cassation determined that he had only a passive role in an operation that saw a partisan murdered by German forces.[238]

The Philippines' 1948 Presidential Proclamation on Amnesty adopted a similar, but somewhat ambiguous, distinction. It granted "full and complete amnesty to all persons accused of any offense against the national security for acts allegedly committed to give aid and comfort to the enemy during the last war," but also stated that the amnesty would not apply to:

> persons accused of treason for having taken up arms against the allied nations or members of the resistance forces, for having voluntarily acted as spies or informers of the enemy, or for having committed murder, arson, coercion, robbery, physical injuries or any other crime against person or property, for the purpose of aiding and abetting the enemy in the war against the allied nations or in the suppression of the resistance movement in the Philippines.[239]

Those who had traded with the enemy or engaged in bureaucratic collaboration were entitled to amnesty on the basis that the post-war prosecutions for the former had not been successful and that the latter had either been coerced or undertaken

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236. Lieber Code, *supra* note 136, art. 154.

237. Presidential Decree No. 4 of 22 June 1946, *cited in* Prosecutor v Tadić, Case No. IT-94-1-A, Appeals Chamber, Judgment, ¶ 217 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

238. *See also Tossani* Case, Italian Court of Cassation, Criminal Section II, Judgment of 17 September 1946, no. 1446 *reprinted in* 5 J. INT. CRIM. JUST. 230, 230 (2007).

239. A Proclamation Granting Amnesty, Proc. No. 51, (1948) (Phil.).

out of a sense of patriotic duty in order to minimize the atrocities perpetrated by the Japanese occupying authorities.[240]

Amnesty has, at times, followed the trials of collaborators. After the Bangladesh War of Independence, the newly created state passed the Bangladesh Collaborators (Special Tribunals) Order 1972 and tried thousands of local collaborators for criminal offenses, including murder, rape, and arson, that had been committed alongside those of Pakistani troops.[241] Many of those convicted of less serious offenses, however, benefited from acts of clemency and amnesty within a couple of years.[242]

Wartime collaborators have at times enjoyed *de facto* amnesty, where prosecutions were not pursued or sentences enforced for political or economic reasons.[243] In Greece, for example, British authorities prevented the prosecution of Nazi collaborators after the war in order to weaken the Greek communists who had provided significant resistance to the German occupation.[244] *De jure* amnesty, in contrast, has at times been applied to collaborators accused of serious crimes in order to foster national unity, rebuild war-torn societies, or temper the severity of post-war purges.[245] Even where amnesty may have formally excluded serious crimes, in practice its application has often been arbitrary and inconsistent. The Soviet Union passed an amnesty law in 1955 for Soviet citizens that had collaborated with the Germans, but excluded those individuals who had been convicted of murder and torture, while German nationals—including those found responsible for crimes against humanity—were given amnesty and repatriated to Germany.[246]

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240. *See further* DAVID JOEL STEINBERG, PHILIPPINE COLLABORATION IN WORLD WAR II (1967); Konrad M. Lawson, *Between Postoccupation and Postcolonial: Framing the Recent Past in the Philippine Treason Amnesty Debate, 1948*, *in* DEBATING COLLABORATION AND COMPLICITY IN WAR CRIMES TRIALS IN ASIA, 1945–1956 105 (Kerstin von Lingen ed., 2017).

241. ALIMUZZAMAN CHOUDHURY, BANGL. COLLABORATORS (SPECIAL TRIBUNALS) ORDER 1972 (Bangladesh Law Foundation 1972); CAITLIN REIGER, INT'L. CENTRE FOR TRANSITIONAL JUST., FIGHTING PAST IMPUNITY IN BANGLADESH: A NATIONAL TRIBUNAL FOR CRIMES OF 1971 3–4 (2010).

242. REIGER, *supra* note 241, at 3–4.

243. *See* HASTINGS, *supra* note 33, at 144; Penter, *supra* note 32, at 353.

244. MALLINDER, *supra* note 11, at 61. *See also* Ed Vulliamy & Helena Smith, *Athens 1944; Britain's Dirty Secret*, GUARDIAN (Nov. 30 2014), https://www.theguardian.com/world/2014/nov/30/athens-1944-britains-dirty-secret.

245. MALLINDER, *supra* note 11, at 49, 58, 86-87, 190.

246. Penter, *supra* note 32, at 356–57.

More recent practice has seen political agreements set aside that were previously committed to the enactment of amnesty, even for collaborators. The Lomé Accord, for example, provided that the Government of Sierra Leone would grant "absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives."[247] The Government thereafter established the Special Court for Sierra Leone pursuant to an agreement with the United Nations to try members of various groups for crimes committed during the conflict, with the Court holding that the amnesty provision of the Lomé Accord did not deprive it of jurisdiction.[248]

Amnesty can play a beneficial role as a post-conflict tool that allows authorities to select individuals or groups that should not be subject to criminal sanctions and provide relief for an overburdened criminal justice system. If amnesty is granted, it is reasonable to apply such a form of quasi-exoneration to those that may have engaged in low-level collaboration to accommodate the enemy, rather than advance the enemy's aims and objectives—as well as those coerced into collaboration. For more serious forms of willful collaboration, authorities may accede to demands for criminal prosecution, particularly of prominent individuals, even though some discretion for granting amnesty remains to the extent that such actors were involved in the commission of crimes recognized by international law.

