TRANSITIONAL JUSTICE, DISTRIBUTIVE JUSTICE, AND TRANSFORMATIVE CONSTITUTIONALISM

COMPARING COLOMBIA AND SOUTH AFRICA

EDITED BY
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WITH
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The Role of Economic Goods in National Reconciliation

Evaluating South Africa and Colombia

Thaddeus Metz

1. Introducing Transitional Justice, Economic Goods, and Indigenous Values

South Africa's institutional reflection about how to engage in transitional justice took place largely in the 1990s, even if the process has yet to be concluded. More than twenty years after South Africa's Parliament authorised the Truth and Reconciliation Commission to make recommendations about how to effect reparations to apartheid-era victims, the executive branch of the government has yet to put them meaningfully into effect.[1]

In contrast, it was only at the end of 2016 that the outlines of a transitional justice pact in Colombia appeared. In this chapter I focus specifically on what was titled the 'Final Agreement' (sometimes also called the 'Peace Agreement') of 24 November 2016,[2] meant to provide a definitive framework for peace between the state and the FARC rebels. The Final Agreement proposes a way to compensate victims with economic goods that, I argue, is compelling from a certain understanding of national reconciliation and merits being upheld as a model. Although there has been a Victim's Law in Colombia since 2011,[3] the Final Agreement would involve wrongdoers themselves making socio-economic reparations to victims in a way that I contend is morally important. Although the Final Agreement has the status of law,[4] its reparative measures have not yet been put into practice systematically.

[1] Ra'essa Pather, 'Ramaphosa under Pressure to Support Reparations for Apartheid Victims', *Mail & Guardian* (17 December 2018) <https://mg.co.za/article/2018-12-17-ramaphosa-under-pressure-to-support-reparations-for-apartheid-victims> accessed 3 October 2022.

[2] <https://www.peaceagreements.org/viewmasterdocument/1845> accessed 3 September 2023. I rely on this English translation of the Final Agreement, but note that the original Spanish version is here: <https://www.jep.gov.co/Normativa/Paginas/Acuerdo-Final.aspx> accessed 3 September 2023.

[3] Victims and Land Restitution Law of 2011 (Law 1448).

[4] See Constitutional Amendment 1 of 2017, Chapter IV, as well as Gonzalo Ramírez-Cleves, 'The Colombian Constitutional Court Rules that the Peace Agreement is Mandatory for Three Presidential Terms' <http://www.iconnectblog.com/the-colombian-constitutional-court-rules-that-the-peace-agreement-is-mandatory-for-three-presidential-terms/> accessed 26 September 2023.

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In this chapter, I argue that they should be. Specifically, I provide reason to believe that, in the light of a certain conception of national reconciliation, the agreement is attractive when it comes to the way the Colombian government is to allocate economic goods. It is much more attractive than what South Africa has achieved to date and even compared to what its salient policy had prescribed back in 1998, when South Africa's Truth and Reconciliation Commission issued its report.[5] Scholars have recently compared the transitional justice processes of Colombia and South Africa in some respects,[6] but there has yet to be a thorough moral-philosophical evaluation of them and, specifically, regarding the way they have sought to allocate property—especially land and money—as well as opportunities such as access to education and job training. I maintain here that the Final Agreement's approach to economic reparation constitutes an advance relative to South Africa's attempts at transitional justice.

The conception of national reconciliation that I advance is informed by an ethic of harmonious relationship, which, broadly understood, is a value salient in the worldviews of many Indigenous peoples in both sub-Saharan Africa and South America.[7] By this conception, national reconciliation is largely a matter of co-operative participation in projects expected to benefit formerly conflicting parties in combination with the disavowal of respects in which parties had flouted the value of harmony in the past. Although I believe this conception of reconciliation follows from relational ethical perspectives prominent in the Global South (though I do not contend they are ubiquitous there or exclusive to those societies), many readers will find the approach to reconciliation intuitively appealing even if they do not adhere to such an ethic. I argue that, given this plausible account of reconciliation, Colombia's proposed manner of allocating property and opportunities is much better than what the South African government has done and even what

[5] Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report* (Truth and Reconciliation Commission 1998) <http://www.justice.gov.za/trc/report/> accessed 3 October 2022.

[6] Nadiehezka Paola Palencia Tejedor, 'The Role of Constitutional Courts in Transitional Justice: Colombia and South Africa' (2016) 9 Criterio Jurídico Garantista 14; Allen Weiner, 'Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court' (2016) 52 Stanford Journal of International Law 211; Héctor Olasolo and others, 'Have the Colombian Government and the FARC Learnt the Lessons of the South African Truth and Reconciliation Commission as to the Need to Clearly Define and Prioritize the Main Goals of a Truth Commission?' (2017) Harvard Human Rights Journal––Online Symposium on Transitional Justice <https://journals.law.harvard.edu/hrj/2017/10/online-symposium-on-transitional-justice/> accessed 26 September 2023; Jerónimo Delgado Caicedo and Juliana Andrea Guzmán Cárdenas, 'Rethinking the Colombian Transition to Peace through the South African Experience' in Fabio Andres Diaz Pabon (ed), *Truth, Justice and Reconciliation in Colombia* (Routledge 2018) 189.

[7] For some broad comparisons between Indigenous African and South American philosophies, see Johannes Waldmüller, '"Corazonar", "Ubuntu", "Self-Transformation": From Western Universality to Global Pluriversality?', Paper presented at the Human Development and Capabilities Association International Conference on Human Development in Times of Crisis: Renegotiating Social Justice in Athens, Greece (2014); and Thaddeus Metz, 'Political Philosophy in the Global South: Harmony in Africa, South America, and East Asia' in Uchenna Okeja (ed), *Routledge Handbook of African Political Philosophy* (Routledge 2023).

its Truth and Reconciliation Commission sought to do, though I acknowledge that Colombia has yet to implement fully the economic dimensions of the Final Agreement. In both countries, there is a large gap between institutional thought and practice, but I argue that Colombia's thought is at least close to the proper aim, particularly because it requires offenders to undergo burdensome ways of improving their victims' socio-economic quality of life.

