

## FACING THE PAST

## SERIES ON TRANSITIONAL JUSTICE

The Series on *Transitional Justice* offers a platform for high-quality research within the rapidly growing field of transitional justice. The research is, of necessity inter-disciplinary in nature, drawing from disciplines such as law, political science, history, sociology, criminology, anthropology and psychology, as well as from various specialised fields of study such as human rights, victimology and peace studies. Furthermore, the research is international in outlook, drawing on the knowledge and experience of academics and other specialists in many different regions of the world.

The series is aimed at a variety of audiences who are either working or interested in fields such as crime and justice; human rights; humanitarian law and human security; conflict resolution and peace building. These audiences include academics, researchers, students, policy makers, practitioners, non-governmental organisations and the media.

All books published within the series are subject to a double-blind peer review by recognised authorities in the field.

### The General Editors of the Series are:

- Prof. Stephan Parmentier (Catholic University of Leuven, Belgium)
- Prof. Jeremy Sarkin (University of South Africa)
- Prof. Elmar Weitekamp (University of Tübingen, Germany)

The general editors receive the support from an Editorial Committee and an Advisory Board, consisting of internationally renowned academics and practitioners.

### Published titles within this Series:

8. Nicola Palmer, Phil Clark and Danielle Granville (chief editors), *Critical Perspectives in Transitional Justice* (2011), 978-1-78068-035-4
9. Edda Kristjánsdóttir, André Nollkaemper and Cedric Ryngaert (eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-conflict States* (2012), 978-1-78068-041-5
10. Bas van Stokkom, Neelke Doorn and Paul van Tongeren (eds.), *Public Forgiveness in Post-Conflict Contexts* (2012), 978-1-78068-044-6
11. Ilse Derluyn, Cindy Mels, Stephan Parmentier and Wouter Vandenhole (eds.), *Re-Member. Rehabilitation, Reintegration and Reconciliation of War-Affected Children* (2012), 978-94-000-0027-4
12. Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (2012), 978-1-78068-002-6
13. Estelle Zinsstag and Martha Albertson Fineman (eds.), *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* (2013), 978-1-78068-142-9
14. Josep M. Tamarit Sumalla, *Historical Memory and Criminal Justice in Spain. A Case of Late Transitional Justice* (2013), 978-1-78068-143-6
15. Catherine Jenkins (ed.), Max du Plessis (ed.), *Law, Nation building and Transformation The South African experience in perspective* (2014), 978-1-78068-184-9
16. Susanne Buckley-Zistel and Stefanie Schäfer (eds.), *Memorials in Times of Transition* (2014), 978-1-78068-211-2
17. Nico Wouters (ed.), *Transitional Justice and Memory in Europe (1945–2013)*, 978-1-78068-214-3
18. Agata Fijalkowski and Raluca Groseanu (eds.), *Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies*, 978-1-78068-260-0
19. S. Elizabeth Bird and Fraser M. Ottanelli (eds.), *The Performance of Memory as Transitional Justice* 978-1-78068-262-4
20. Bo Viktor Nylund, *Child Soldiers and Transitional Justice*, 978-1-78068-394-2

For previous volume in the series, please visit <http://tj.intersentia.com>

# FACING THE PAST

## Amending Historical Injustices through Instruments of Transitional Justice

*Edited by*

Peter MALCONTENT



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd  
Sheraton House | Castle Park  
Cambridge | CB3 0AX | United Kingdom  
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169  
Email: mail@intersentia.co.uk  
www.intersentia.com | www.intersentia.co.uk

*Distribution for the UK and Ireland:*

NBN International  
Airport Business Centre, 10 Thornbury Road  
Plymouth, PL6 7PP  
United Kingdom  
Tel: +44 1752 202 301 | Fax: +44 1752 202 331  
Email: orders@nbninternational.com

*Distribution for Europe and all other countries:*

Intersentia Publishing nv  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21  
Email: mail@intersentia.be

*Distribution for the USA and Canada:*

International Specialized Book Services  
920 NE 58<sup>th</sup> Ave Suite 300  
Portland, OR 97213  
USA  
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832  
Email: info@isbs.com

Facing the Past

© The editor and contributors severally 2016

Artwork on cover: Author Jan Jordaan, title 'Hurt', medium Linocut, 1999. From the *Universal Declaration of Human Rights – International Print Portfolio*, Article 5, published by Art for Humanity, South Africa, 1999.