Although distinct from amnesty, pardons have occasionally been given for historic convictions for treason, such as those occurring during and after the Second World War.[249] Amnesty can be a blunt tool in a post-conflict context, the use of which may be resisted owing to the perception that it effectively al-

247. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Article IX, U.N. Doc. S/1999/777 (1999) *available at* https://peacemaker.un.org/sierraleone-lome-agreement99.

248. Prosecutor v. Kallon and Kamara, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 88 (Mar. 13, 2004).

249. *See* Tristina Moore, *Nazi deserter hails long-awaited triumph*, BBC NEWS (Sept. 8, 2009), http://news.bbc.co.uk/2/hi/europe/8244186.stm; Charles Hawley, *Germany considers rehabilitating soldiers executed for 'treason'*, DER SPIEGEL (June 29, 2007), http://www.spiegel.de/international/germany/overturning-hitler-s-military-tribunals-germany-considers-rehabilitating-soldiers-executed-for-treason-a-491332.html.

lows for impunity for both perpetrators and those that served the enemy. The granting of selective amnesty in relation to wartime collaboration should not be discounted, however, as it may offer a vehicle for distinguishing between various forms and differing degrees of collaboration—not all of which may merit exposure to criminal prosecution and punishment.

B. Truth Commissions

In recent decades, states have increasingly resorted to establishing truth commissions in the aftermath of armed conflict or periods of repression.[250] Such bodies may provide a forum for truth-telling by victims and perpetrators, and their reports can "expose patterns of violations, raise awareness about the rights of victims and offer road maps for reform."[251] Despite the prevalence of collaboration during situations of armed conflict, truth commissions have only occasionally addressed the phenomenon in detail. Truth commission reports that have dealt with collaboration and its consequences can serve to establish facts regarding such practices and clarify the responsibility of implicated parties and individuals. Such reports have included analyses of the lawfulness of the trial and treatment of collaborators, as well as recommendations concerning reparations and the rehabilitation of former collaborators. The processes and outcomes associated with truth commissions provide opportunities for a richer exposition of the practice of collaboration, the motivations of individual collaborators, and the consequences of the phenomenon for them and for society as a whole.

Truth commissions have often addressed collaboration in only a cursory fashion, by providing brief descriptions of the practice, alluding to the purposes for which of collaborators were used by parties to a conflict, and outlining the treatment meted out to individuals. For example, following the civil war from 1979 to 1992, the Commission on the Truth for El Salvador referred to the national army's counter-insurgency strategy that entailed "cutting the guerillas lifeline," whereby local inhabitants in certain areas "were automatically suspected of belonging to the guerilla movement or collaborating with it and thus

250. *See generally* HAYNER, *supra* note 12; FREEMAN, *supra* note 12; ALISON BISSET, TRUTH COMMISSION AND CRIMINAL COURTS (2012); ONUR BAKINER, TRUTH COMMISSIONS: MEMORY, POWER AND LEGITIMACY (2016).

251. Rep. of the S.C., ¶ 20, U.N. Doc. S/2011/634 (2011).

ran the risk of being eliminated."[252] The Commission's report described the FMLN (*Frente Farabundo Martí para la Liberación Nacional*) practice of executing suspected spies or traitors without due process.[253] With regard to the organization's claim that the killing of a particular individual was "a legitimate execution, since he was a traitor who was contributing in a direct and effective manner to repression against FMLN," the Commission held that "international humanitarian law does not permit the execution of civilians without a proper trial."[254]

Guatemala's Commission for Historical Clarification referred to enforced disappearances by state agents of those "under suspicion of collaborating with the enemy," while guerrilla groups also executed persons "in reprisal for collaboration with the Army" during the civil war from 1962 to 1996.[255] During the civil war in Liberia from 1999 to 2003, the Truth and Reconciliation Commission reported women were frequently abducted and mistreated after having been accused of being enemy spies.[256] Such reports can provide official, or at least authoritative, acknowledgment of the often covert use of informers or other collaborators, as well as assign responsibility for such activity and its consequences.

Truth commissions have also looked at the use of informers and other collaborators by state security services and opposition groups outside of the context of armed conflict. *Nunca Más*, the report of the National Commission on the Disappeared People, described the practice in Argentina whereby "the authorities managed to obtain, through torture, various forms of collaboration" by prisoners in many of the large detention centers.[257] The Commission described how such individuals were compelled to identify other members of political groups, participate in torture, and were themselves frequently disappeared.[258] The Chilean National Commission on Truth

252. Rep. of the Comm'n on the Truth for El Salvador, *From Madness to Hope: the 12-year war in El Salvador*, at 44, UN Doc. S/25500, (April 1, 1993).