In the following, I presume that the reader is familiar with the essentials of the conflicts that took place in South Africa and Colombia, and instead begin by advancing the conception of national reconciliation that I use to appraise South Africa's and Colombia's proposed allocations of economic goods pertaining to transitional justice (Section 2). I show that this construal of reconciliation complements a harmonious ethic that is broadly shared amongst these countries' Indigenous populations, how it differs in plausible ways from other, influential conceptions of reconciliation, and what the favoured conception entails for the distribution of property and opportunities. On this score, I highlight the fact that those guilty of injustice should be the ones to provide property to, and to facilitate opportunities for, their victims. Assuming that it would be morally ideal to have the guilty labour for the sake of those whom they have wronged, particularly by improving their economic standing, I then show that what South Africa has done and even had proposed to undertake do not conform to the key tenets of this conception of what justice requires. South Africa has focused on certain kinds of restorative, retributive, and distributive justice that have not approximated national reconciliation of a particularly attractive sort when it comes to allocating goods such as property and opportunities (Section 3). In the last major section, I argue that Colombia's Final Agreement better approximates the reconciliatory ideal (Section 4), after which I conclude by briefly suggesting why different political factors in both countries have prevented proper economic reconciliation from being realised in practice (Section 5).

2. A Conception of National Reconciliation

I ultimately want to know how a state should allocate opportunities, including education and jobs, as well as property, such as money and land, in order to effect transitional justice in a country. To make that project manageable, I presume that central to (if not exhaustive of) transitional justice is national reconciliation, and I consider the degree to which South Africa's and Colombia's different approaches to the allocation of economic goods have fostered it. In this section I advance an account of national reconciliation that would, upon reflection, have broad appeal in at least Colombia and South Africa, applying it only in the following sections to the ways the two countries have proposed to distribute opportunities and property in respect of transitional justice. Specifically, in this section I first briefly sketch a

relational value of harmony that is salient in the worldviews of people indigenous to both countries (Section 2A), after which I draw on it to advance a conception of national reconciliation (Section 2B), contrast it with salient alternatives (Section 2C), and bring out what it entails for how to allocate economic goods (Section 2D).

A. Harmony as an Indigenous Value

Beyond WEIRD (western, educated, industrialised, rich, and democratic) societies, which have a disproportionately large share of influence over globally influential principles and policies, some conception of harmonious relationship is widely taken to be the 'mother of all values'.[8] In particular, harmony is salient in the ethical perspectives of the Indigenous peoples of (particularly southern) Africa and South America.[9] Instead of deeming autonomy, rationality, independence, self-reliance, desire-fulfilment, satisfaction, pleasure, authenticity, uniqueness, or other individualist values to be central, these peoples tend to prize relationality.

In drawing on harmony as a value that is salient amongst indigenous worldviews of those in South Africa and Colombia, I do not aim to provide a detailed account of the worldviews in these countries, let alone their continents, or even of how harmony is understood in them. My goals are merely to point out a broad ethical perspective shared by victims of historical injustice in both societies, and to utilise it to ground a philosophical ideal of reconciliation that may be drawn on to evaluate the transitional justice measures undertaken in them.

In the case of southern Africa, often the relational values associated with harmony (or community) are captured with the terms '*ubuntu*' and '*botho*', the Nguni and Sotho-Tswana terms (respectively) for humanness. The broad ethical perspective is that one should develop one's humanness, which can be achieved insofar as one honours harmonious (or communal) relationships with others, which are the core normative aspects of the ubiquitous maxim, 'A person is a person through other persons'.[10] Such an ethic counts as 'African' insofar as it has been salient in the cultures of many peoples indigenous to the continent. Note that there is no suggestion that it is the only value that has been held by them, or even that it is utterly unique to that part of the world.

As for what harmony (communion) involves in at least the southern African tradition, consider remarks such as these from South African intellectuals: 'Harmony is

[8] In the words of Daniel A Bell and Yingchuan Mo, 'Harmony in the World 2013: The Ideal and the Reality' (2014) 118 Social Indicators Research 797.

[9] See n 7 and discussion in the rest of this section. Consider, too, East Asia, where different conceptions of harmony are central to Daoism and Confucianism, for two examples.

[10] See, eg, Reuel Khoza, *Ubuntu, Botho, Vumunhu, Vhuthu, African Humanism* (Ekhaya Promotions 1994) 3; Mluleki Mnyaka and Mokgethi Motlhabi, 'The African Concept of *Ubuntu/Botho* and Its Socio-moral Significance' (2005) 3 Black Theology 218.

achieved through close and sympathetic social relations within the group';[11] 'I participate, I share ... Harmony, friendliness, community are great goods. Social harmony is for us (Africans––ed.) the *summum bonum*—the greatest good ... Anger, resentment, lust for revenge, even success through aggressive competitiveness, are corrosive of this good';[12] 'If you asked *ubuntu* advocates and philosophers: What principles inform and organise your life? ... the answers would express commitment to the good of the community in which their identities were formed, and a need to experience their lives as bound up in that of their community'.[13]

In these and other characterisations of how to relate, two distinct properties are mentioned.[14] On the one hand, there is being close, participating, and experiencing life as bound up with others. Here, one enjoys a sense of togetherness with others and engages in cooperative projects with them. On the other hand, there is mention of sympathy, sharing, and being committed to the good of others, where such ways of relating involve doing what is likely to meet others' needs (including their need to realise their own humanness), doing so out of sympathy and for their own sake, and, where feasible, doing so reciprocally.