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

ISBN 978-1-78068-403-1

D/2016/7849/104

NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

# ACKNOWLEDGEMENTS

The history of this volume goes back to May 2010, when I hosted an international conference in Utrecht (the Netherlands) on the functioning of transitional justice instruments and their effectiveness. The idea behind this conference was to publish a comprehensive volume offering an integral view on how societies at the national and international level try to deal with mass atrocities through instruments of retributive and restorative justice. Many publications in this field only pay attention to one specific category of transitional justice (criminal tribunals, truth commissions, reparations etc.). And from those offering a more encompassing view many are outdated or too extensive and expensive as an introduction to the topic of transitional justice.<sup>1</sup> With this volume its editor and contributing authors want to offer a new comprehensive and integrated volume that may serve as a valuable source of information for every academic, policymaker, politician and journalist trying to find his or her way in the complicated and still expanding world of transitional justice.

Much of the editing of this volume, including the writing of the introductory chapters, had to be done in spare time as a result of which the project was confronted with several delays. Therefore, I not only want to thank all contributing authors for their cooperation, but also for their boundless patience with me. I also would like to thank Jessica Dorsey, who assisted me in organising the Utrecht conference and also contributed to the editing of the volume, as did Jorrit Steehouder, who was of great assistance in preparing the final copy. I also would like to show my gratitude to Maria Kamphuis for her invaluable language comments. Last but not least, I would like to thank the Board of the Utrecht University Focus Area Cultures, Citizenship and Human Rights, whose generous financial contribution to the organisation of the Utrecht conference in 2010 offered the volume's editor and authors the necessary time and space to discuss its content and structure thoroughly.

Peter Malcontent  
Utrecht, 28 April 2016

---

<sup>1</sup> See for example: L. Stan and N. Nedelsky, eds., *Encyclopedia of Transitional Justice* (3 volumes), Cambridge: Cambridge University Press, 2012.

# CONTENTS

<i>Acknowledgements</i> .....	v
PART I. TRANSITIONAL JUSTICE. WHAT'S IN THE NAME? .....	1
<b>Introduction</b>	
Peter MALCONTENT .....	3
<b>Do Bystanders Exist?</b>	
Fred GRÜNFELD .....	27
<b>The Marketisation of Historical Injustice</b>	
Duco HELLEMA .....	43
PART II. RETRIBUTIVE JUSTICE .....	57
<b>Introduction</b>	
Peter MALCONTENT .....	59
<b>Pacting the Law within Politics. Lessons from the International Criminal Court's First Investigations</b>	
Kenneth A. RODMAN .....	91
<b>National and Hybrid Tribunals. Benefits and Challenges</b>	
Brienne MCGONIGLE LEYH .....	115
<b>Beyond the Courtroom. The Objectives and Experiences of International Justice at the Grassroots</b>	
David TAYLOR .....	139
<b>From Gacaca to Mato Oput. Pragmatism and Principles in Employing Traditional Dispute Resolution Mechanisms</b>	
Barbara OOMEN .....	167

<b>Dealing with Organisations and Corporations</b>	
Cedric RYNGAERT .....	187
<b>PART III. RESTORATIVE JUSTICE .....</b>	<b>203</b>
<b>Introduction</b>	
Peter MALCONTENT .....	205
<b>The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past</b>	
Stephan PARMENTIER and Monica ACIRU .....	225
<b>Official Apologies</b>	
Rhoda E. HOWARD-HASSMANN .....	247
<b>Financial Compensation as a Political Process</b>	
Peter MALCONTENT .....	265
<b>Education in the Shadow of History. Education, History Education, and Their Place in Historical Justice</b>	
Elizabeth A. COLE .....	285
<b>Governing through Repair. Historical Injustices and Indigenous Peoples in Canada</b>	
Andrew WOOLFORD .....	303
<b>PART IV. PENDING CASES .....</b>	<b>321</b>
<b>The Unfulfilled Promise of Protection. The Netherlands and Srebrenica</b>	
Christ KLEP .....	323
<b>Facing the Armenian Genocide. A History of Denial and Politics</b>	
Peter MALCONTENT .....	339
<b>The United States and Torture. The Politics of Transitional Justice</b>	
David P. FORSYTHE .....	361
<i>Author Information .....</i>	<i>387</i>