253. *Id.* at 44, 150.

254. *Id.* at 162–63.

255. COMMISSION FOR HISTORICAL CLARIFICATION CONCLUSIONS AND RECOMMENDATIONS, GUATEMALA MEMORY OF SILENCE 35, 42 (1999).

256. *See, e.g.,* 2 REPUBLIC OF LIBERIA TRUTH AND RECONCILIATION COMMISSION, CONSOLIDATED FINAL REPORT 169 (2009).

257. ARGENTINA'S NATIONAL COMMISSION ON DISAPPEARED PEOPLE, NUNCA MÁS (NEVER AGAIN) 72 (1986).

258. *Id.* at 72–75.

and Reconciliation described how the functioning of the state's intelligence service operated secretively, above the law, and was generally "destructive of human rights."[259] It established a "network of collaborators and informers in government agencies" and amongst the prison population, and its staff were found to have killed suspected traitors within their own ranks.[260] Such reports strongly suggest the inevitability of human rights violations occurring in the recruitment, use, and treatment of informers and collaborators.

Truth commissions in Timor-Leste, Sierra Leone, South Korea, and South Africa have also provided thorough examinations of the employment and treatment of informers and other collaborators in times of conflict. The report of the Timor-Leste Commission for Reception, Truth, and Reconciliation describes how, during the Indonesian occupation of East Timor, the Indonesian military developed far-reaching informer networks, and the information shared by those informers often led to extrajudicial killings, sexual violence, and other serious human rights violations by the military and by informers themselves.[261] At the beginning of the occupation, there was "an atmosphere of uncontrolled fear and vicious resentment towards those regarded as actual or potential collaborators with the invaders."[262] The Indonesian armed forces relied on civil defense organizations and local militias during the occupation, with which it "collaborated in implementing a strategy of mass violence across the territory."[263] The majority of killings and other violations reported to the Commission were attributed to the Indonesian military and its so-called "Timorese Collaborators."[264]

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259. REPORT OF THE CHILEAN NATIONAL COMMISSION FOR TRUTH AND RECONCILIATION 615–17 (1993).

260. *Id*. at 618–21, 650.

261. *See generally* 1–4 THE TIMOR-LESTE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION, THE FINAL REPORT (2013). *See generally* Dominique Le Touze et al., *Can There Be Healing Without Justice? Lessons from the Commission for Reception, Truth and Reconciliation in East Timor*, 3 INTERVENTION 192 (2005); Simon Robins, *Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor-Leste*, 6 INT'L J. TRANSITIONAL JUST. 83 (2012).

262. 2 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 1120.

263. 1 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 299; 3 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 1631.

264. 1 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 510, 534.

The Timor-Leste Commission described how the pro-independence groups Fretilin and Falintil mistreated and killed individuals suspected of being traitors; in one incident, five people were forced to dig their own graves in the shape of a T for traitor (*traidor*), before being killed.[265] During the 1990s, most of the extrajudicial executions carried out by Falintil were "targeted against collaborators or civilians working as spies for the Indonesian military."[266] The Commission faced challenges in comprehensively determining the truth in the context of such killings:

> The Commission received abundant testimonies about the execution or death perpetrated in other ways of people accused of being [Armed Forces of the Republic of Indonesia] spies. Many of these cases are difficult to assess, although the dates and places in which they occurred sometimes suggest that they may have been related to internal political conflicts within Fretilin. However, it is also often evident that people were accused of being in contact with the Indonesians when they simply wanted to surrender or were engaged in innocent contact with friends or relatives in Indonesian-controlled areas.[267]

In some cases, those killed were "clearly collaborating with Indonesians," but the system of "popular justice" used by Fretilin to try alleged traitors was found by the Commission to be arbitrary and lacking due process.[268] Homes of suspected collaborators were often burned "as a warning to the rest of the community about the consequences of collaboration."[269] The report of the Commission also described how instances of defection from the Indonesian-supported militias to pro-independence groups often led to executions and forced displacement by the Indonesian armed forces.[270]

The Timor-Leste Commission also broached the issue of attribution of responsibility to various actors for crimes commit-

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265. 2 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 925–27.

266. *Id.* at 1054–55.

267. *Id.* at 930–31.

268. *Id.* at 936; 3 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 1446–56.

269. 2 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 1050.