These ways of relating harmoniously on the face of it ground several salient practices amongst Indigenous African peoples that are intuitively appealing, including (amongst other things[15]): collective harvesting and building, not leaving individuals to fend for themselves; resolving political disputes by giving all affected a voice and seeking consensus amongst them (or at least popularly appointed elders), not resting content with majority rule that would exclude a minority; enjoying a family far extended beyond the nuclear structure whose members care for one another's children; distributing wealth as to avoid great inequalities that would leave people hungry and risk fostering attitudes of envy and distance; and seeking reconciliation, and not so much retribution, after wrongdoing and more generally conflict.

Turning to South America, there the ethic of harmony tends to go under the heading of the Spanish phrase '*buen vivir*', which means living well or good living. As one commentator from Colombia remarks, 'Similar to the concept of *ubuntu* from South Africa, it (*buen vivir*––ed.) holds that an individual's wellbeing can only be achieved through harmonious relationships with the wider community—including people, the environment, other living beings, their ancestors and the

[11] Yvonne Mokgoro, '*Ubuntu* and the Law in South Africa' (1998) 1 Potchefstroom Electronic Law Journal 17.

[12] Desmond Tutu, *No Future Without Forgiveness* (Random House 1999).

[13] Gessler Muxe Nkondo, '*Ubuntu* as a Public Policy in South Africa: A Conceptual Framework' (2007) 2 International Journal of African Renaissance Studies 91.

[14] First reconstructed in Thaddeus Metz, 'Toward an African Moral Theory' (2007) 15 Journal of Political Philosophy 321.

[15] For these and other respects in which an ethic of communion grounds recurrent ways of life amongst 'traditional' sub-Saharan peoples, see Thaddeus Metz, *A Relational Moral Theory: African Ethics in and Beyond the Continent* (OUP 2022) 128–36.

cosmos.'[16] The ethic of *buen vivir* 'seeks to establish a harmonious relationship between mankind and nature and a social equilibrium within societies'.[17] Note the two key ideas in this remark and many others summing up *buen vivir*, such as that its aim is to achieve 'harmony between human beings, and also between human beings and nature'.[18]

Harmony between humans is of course the central concept when it comes to reconciliation consequent to *social* conflict. Here, the idea is of relating to other people in mutually supportive ways to achieve an objectively decent quality of life, one that is neither consumerist nor competitive. In part *buen vivir* involves 'acting in concert with others in a community with reciprocity as key element and the aim of living well, but not necessarily living better than others'.[19] Another scholar remarks that '[i]n opposition to Western concepts of exclusivity, categorization, competition, subjectification, etc., Buen Vivir puts emphasis on key values such as solidarity, generosity, reciprocity and complementarity'.[20]

While there are surely differences to be teased out between *ubuntu* and *buen vivir*—which has yet to be done systematically in the literature—I focus on the patent similarities, so as to articulate an ethical perspective that can be used to evaluate the approaches to the distribution of economic goods that have been taken in the two post-conflict societies of South Africa and Colombia. For both, harmony involves: being inclusive, as opposed to viewing some as inferior or other; participating, instead of remaining isolated; cooperating, instead of subordinating or being fiercely competitive; helping others, rather than leaving them to fend for themselves, let alone harming them for gain to oneself; engaging in mutual aid in ways that are objectively good for people, rather than seeking to promote their desires or pleasures; and aiming to help others for their own sake, and not merely one's long-term self-interest. What then does this cluster of values mean for how to respond properly to serious social conflict, that is, to discordant ways of relating that run counter to an ethos that many of those indigenous to South Africa and Colombia seek to promote?

[16] Dimitri Selibas, 'Buen Vivir: Colombia's Philosophy for Good Living' *BBC* <https://www.bbc.com/travel/article/20210207-buen-vivir-colombias-philosophy-for-good-living> accessed 3 October 2022. See also Martha Chaves and others, 'Radical Ruralities in Practice: Negotiating *Buen Vivir* in a Colombian Network of Sustainability' (2018) 59 Journal of Rural Studies 153. I do not here consider the debate about how the values associated with the Quechua phrase '*sumak kawsay*', prominent in Bolivia and Ecuador, relate to *buen vivir* as understood in Colombia and elsewhere in South America. For one discussion, see Javier Cuestas-Caza, 'Sumak Kawsay Is Not Buen Vivir' (2018) 5 Alternautas 51.

[17] Ana Agostino and Franziska Dübgen, '*Buen Vivir* and Beyond: Searching for a New Paradigm of Action', Degrowth Conference Venice 2012, 6 <https://www.degrowth.info/en/catalogue-entry/buen-vivir-and-beyond-searching-for-a-new-paradigm-of-action/> accessed 3 October 2022.

[18] Eduardo Gudynas quoted in Oliver Balch, '*Buen Vivir*: The Social Philosophy Inspiring Movements in South America', *The Guardian* (4 February 2013) <https://www.theguardian.com/sustainable-business/blog/buen-vivir-philosophy-south-america-eduardo-gudynas> accessed 3 October 2022.

[19] Agostino and Dübgen (n 17) 6.

[20] Johannes Waldmüller, 'Buen Vivir, Sumak Kawsay, "Good Living": An Introduction and Overview' (2014) 1 Alternautas 21.

B. Reconciliation as Valuing Harmony

If relating harmoniously is a high value, then some kind of reconciliation, the repair of discordant relationships, is the natural response to social conflict. Prizing harmony on the face of it would rule out not only responding retributively to wrongdoing, that is, imposing 'an eye for an eye' without the essential expectation of any good to come of it, but also imprisoning offenders so as to prevent them from committing crime again, without concern for what they do during their removal from society. Instead, valuing harmony prescribes expressing the attitude that offenders had wrongfully prized the opposite of discord, while doing what is likely to ameliorate the harm they did and improve their relationships with their victims and the broader society.