270. 1 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 245–46, 254–55, 371; 2 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 970, 978–979, 1129–1130, 1291; 4 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 2284.

ted by or against collaborators and made recommendations on how to address this past violence. In relation to the killing and mistreatment of suspected collaborators by Fretilin and Falintil, the Commission described these as violations of the laws of war, specifically Common Article 3 of the 1949 Geneva Conventions.[271] The Commission recognized the need to take further measures to address collaboration and its consequences; in his testimony, Mari Alkatiri, Secretary-General of Fretilin and Prime Minister of Timor-Leste, acknowledged that the treatment of alleged collaborators has not been adequately dealt with:

> Fretilin as an organisation must take responsibility . . . and I do not run away from this. . . . When I hear people who come to me say "my brother, my father, my family was killed by Fretilin who accused them of being traitors. Are we now traitors or not? We want to know this." When we hear this . . . we know that we need to resolve this, that it cannot go on like this.[272]

The Commission itself could only go so far in clarifying the facts in individual cases, but its work identified the need for parties to the conflict to take further steps in order to clarify what happened in particular instances.

With regard to rehabilitation and reconciliation, the Community Reconciliation Process in Timor-Leste was designed to assist with the reception and reintegration of persons implicated in acts connected with the conflict; the Commission believed this would be an appropriate means of addressing non-criminal acts that caused harm, such as informing or other methods of collaboration.[273] Members of militias and other collaborators who made statements before the Community Reconciliation Process regarding their activities, including pleas for recognition of their having acted under duress, could be questioned by victims as to the veracity of their claims.[274] One collaborator explained that he had participated in the beating of an individual in order to protect himself from being killed. For the Commission, this case illustrated:

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271. 3 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 1720, 1773–74; 4 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 2269–70.

272. 4 THE TIMOR-LESTE COMMISSION, *supra* note 261, at 2330.

273. *Id.* at 2439.

274. *Id.* at 2469.

> how "perpetrator" and "victim" are often inadequate terms to describe the complex roles which individuals played during the political conflicts. One of the positive attributes of the [Community Reconciliation Process] was its capacity to expose and clarify these complexities, so that the participating community was able to gain a fuller understanding of what had taken place.[275]

In addition to the widest possible dissemination of its report, the Commission made various recommendations of relevance to collaboration and its consequences. This included individual and collective reparations, memorialization, searching for the disappeared, rehabilitation of victims, public education, regulation and oversight of security and intelligence services, investigation and prosecution of serious crimes, the establishment of reconciliation processes, and the release of Indonesian military and intelligence records relating to Timor-Leste.[276]

The report of the Sierra Leone Truth and Reconciliation Commission corroborates the findings of the Special Court for Sierra Leone of the "gruesome repercussions of collaborating" that were evident throughout the civil war.[277] The Commission also highlighted the elasticity of the term collaboration and the broad understanding given to it by parties to the conflict, as well as its frequent deployment as a pretext for abusive conduct. While there were examples of civilians directly supporting the activities of parties to the conflict, such as by engaging in intelligence gathering, the Commission found that, in general, "[t]he notion of 'collaboration' was often applied subjectively and arbitrarily by those who used it. It spread fear and suspicion. 'Collaboration' often became a premise upon which violations and abuses were carried out."[278] Almost all parties to

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275. *Id.* at 2469–70.

276. *Id.* at 2573–2623.

277. Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T, Trial Chamber I, Judgment, ¶ 1125 (2009). On the truth commssion see generally Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361 (2005); Beth K. Dougherty, *Searching for Answers: Sierra Leone's Truth & Reconciliation Commission,* 8 AFR. STUD. Q. 39 (2004).

278. 3A SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION 303, 315 (2004); 3B SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION 286 (2004).

the conflict, as well as civilian mobs, engaged in severe violence against persons labeled as "collaborators."[279]

Extrajudicial executions constituted violations of international human rights law and Common Article 3 of the 1949 Geneva Conventions, "[r]egardless of the veracity of the allegation—or indeed the 'guilt' or 'innocence' of the supposed collaborator."[280] The Commission found a broader trend relating to such summary justice, showing that "armed combatants of all factions acted hastily and violently to eliminate an 'enemy' whom they did not know for certain was an enemy."[281] The role of the Attorney General in issuing a letter to security forces entitled "Present Position relating to the Collaborators of the AFRC Junta" was singled out for particular criticism by the Commission:

> The letter was open to wide interpretation and consequently may have led to abuse on the ground. The Attorney-General appeared to have created a new category of criminal known as a "collaborator" and sought to have all persons falling into that category detained in the custody of the state. This new category was not codified in law but it served to "criminalize" thousands of Sierra Leoneans.[282]

The conflict in Sierra Leone saw civilians collaborate with parties to the conflict in various ways, including as perpetrators of serious violations of human rights and humanitarian law.[283] Nonetheless, the term collaboration was usually deployed in ways which rendered it almost meaningless. It often covered those only tenuously associated with parties to the conflict, or not at all, and was employed arbitrarily and without distinction in order to justify repression and criminal violence.