More specifically, I submit that an attractive form of reconciliation is one in which parties to a conflict disavow respects in which the value of harmony was flouted and come to relate in a somewhat harmonious way, namely, on a cooperative basis that is, at least down the road, expected to be good for all sides.[21] There are two distinct features to clarify.

One part is a familiar feature of reconciliation, namely, the idea that parties interact in positive ways, and specifically by coordinating behaviour towards mutual aid. Reconciliation is not akin to divorce, meaning that some kind of cohesion is instead essential. My favoured view focuses on people's behaviour, that is, how they act in respect of each other, and not so much their feelings, beliefs, desires, or emotions.

A second part of the preferred view includes disavowal, that is, expressing disapproval and related negative attitudes towards wrongful discord. Treating harmony as important calls for a critical response to it when it has been objectionably undermined, or, more concretely, treating victims with respect means acting as though they should not have been mistreated. In the first instance, such action ought to come from offenders. They should express remorse for what they have done, including by apologising for it, striving to make up for harm they caused as part of their offence, and working to make it clear they will not reoffend. All of these are normal ways for a person to distance himself from immoral ways in which he has treated others.

However, at least if offenders are not willing to engage in these practices, then the political community ought to step in and perform some of these functions. It should in that case (though probably not only in it) express the judgement that what the offender did was wrong, perhaps with informed reports and symbolic

[21] First articulated and defended in Thaddeus Metz, 'The Reach of Amnesty for Political Crimes: Which Extra-Legal Burdens on the Guilty Does National Reconciliation Permit?' (2011) 3 Constitutional Court Review 243, and Thaddeus Metz, 'A Theory of National Reconciliation: Some Insights from Africa' in Claudio Corradetti and others (eds), *Theorizing Transitional Justice* (Ashgate 2015) 119.

memorials, compel the offender to make up for the harm caused, step in to make compensation if he cannot, and work to ensure that the offender will not do it again. And where the state itself was guilty, perhaps of not having stopped offenders when it could have, then, it, too, must express remorse.

Notice that it would intuitively not genuinely express disapproval merely to say the words 'I am sorry' or 'That was wrong'. Instead, in cases of serious discord, doing so plausibly requires burdens to be willingly undertaken by the offender, or imposed on him by the state. However, the burdens should be productive ones that help to repair the broken relationship, namely by serving the functions of compensating victims and rehabilitating offenders.[22] By this approach, accountability is inherent to reconciliation; it is not enough to shake hands and act as though nothing happened. Offenders should undergo hard treatment, albeit forms of it that express disapproval of what they did and specifically in ways that improve victims' well-being and offenders' character.

Both parts, namely, the realisation of some facets of harmony and the disavowal of prior discord, are essential for a plausible account of reconciliation. Mere disavowal of a wrong might not be sufficient for something to count as reconciliation at all, which probably requires more cohesion than that. For instance, it would be difficult to speak of 'reconciliation' if all that happened were for a state verbally to criticise offenders and pay compensation to victims on their behalf; offenders should really be involved and in ways at least likely to result in improved relationships with their victims. Conversely, mere cohesion without disavowal would not be a particularly attractive kind of reconciliation. For example, if victims elected simply to forget how they were mistreated, offenders did not express any remorse for what they had done, but both sides moved forward with cooperative projects of mutual aid, that would be a form of reconciliation, but one that would not be as desirable as one that included moral disavowal of the past.[23]

C. Contrasts with Rival Conceptions of Reconciliation

Unlike many other conceptions of reconciliation, the one I advance is behavioural. For this conception, what matters is what people do and what is expressed by their actions, even if they themselves lack certain attitudes such as remorse, forgiveness, and sympathy. Although such emotions are commonly associated with talk of 'reconciliation', I maintain that they are not essential to an attractive sort of it.

[22] Some ideas here are borrowed from Thaddeus Metz, 'Reconciliation as the Aim of a Criminal Trial' (2019) 9 Constitutional Court Review 113.

[23] For a fuller defence of these claims, see Thaddeus Metz, 'Why Reconciliation Requires Punishment but Not Forgiveness' in Krisanna Scheiter and Paula Satne (eds), *Conflict and Resolution: The Ethics of Forgiveness, Revenge, and Punishment* (Springer 2022) 265.

The first choice would of course be for offenders themselves to feel sorry. The best form of reconciliation would be for offenders to have this sort of mental state and to mean it when they apologise and the like. However, a good enough sort of reconciliation, I submit, would be for them to do what signifies a remorseful state of mind even if they lack it—for example, by making restitution.[24]

For another respect in which attitudes are not essential to reconciliation, note that forgiveness, understood as including the dissipation of negative emotions, is not essential to the conception I propose. Some South African thinkers, particularly those in the Christian tradition,[25] have held that reconciliation requires forgiveness on the part of victims. While emotions must change enough in order for people to engage in cooperative projects expected to be mutually beneficial in the long run, that does not necessarily mean there are no lingering resentments. Entirely letting go of those would be desirable from the perspective of a fully harmonious relationship, but reconciliation is normally viewed as a stepping-stone or a bridge to an ideal, rather than a social ideal itself.

Similarly, I deny that reconciliation essentially involves empathy,[26] let alone 'a spiritual sense of belonging and community that draws people towards a fullness of humanity through others'.[27] Probably the best possible form of reconciliation, or a full-blown harmony, would include such mental states, but that would be a tall order for a state to promote between, say, an apartheid agent and the family of a non-violent black activist he murdered. It would count as reconciliation enough, and quite an amazing one, if the agent sent a large amount of his paycheque to them for the rest of his life and the family let him visit their son's grave from time to time.

D. From National Reconciliation to the Allocation of Economic Goods

I have suggested that valuing harmony means seeking reconciliation as a central response to discord, where the proper form reconciliation should take includes the political community, if not offenders, disavowing the unjust discord that occurred. Such disavowal, in turn, means that offenders must undergo burdensome ways of both reforming themselves so as not to reoffend and compensating their victims. It

[24] For discussion of how one can express an attitude without having it oneself, see Thaddeus Metz, 'The Nature of Reactive Practices' (2008) 3 South African Journal of Philosophy 49.