Significantly, the Commission uniquely offered a gender perspective on the practice of collaboration and its consequences

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279. 2 SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION 51, 56, 70, 76, 78, 84, 88 (2004); 3A SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *supra* note 278, at 196, 199, 301, 484, 502.

280. 3A SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *supra* note 278, at 555–56.

281. *Id.* at 199.

282. *Id.* at 303–04.

283. 1 SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION 202–25 (2004).

during the conflict in Sierra Leone, providing a distinctive examination of the impact of the phenomenon on women. While most women were victims during the conflict, some women participated as perpetrators or engaged in various "collaborative roles," such as acting as spies after establishing relationships with soldiers.[284] The Commission recognized that women took on such roles "out of personal conviction or simply in order to survive."[285] According to the Commission's report:

> Collaboration in war is often a result of the fact that women actively work to improve their situation and thus effectively support the efforts of one or the other side. Many conflicts, including the Sierra Leonean conflict, have arisen as a result of socio-economic inequalities, so it is not surprising that women become collaborators in order to survive.[286]

Rape and other forms of sexual violence were perpetrated against women that were considered collaborators for having "associated with" parties to the armed conflict.[287] During the conflict, women and girls were killed, assaulted, and held "under the most cruel and inhuman conditions with the intention of violating them by raping them and exploiting them as sexual slaves."[288]

The consequences of real or perceived collaboration by women during the conflict were also evident after the conflict, with the risk of further stigma and ostracization from society. This limited the ability of the Commission to hear from such women:

> Women who have come forward to the TRC have testified about their own anguish at being identified, ostracized and mocked, or at being made social outcasts for having been associated with the armed factions. This plight stands to be compared to the relative ease with which many of their male counterparts have been accepted back in society. The Commission finds that women in Sierra Leone have had no option

284. 3B SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *supra* note 278, at 87, 186–91.

285. *Id.* at 87.

286. *Id.* at 191.

287. 2 SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *supra* note 279, at 101; 3B SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *supra* note 278, at 177, 180.

288. 2 SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *supra* note 279, at 101. *See further* CHRIS COULTER, BUSH WIVES AND GIRL SOLDIERS: WOMEN'S LIVES THROUGH WAR AND PEACE IN SIERRA LEONE (2009).

> other than to bury their past so as to be accepted back into society.[289]

While the Commission had to conclude that the story of female perpetrators and collaborators in Sierra Leone "has not been told in its entirety,"[290] its report has provided a valuable account and analysis of the specific impact collaboration during armed conflict has on women.

Most truth commissions have only touched on the distant past, focusing in greater detail on the more recent past, but the Truth and Reconciliation Commission of the Republic of Korea was tasked with examining almost a century of Korean history when it was established in 2005.[291] This Commission addressed examples of collaboration and its consequences, including that by Koreans with the Japanese occupiers during the Second World War and the extrajudicial execution of South Korean civilians suspected of having collaborated with North Korean forces during the Korean War. The failure to address the former was considered an impediment to democracy[292] and was also addressed by a series of more narrowly focused Commissions, the first of which was established in 1948 to investigate and punish collaborators—while a more recent Commission set up in 2006 confiscated the property of collaborators.[293] With regard to the latter episode of collaboration, the Truth and Reconciliation Commission observed that:

> As South Korean forces regained their territory, they killed their own civilians after accusing them of "collaborating with

289. 3B SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *supra* note 278, at 191.

290. *Id*. *See further* Chris Mahony & Yasmin Sooka, *The Truth about the Truth: Insider Reflections on the Sierra Leonean Truth and Reconciliation Commission in* EVALUATION TRANSITIONAL JUSTICE: ACCOUNTABILITY AND PEACEBUILDING IN POST-CONFLICT SIERRA LEONE 35 (Kirsten Ainley et al. eds., 2015).

291. For an overview of the Commission's mandate and operation see TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, TRUTH AND RECONCILIATION; ACTIVITIES OF THE PAST THREE YEARS 13 –21 (2009), https://www.usip.org/sites/default/files/ROL/South_Korea_2005_reportEnglish.pdf. The Truth and Reconciliation Commission's final report was published in 2010 in Korean. *Id.*

292. *Id.* at 5.

293. *See* Hun Joon Kim, *Transitional Justice in South Korea*, *in* TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 229, 238–40 (Renée Jeffery & Hun Joon Kim eds., 2013).