[25] For just one example, see Tutu (n 12).

[26] For a contrary view, see Patrick Lenta, 'In Defence of AZAPO and Restorative Justice' in Wessel le Roux and Karin van Marle (eds), *Law, Memory and the Legacy of Apartheid* (Pretoria University Law Press 2007) 162, 172.

[27] In the words of Charles Villa-Vicencio, 'Reconciliation: A Thing that Won't Go Away' in Fanie Du Toit and Erik Doxtader (eds), *In the Balance: South Africans Debate Reconciliation* (Jacana Media 2010) 165.

is the compensatory facet of reconciliation that is relevant to the way a state should allocate property and opportunities so as to advance transitional justice.

Insofar as reconciliation requires offenders to undertake labour or other kinds of sacrifice in order to make up for wrongful harm done to their victims, it is distinct from two related sorts of justice. First, it is different from retributive justice, the point of which is to respond to past injustice with a proportionate burden placed on an offender, one that is not inherently meant to produce any future economic benefit to the victim. Victims might happen to feel satisfied upon knowing those who wronged them have been made to suffer, but that would be an unintended side-effect of retribution and would of course do nothing in respect of property and opportunities.

Whereas retributive justice would have offenders suffer harm simply because they deserve it, without any forward-looking aim such as improving victims' economic standing, distributive justice is squarely concerned with the allocation of economic goods. Apart from libertarian views, according to most other accounts of distributive justice, the state should do what it can to improve its people's quality of life, particularly those who have become economically badly off through no fault of their own. However, distributive justice does not prescribe promoting economic benefits essentially as a way of responding to past injustice, let alone with any burden placed on those responsible for that. Instead, it is conceived as a morally required response to distributions that have become inappropriate without specifiable guilt. For example, distributive justice might involve providing financial support to those who have lost their jobs due to automation, or enabling those born into poor families to attend university.

In contrast to both retributive and distributive justice, reconciliation (or, more narrowly, compensatory justice) includes the idea that offenders should express remorse by undergoing burdensome ways of making reparations to their victims. Like retributive justice and unlike distributive justice, it involves responding to past injustice and doing so by placing burdens on wrongdoers, but, unlike retributive justice and like distributive justice, it involves doing what is expected to improve people's quality of life.

Offenders are in the first instance responsible for compensating their victims. For offenders to reconcile by disavowing their injustice, they must perform actions that express remorse, which, in turn, means (amongst other things) undergoing labour or some other burden in order to do what will improve their victims' socioeconomic conditions. Although compensation merely for the sake of moving forward together need not involve hard treatment of an offender, compensation in order to disavow a crime plausibly must. If an offender were truly sorry and wanted to demonstrate his guilt, he would be willing to place hardship on himself as a way to display those emotions, where the greater his wrongdoing and the stronger his apt emotional reactions to it, the heavier the hardship—but a hardship that is expected to improve the situation of his victim. Normally, the burden on an

offender that would compensate his victim would have an economic dimension, since property and opportunities are central to a victim's life going well. Improving socio-economic conditions would be a particularly important way to compensate victims in cases of large-scale social conflict of the kinds that transpired in South Africa and Colombia; for the nature of the wrongful harm done to victims there characteristically included taking property such as land and reducing opportunities for education/jobs.

So, for example, an offender might offer financial compensation to his victim. Where the wrongdoer is rich, that is not all he or she would do, since merely writing a cheque might then not be enough to express contrition. However, in the case where giving up money would mean a noticeable shift in lifestyle for someone not so well off, it could be enough to express remorse, depending on the nature of the wrongdoing.

There are additional ways that a wrongdoer might undergo a burden in order to improve his victim's economic standing, which do not involve a transfer of money. Those who have unjustly taken land in the past should return it, or at least large parts of it, along with a time-consuming transfer of capital and skills needed to make the land productive. Possibly someone who has unjustifiably taken the life of a breadwinner should help farm with his hands, providing sustenance to the victim's family, or he could help build a school so that the victim's children can get an education.

However, the state (or other political community) also has a role to play in effecting compensation. For one, at least in cases where offenders are disinclined to effect reparations in burdensome ways, the state should express its disapproval of their behaviour by making them do so. That is, it should subject them to judicial proceedings to establish guilt, and, upon it having been established in a fair way, impose hard treatment on the guilty that will serve the function of making restitution to victims. For another, sometimes offenders make a mess bigger than they could ever clean up on their own. Where they have caused more wrongful harm than they can repair with their money, labour, and other contributions, the state should step in to 'top up' as it can afford.[28] Both engagements would be ways for the state to disavow the injustice.

[28] Compensatory justice is not the only form of justice, and it can come into conflict with a state's ability to advance distributive justice. Urgent needs for compensation, eg to repair severe injury, take priority over meeting non-urgent needs for distribution, say, for internet access. Similarly, urgent needs for distribution, eg for food and water, take priority over meeting non-urgent needs for compensation, say, provision of stolen land where the victim had retained quite a lot of similar land. Beyond such norms, it is difficult at this stage for me to provide guidance about how to make trade-offs between the two kinds of justice. For a South African Constitutional Court case on the related matter of how to balance an interest in retributive justice with forward-looking concerns such as compensatory and distributive justice, see *AZAPO v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC).