> the enemy" during North Korea's occupation of South Korean territory. However, the South Korean military, police, and right-wing groups ignored judicial procedures during the executions. The victims were never given a trial, an official accusation, or even a reason for their execution. . . . The families of the victims, afraid of being stigmatized as communists, remained quiet. However, due to Korea's recent democratic progress, these families have finally spoken after nearly sixty years of silence.[294]

The families aimed to "correct the distorted history" and "restore honor to the victims and survivors by rectifying the distorted history that buried the truth of these massacres."[295]

The Truth and Reconciliation Commission noted how alleged collaborators were "illegally executed without clear legal grounds or criteria," and that some killings were the result of personal vendettas or disputes.[296] In relation to specific massacres of alleged collaborators, the Commission recommended that the Korean government make an official apology, support memorial services for the victims, and provide "peace and human rights education" for the military, police, and civil service.[297] The Commission viewed such killings as crimes against humanity and noted the enduring stigma of being labeled a collaborator: "[t]he victims' pain and suffering were subsequently passed down to their descendants who faced various forms of social discrimination and prejudice."[298]

Stigmatization and other consequences of being labeled a collaborator were examined in greater depth by the South Africa Truth and Reconciliation Commission.[299] The Commission provided an account of the widespread use of informers and collaborators in apartheid South Africa, as well as the regular killing and mistreatment of those considered or falsely accused of be-

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294. TRUTH AND RECONCILIATION COMMISSION OF THE REPUBLIC OF KOREA, *supra* note 291, at 7.

295. *Id*.

296. *Id*. at 68.

297. *Id*. at 70–78.

298. *Id*. at 76.

299. *See generally* ALEX BORAINE, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2000); COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (Deborah Posel & Graeme Simpson eds., 2002).

ing such traitors.[300] These acts amounted to gross violations of human rights, with the killings of collaborators labeled by the Commission as grave breaches and war crimes under the 1949 Geneva Conventions and Additional Protocol I.[301] Informers were not legitimate targets in the view of the Commission, even though violence against them could be considered a political act for which amnesty could be sought from the Commission.[302] The examination of patterns of human rights abuses by the Commission allowed it to conclude that the "violations associated with the liberation and mass democratic movements in the 1980s were not, in the main, the result of armed actions and sabotage, but tended to target those perceived to be collaborating with the policies and practices of the former government."[303] With regard to "necklacing" as a particularly brutal form of killing, the Commission described the rationale behind the use of this technique against suspected informers and collaborators:

> From evidence before the Commission, it appears that the burning of a body was a sign of contempt for the victim and his/her deeds. No act could convey a deeper sense of hatred and disrespect. The practice was also used to make an example of the victim, so that others would be inhibited from behaving like the deceased.[304]

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300. *See e.g.* 1 TRUTH AND RECONCILIATION COMM'N OF S. AFR., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 90 (1998); 2 TRUTH AND RECONCILIATION COMM'N OF S. AFR., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, 10–13, 30, 33, 37, 83–84, 98, 105, 114, 127, 131, 236, 242–45, 257, 295, 300, 309–10, 326, 328, 335–37, 339, 345–46, 376, 379, 386–90, 562, 566–71, 581–82 (1998).

301. 6 TRUTH AND RECONCILIATION COMM'N OF S. AFR., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, 649, 652 (1998). For a discussion of the applicability of treaty and customary international humanitarian law in South Africa see *id.* at 597–602.

302. 6 THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, *supra* note 301, at 379, 431, 706–07. There were also attempts by former informers to seek amnesty, see *id.* at 232–34. *See generally* ANTJE DU BOIS-PEDAIN, TRANSITIONAL AMNESTY IN SOUTH AFRICA (2007); James L. Gibson, *Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa,* 46 AM. J. POL. SCI. 540 (2002).

303. 2 THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, *supra* note 300, at 9.

304. *Id.* at 386–88.

The Commission considered that the state bore responsibility for fostering paranoia in communities through the use of informers, which in turn led to a climate where violence of this nature became common.[305]

Informers also engaged in criminal activity, such as so-called "credibility operations" involving property destruction and violence undertaken in order to maintain their cover.[306] The Truth and Reconciliation Commission also found that there were security service informers within media organizations, and that "[h]undreds and probably thousands of South African private sector companies made the decision to collaborate actively with the government's war machine."[307]

The South African government's widespread and systematic use of informers was a deliberate strategy aimed at suppressing communities and undermining resistance efforts; for the Commission, this was "highly effective in creating a climate of suspicion and breaking down trust both within and between families and communities."[308] The state was able to recruit informers and collaborators through torture and the manipulation of communities that were suffering from poverty and unemployment.[309] Records relating to the apartheid regime's informer networks were deliberately destroyed, according to the Commission.[310] As to the impact of collaboration on individuals, the Commission observed that:

> The consequences of being exposed as an informer were social isolation and, sometimes, physical danger. Communities were constantly on guard against informers in their midst. Moreover, being falsely accused could have extremely distressing consequences for the affected person and his or her family.[311]

The stigma attached to real or imagined collaboration in South Africa was profound:

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305. 3 TRUTH AND RECONCILIATION COMM'N OF S. AFR., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 667–68 (1998).

306. *Id.* at 171, 628.

307. 4 TRUTH AND RECONCILIATION COMM'N OF S. AFR., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 49-50, 184–85 (1998).

308. 5 THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, *supra* note 14, at 147.