It is worth asking just how much of a productive burden may be demanded of an offender. The principle that the worse the crime, the greater the burden that is appropriate does not indicate which limits there might be to the burdens the state may rightly place on a criminal. At this point, all I can say is that a strict proportionality between the nature of the crime and the sort of hardship imposed on the criminal would probably be too much in some cases. The death penalty would normally be ruled out because it usually would not serve the function of compensating a killer's victims (or reforming his character). However, suppose that a criminal has tried to kill an innocent party and in so doing has fatally injured her liver, where the only way for the latter to survive would be to obtain the former's healthy liver, foreseeably leading to his death. May the state engage in forcible organ transfer if necessary and sufficient for the offender to make his victim whole? While the offender should offer to give up his liver at the cost of his own life in order to save hers, I baulk at the idea that the state may force him to do so, even if necessary to save the life of his victim. Expressing respect for victims must be done in a way that does not fail to express respect for offenders, who invariably retain some human rights despite their misdeeds.

3. South Africa's Approach to Economic Goods in the Light of Reconciliation

In the rest of this chapter I take for granted the conception of reconciliation advanced in the previous section, and use it to evaluate South Africa's and Colombia's economic approaches to transitional justice. More specifically, I consider how the two countries have allocated, or principally considered allocating, property and opportunities, and consider the extent to which they measure up when it comes to the reconciliatory principle that offenders should undergo burdensome forms of compensating their victims.

In this section I argue that while South Africa has advanced certain kinds of restorative, retributive, and distributive justice since the transition to democracy in 1994, it has fallen far short of reconciliation, or roughly compensatory justice, so construed. Basically, the Truth and Reconciliation Commission proposals about reparations were not implemented by the government (Section 3A), while large-scale economic programmes that the government did adopt either were forms of distributive justice or were reparative schemes limited in both the benefits to victims and the burdens placed on those responsible for (or even who gained from) apartheid (Section 3B).

A. Truth and Reconciliation Commission Recommendations

As is well known, one major way that South Africa responded to the injustice of apartheid was with its Truth and Reconciliation Commission (TRC), set up in the mid-1990s to investigate human rights abuses during the apartheid era. It heard testimony from more than 21,000 victims, and more than 7,000 people applied for amnesty,[29] whereby those who fully disclosed their political crimes were freed from both criminal and civil prosecution. Those who did not reveal the truth about their apartheid-era misdeeds could be, and sometimes (albeit rarely) were, prosecuted through normal legal channels. These procedures were reasonably effective at publicising what happened during apartheid, and so in that respect they did advance a part of reconciliation or a kind of restorative justice.

However, victim compensation, let alone offender burden to effect it, have been inadequate, from the reconciliatory perspective advanced in the previous section. The TRC was not empowered to award any sorts of damages, and was limited to making recommendations to the government about how to do so. On this score, the TRC did make substantial recommendations regarding compensation, but virtually none of them was ever adopted by the South African government.

On the one hand, in the late 1990s the TRC suggested large-scale redistributive mechanisms to transfer wealth from those responsible for apartheid, or rather more often from those who benefitted from it, to those who were victims of it, including at the community level. For example, it suggested a wealth tax, a percentage donation from companies listed on the stock exchange, the disbursement of a special insurance fund covering political risk to which business had contributed, and a retrospective surcharge on both profits earned by corporations and 'golden handshakes' given to civil servants.[30] None of these proposals was implemented by the post-apartheid government,[31] which even fought the attempt of activists and apartheid-era victims to sue multinational corporations who had done business with the apartheid government.[32]

On the other hand, the TRC also proposed the payment of reparations by the government to thousands of individual victims of human rights abuses. Some

[29] Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*, *Volume One* (Truth and Reconciliation Commission 1998) 12, 34 <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf> accessed 3 October 2022.

[30] South African Press Association, 'Wealth Tax Proposed by TRC' (29 October 1998) <http://www.justice.gov.za/trc/media%5C1998%5C9810/s981029t.htm> accessed 3 October 2022.

[31] Adam Yates, 'Justice Delayed: The TRC Recommendations 20 Years Later', *Daily Maverick* (5 September 2018) <https://www.dailymaverick.co.za/article/2018-09-05-justice-delayed-the-trc-recommendations-20-years-later/> accessed 3 October 2022.

[32] Isaac Mangena, 'Mbeki's Big Blunder: Apartheid Reparations', *Thought Leader* (9 March 2012) <https://thoughtleader.co.za/readerblog/2012/03/09/mbekis-big-blunder-apartheid-reparations/> accessed 3 October 2022; Rebecca Davis, 'US Corporations Can't Be Sued for Apartheid, Court Rules', *Daily Maverick* (22 August 2013) <https://www.dailymaverick.co.za/article/2013-08-22-us-corporations-cant-be-sued-for-apartheid-court-rules/> accessed 3 October 2022.

people did receive payment, but it was much less than the TRC had suggested, and it came many years later.[33] As I write, there is about 1.5 billion rand (approximately 100 million US dollars) in the President's Fund earmarked for reparative purposes that has yet to be paid out.[34] Beyond the fact that specific persons who particularly suffered from apartheid injustice have not been compensated (with some having died in the interim), it is noteworthy that South Africa would have the government, and not those responsible for the suffering, make the compensation—thereby using taxes collected from millions of black people, that is, those who were victims of apartheid or are their offspring.

B. South African Government Policies

In the late 1990s and early 2000s the government took three major measures to effect redress. One was the implementation of land reform. Apartheid-era laws had prevented black people from owning a large majority of South African land and had also forcibly excluded them from living in choice areas. The new, post-apartheid government quickly began a process of land reform, in 1994 adopting a law that allowed for those who had been dispossessed of land to claim it back.[35]

Although tens of thousands of claims have been settled and millions of hectares of land have been transferred, no source suggests that the government has achieved its 2014 goal of having 30 per cent of the farmland owned by black people.[36] Instead, there is ongoing debate about how far short of that percentage the government has come and why. Three widely cited explanations for the failure to reach that target are: first, that the relevant government departments have been short-staffed and could not oversee such a massive project; secondly, that the government had initially sought to buy land from white farmers at market-related prices that it could not afford; and, finally, that it had transferred the land to black people without having provided the capital, skills, and the like needed to run farms, only to become wary of the land becoming unproductive.[37] Regardless of the reasons,

[33] Jasmina Brankovic, 'Questioning the Model: Transitional Justice in South Africa after the TRC' in James Stormes and others (eds), *Transitional Justice in Post-Conflict Societies in Africa* (Hekima Institute of Peace Studies and International Relations 2016) 136–39.