309. *Id.* at 160.

310. *Id.* at 203.

311. *Id.* at 147.

> In this complicated process of conflict and pain, the Commission often became aware that one of the most destructive legacies of the past is the labelling of sometimes innocent people as "informers" or collaborators. Individuals and their families were killed, assaulted, harassed and ostracised as a result of this stigmatisation. Many people still live with the daily experience of rejection because they were identified as informers during the period of the Commission's mandate. The problem is complex and not readily resolved and the Commission was unable, in the vast majority of cases, to prove or disprove such allegations. However, the ongoing persecution of these so-called informers is a serious hindrance to the process of reconciliation.[312]

The Commission recommended the development of a process of reintegration and rehabilitation for collaborators to remedy their situation.[313] It suggested ceremonies or mediation involving political parties or community organizations as a means of facilitating "a public process of reintegration and forgiveness."[314] Appearing before the Commission itself allowed for some to be exonerated after having been falsely accused of being collaborators.[315]

The truth commissions for Timor-Leste, Sierra Leone, South Korea, and South Africa emphasized the profound stigma that attaches to collaboration with the enemy and its enduring implications for post-conflict societies. Such stigma and its consequences invariably arise in any conflict or post-conflict context and can endure for decades.[316] The recent opening of Norway's archives regarding the 90,000 cases of alleged treason after the Second World War prompted concern that the stigma of being a traitor would attach even to those investigated but not prosecuted for treason.[317]

Collaboration with an opposing side during an armed conflict can carry negative implications for both suspected individuals

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312. *Id.* at 307.

313. *Id.* at 310.

314. *Id*.

315. *Id.* at 364–65.

316. DAVID FRENCH, FIGHTING EOKA: THE BRITISH COUNTER-INSURGENCY ON CYPRUS, 1955-1959 8 (2015); Penter, *supra* note 32, at 364; *See also* BIRSTEIN, *supra* note 33, at 175.

317. Nina Berglund, *Norway to open war treason archives*, NEWS IN ENGLISH (May 15, 2014), http://www.newsinenglish.no/2014/05/15/norway-to-open-war-treason-archives/.

and their families. The United Nations Independent Commission of Inquiry on the 2014 conflict in the Gaza Strip, for example, encountered significant reluctance on the part of family members of executed collaborators to come before it because of such stigma:

> The summary executions had devastating consequences that extend well beyond the acts themselves. Since they are widely perceived as evidence of the victims' guilt, the stigma that accompanies them "punishes" the relatives. Witnesses spoke of the executions as indelible stains on the family's reputation and honour, which can be long-lasting and translate into various forms of discrimination, including in terms of access to education and employment. Witnesses described how relatives of those executed face exclusion and could not find jobs as a result of the executions.[318]

In a post-conflict context such as Northern Ireland, informers and their families continue to be ostracized from their communities.[319] According to Ron Dudai, informers are "the most reviled" of all conflict participants and remain the "unforgiven" actors in Northern Ireland: "while at least many in the affected communities were willing to hold some form of normalized contact with the groups with whom they fought for decades, such willingness to 'move on' was not extended to informers."[320]

The strength of emotion engendered by collaboration with an opposing side during a violent conflict will almost inevitably stymie efforts aimed at acknowledging and confronting the practice and its consequences after a conflict's end.[321] At the very least, transparency as to what has occurred is a necessary step towards rehabilitating a class of conflict participants that may remain excluded from society. Although falling outside the context of armed conflict, the reunification of Germany prompted debates as to whether the public should be given access to the files of the Ministry of State Security, which contained detailed information of its widespread use of inform-

318. Human Rights Council, Report of the Detailed Findings of the Independent Commission of Inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 130, 132 (2015).

319. Dudai, *supra* note 13, at 33.

320. *Id.* at 35, 36, 38.

321. *Id.* at 39–40, 48–49.

ers.[322] The 1991 Stasi Records Law facilitated such public access and sought to strike a balance between access to information and the rights of individuals by allowing certain access to materials, while also restricting some of the uses of these files.[323] The Gauck Authority had responsibility for managing access to the Stasi files and was tasked with assessing whether individuals were collaborators with the Stasi, albeit on the basis of incomplete or inaccurate information at times, which may not have revealed the extent to which duress or blackmail were employed.[324] Those found to have collaborated suffered consequences, including being barred from certain employment and having their identities disclosed to victims.[325] While this may have led to further unforeseen exclusions, the process of allowing access to such files opened up to examination one of the most notorious systems of citizen surveillance.

CONCLUSION

The challenges for countries, societies, and individuals in coming to terms with past collaboration during times of war can be significant, and it may take decades before the emergence of a willingness and opportunity to confront this aspect of a difficult past.[326] This article has explored the formal measures employed by state authorities to address the phenomenon of collaboration or to hold individual collaborators to account.[327] The post-war responses to collaboration with the enemy during an armed conflict have been largely punitive, with accountability mechanisms serving as a means of revenge,

322. *See* Louisa McClintock, *Facing the Awful Truth; Germany Confronts the Past, Again*, 52 PROBLEMS OF POST-COMMUNISM 32, 37 (2005).

323. *Id*. *See also* John Miller, *Settling Accounts with a Secret Police: The German Law on the Stasi Records*, 50 EUROPE-ASIA STUDIES 305 (1998).

324. McClintock, *supra* note 322, at 32, 38–39; Miller, *supra* note 323, at 322–23.

325. Miller, *supra* note 323, at 318.

326. *See e.g.* COLLABORATION WITH THE NAZIS: PUBLIC DISCOURSE AFTER THE HOLOCAUST (Roni Stauber ed., 2010); Michael R. Marrus, *Coming to Terms with Vichy*, 9 HOLOCAUST AND GENOCIDE STUD. 23 (1995); ELSTER, *supra* note 19.

327. On more informal mechanisms see for example Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,* 34 J. L. SOC'Y 411 (2007); TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE (Kieran McEvoy & Lorna McGregor eds., 2008).

retribution, and lustration of those considered traitors. Following the end of conflict, informers and other collaborators have been the subjects of violent reprisals, public humiliation, criminal prosecution, capital punishment, imprisonment, hard labor, dismissal from their posts, denial of civil rights, and ostracization from society. The wide-ranging purge of collaborators after the Second World War exemplified this approach.

Post-conflict trials of collaborators, including those following the Second World War, have also been commonly deployed. In the past, these trials were not overly encumbered by existing legal constraints, such as the principle of legality. For involuntary collaborators, duress has offered a limited defense, and its application reveals the limitations of criminal trials or court-martials as a means of coming to terms with the complexities of collaboration. In some individual cases, the stain of collaboration has proved indelible and accountability has arisen many decades after the cessation of hostilities, such as by way of denaturalization proceedings or criminal prosecution. International law has not dictated how a state should address the phenomenon of collaboration during armed conflict, but increasingly offers normative guidance that can influence the form of relevant transitional justice measures. Certain punitive measures taken by states to address the phenomenon of collaboration have not always accorded with their human rights obligations, for example.[328]

Efforts to address collaboration post-conflict have at times recognized collaborators as potential victims, or at least as victims of circumstances that should not necessarily be subject to formal sanctions. Authorities have occasionally sought to address collaboration with a view to societal reconstruction. States have used amnesty to shield collaborators and other participants in conflict from criminal prosecution, which may raise tensions with international law. Truth commissions have served to provide an understanding of both the causes and consequences of collaboration during armed conflict. As it has often been the case that "[c]ollaborators, spies and double agents

328. A series of European Court of Human Rights cases have challenged certain measures, see for example De Becker v. Belgium, App no 214/5, Eur. Ct. H.R. (1962); Lehideux & Isorni v. France, App no 24662/94, Eur. Ct. H.R. (1998); Zawisa v. Poland, App no 37293/09 Eur. Ct. H.R. (2009); Žičkus v. Lithuania, App no 26652/02 Eur. Ct. H.R. (2009); Turek v. Slovakia, App no 57986/00 Eur. Ct. H.R. (2006).

did their work in secrecy and silence,"[329] the reports and public activities of truth commissions have shined a light on such covert activities and demonstrated how they entail serious and destructive consequences for both individuals and communities.

Informed by the testimony of victims, perpetrators, and officials, truth commissions have offered a more complete picture of the phenomenon of collaboration during a conflict, unencumbered by the restrictions inherent in individualized criminal trials. Truth commission reports have facilitated a deeper understanding of the rationales underlying such practices, the patterns of violence associated with collaboration, and the impact on particular groups in society, including women. Such efforts have occasionally recognized the limitations of the victim-perpetrator binary. Truth commissions have also identified the challenges faced by implicated individuals after the end of conflict and suggested potential reforms or processes for state authorities or other actors to undertake that may contribute to societal reconstruction, rehabilitation, and reconciliation.

The post-conflict environment offers a unique opportunity for coming to terms with the unsettling and often hidden aspect of armed conflict that is collaboration with an opposing side. International humanitarian law has adopted a permissive stance towards the practice itself, albeit subject to an overall prohibition of coercion for such purposes, but offers limited guidance on how the phenomenon might be addressed when conflict ends. There are particular challenges in dealing with what may be considered as the shameful behavior of collaborators in wartime, and the vexing question of whether such persons might themselves be considered as victims in some respects. The suitability or desirability of specific measures or mechanisms that may be deployed for this purpose as examined in this article will need to be assessed on a case-by-case basis, taking into consideration the needs of individuals and society, including the maintenance of peace and security and relevant obligations under international law, such as the rights of victims to justice, truth, and reparation.

329. 5 THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, *supra* note 14, at 299.