[34] Pather (n 1).

[35] Restitution of Land Rights Act 22 of 1994, with several amendments, including in 1997 and 2003.

[36] Ben Cousins, 'South Africa's Land Debate Is Clouded by Misrepresentation and Lack of Data' *The Conversation* (8 March 2018) <https://theconversation.com/south-africas-land-debate-is-clouded-by-misrepresentation-and-lack-of-data-93078> accessed 3 October 2022.

[37] Lungisile Ntsebeza and Ruth Hall, 'Introduction' in Lungisile Ntsebeza and Ruth Hall (eds), *The Land Question in South Africa* (HSRC Press 2007) 8–9; South African History Online, 'Land Restitution in South African since 1994'. <https://www.sahistory.org.za/article/land-restitution-south-africa-1994> accessed 3 October 2022; South African History Online, 'Timeline of Land Dispossession and Restitution in South Africa 1995–2013' <https://www.sahistory.org.za/topic/timeline-land-dispossession-and-restitution-south-africa-1995-2013> accessed 3 October 2022.

the bottom line is that a good portion of the transfer of land came with compensation for white farmers, and a large majority of South Africa's farmland remains in the hands of white people, without many black people having been otherwise compensated.

A second reparative measure undertaken by the post-apartheid government has been affirmative action, or what is more often called 'equity' in the South African context. By law since 1998, organisations have been required to give preference to black people when hiring,[38] and, indeed, universities, sports teams, firms, and governments have systematically used numerical goals and sometimes even quotas to do so.[39]

However, as less than 9 per cent of the population is white, there has been only so much good that affirmative action could have achieved for the much larger black population. Additionally, it is well known that much of the white population remains decently employed because of its skills (although not so much in government departments). Educational facilities were much better for whites than for blacks during apartheid, with white parents able to pass on better schooling, greater cultural capital, and the like to their offspring, with the white unemployment rate far lower than the black one.[40]

The third major reparative policy that the post-apartheid government adopted was Black Economic Empowerment (BEE).[41] Initially it involved companies being required to have a certain percentage of black shareholders, which led to their making a very small minority of black people very rich. It was then amended so that the benefits would be spread more widely. For example, there are schemes in which black South Africans can obtain shares in major companies at a reduced rate and in which governments and firms are to give preference to black suppliers.

Although the more recent versions of BEE have spread the wealth somewhat more broadly, no one maintains that it has reached a majority of black South Africans. Those who have managerial skills, own businesses, can afford to buy shares, and enjoy related kinds of economic standing have likely benefitted, but the very large majority of black South Africans without them have not.[42] More than half the country lives in poverty, with more than 90 per cent of poor people being

[38] Employment Equity Act 55 of 1998, and Employment Equity Amendment Act 47 of 2013.

[39] For an important South African Constitutional Court case affirming the legitimacy of equity in hiring, see *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC).

[40] BusinessTech, 'White vs Black Unemployment in South Africa' <https://businesstech.co.za/news/general/96887/white-vs-black-unemployment-in-south-africa/> accessed 3 October 2022.

[41] Broad-Based Black Economic Empowerment Act 53 of 2003, and Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.

[42] Gwen Ngwenya, 'B-BBEE Proves that When One Black Person Prospers, Others Do Not Necessarily Benefit by Proxy', *BusinessDay* (4 August 2018) <https://www.businesslive.co.za/bd/opinion/2018-08-04-b-bbee-proves-that-when-one-black-person-prospers-others-do-not-necessarily-benefit-by-proxy/> accessed 3 October 2022.

black,[43] and the unemployment rate for African people is between 30 and 40 per cent, depending on the definition.[44]

Beyond these reparative measures, the post-apartheid government has adopted many welfare programmes to provide opportunities and resources to South Africans, including: child support grants, old age grants, sickness/disability grants, unemployment insurance, job training (SETAs), and loans for tertiary education. The extent of support is substantial, with more than a quarter of South Africans benefitting from at least one of the grants and more people receiving a grant than are employed.[45]

Even so, these programmes have been far removed from what transitional justice, and specifically national reconciliation, would prescribe, in that they have been available to all South Africans, without a focus on victims, and none of the programmes has been primarily financed by apartheid-era offenders. The grant systems have been part of South Africa's attempt to advance distributive justice, but that is of course not a reaction towards injustice in the past. One might suggest that reconciliation would have been advanced more in South Africa, had economic policies improved black people's quality of life more substantially, and they were not so reliant on meagre grants. That might be true, in one, purely future-oriented sense of 'reconciliation' focused on overcoming extant racial animosity. However, the account of reconciliation I have defended includes a requirement to disavow respects in which harmony had been flouted, that is, to honour those who were victimised in the past. That requires the transfer or other provision of economic goods as a burdensome way for offenders to express remorse for their past misdeeds or at least for the state to make an effort to impose such burdens on offenders. That simply did not happen systematically in South Africa.

4. Colombia's Approach to Economic Goods in the Light of Reconciliation

The TRC in South Africa made some sensible recommendations in respect of economic goods, from the perspective of the reconciliation favoured here, but the government did not implement them. Although these recommendations targeted mostly those who benefitted from apartheid, and not so much those who

[43] Kate Wilkinson, 'South Africa's Official Poverty Numbers', *Africa Check* (15 February 2018) <https://africacheck.org/factsheets/factsheet-south-africas-official-poverty-numbers/> accessed 3 October 2022.

[44] Kate Wilkinson, 'Ramaphosa Right about "Big Difference" between Black & White Unemployment in SA', *Africa Check* (20 February 2018) <https://africacheck.org/spot-check/ramaphosa-right-about-big-difference-between-black-white-unemployment-in-sa/> accessed 3 October 2022.

[45] BusinessTech, 'There Are Officially More South Africans on Social Grants than Working' (21 June 2017) <https://businesstech.co.za/news/business/180503/there-are-officially-more-south-africans-on-social-grants-than-people-who-work-irr/> accessed 3 October 2022.

were responsible for it (which would have been ideal), they would at least have been better than what the government actually did, which was to adopt redress programmes that benefitted mainly those black people who already enjoyed competitive economic advantages and that came at virtually no cost to the white beneficiaries, let alone the architects of apartheid.

Colombia has had the chance to do things differently. In particular, its policy is even more attractive than what the TRC had recommended (and than what the South African government has done, of course) when it comes to effecting compensation for victims at the expense of offenders. Colombia's proposed way forward, even though not its systematic practice yet, includes the ideal that 'victim compensation should be at the core of any agreement'[46] and that the 'rights of the victims of the conflict are non-negotiable'.[47] Colombia's approach is more oriented towards not only benefitting victims, but also doing so at the expense of offenders, and thereby advancing the favoured conception of reconciliation. There are two major facets of the Final Agreement that propose such compensatory justice, one concerning reform in rural areas (Section 4A) and another about victim reparation more generally (Section 4B).

A. Comprehensive Rural Reform

The first chapter of the Final Agreement between the Colombian government and the FARC is titled 'Towards a New Colombian Countryside: Comprehensive Rural Reform' (abbreviated 'CCR').[48] Since much of the conflict was occasioned by a distribution of land that the FARC had perceived to be unjust, it makes good sense to see the Final Agreement begin with the countryside.

There are many proposals in the Final Agreement about how to effect CCR, many of which pertain to distributive justice. Of relevance to the present discussion, though, are the principles expressing a demand for compensatory justice. First off, the agreement 'prioritises the territories most affected by the conflict, poverty and neglect'[49] and aims to 'reverse the effects of the conflict, to achieve restitution for the victims of dispossession and forced displacement and the restoration of land rights to communities'.[50] These are clear reparative goals.

Furthermore, as to where the land will come from, the very first proposal made is to deploy 'legal cessation of ownership in favour of the Nation … with a view to reversing the unlawful concentration of land ownership'.[51] In other words, those

[46] Final Agreement (n 2) 9.
[47] ibid 132; see also 154.
[48] ibid 10.
[49] ibid 11.
[50] ibid 18; see also 13, 16, 22.
[51] ibid 15.

with unjust possession of land will undergo the burden of being deprived of it for the sake of those they had deprived. That is not the only source of land that the Final Agreement proposes to distribute to the landless, for there is also mention of unoccupied public land, donated land, and the like,[52] but, from the perspective of reconciliation, it is welcome that it is included. It is a way for the government to express disapproval of past injustice, and for those responsible for the injustice at least to act in ways that express remorse for it.

Finally, the CCR is specific about how to realise its reparative aims beyond simply the provision of land. It does not merely state an intention to compensate in the abstract, but is fairly concrete about what should be done in order for compensation to be realised. For instance, the agreement says, 'Although the aforesaid access to land is a prerequisite for transformation of the countryside, on its own it is insufficient; national plans financed and promoted by the state must be set up with a view to achieving the comprehensive rural development that will provide public services and goods'.[53] The agreement includes details of the kinds of training and resources that should be provided (presumably as an essential 'top up' from the state beyond what offenders could muster), so that the land would be genuinely expected to improve victims' quality of life.

Lately, much of the South African populace has become enthusiastic about speeding up the pace of land reform, exhibiting less patience with great racial inequalities in the distribution of land and other kinds of property, indeed to the point of protest and invasion of land. In addition, the government has finally, in the past ten years or so, worked to enable black beneficiaries of land reform to make productive use of it, with some success.[54] Colombia ideally would not wait so long in order to make effective redress when it comes to land.

B. Comprehensive System for Truth, Justice, Reparations and Non-Recurrence

The fifth chapter of the agreement is about responding to victims of the conflict, with the agreement prescribing what is labelled a 'Comprehensive System for Truth, Justice, Reparations and Non-Recurrence'. It includes a wide and intricate array of mechanisms designed to honour victims, including searching for those who disappeared during the conflict, obtaining the truth about what happened to victims during it, assuring victims that they are safe from further attacks, and imposing long sentences of imprisonment on those guilty of the most serious human

[52] ibid 15.
[53] ibid 11, 16, 24–30, 195.
[54] Cousins (n 36).

rights violations. Of interest to the present discussion are the reparative mechanisms that are also discussed.

First, as with the CCR, there are clearly stated aims of compensating victims: 'These measures seek to ensure the comprehensive reparation of the victims, including the rights to restitution, indemnification, rehabilitation, realisation and non-recurrence; and the collective reparation of the territories, the populations and the communities most affected by the conflict'.[55] Notice the two dimensions, of the individual and the social. In terms of the agreement, it is not just persons who are entitled to redress, but also networks of them, that is, communities that were broken up and otherwise wrongfully harmed.

As to who it is that is to compensate individuals and communities, the agreement proposes that it should be offenders in the first instance, with the use of the compelling phrase 'restorative sanctions':[56] 'In the context of these [reparation] plans, stress will be laid on acknowledging the responsibility of the state, the FARC-EP, paramilitaries and any other group, organisation or institution that caused harm or injury during the conflict'.[57] Those responsible are to be sanctioned in part according to their revelation of truth about serious crimes, where the 'sanctions will have the overall aim of realising the rights of victims and consolidating peace. They will need to have the greatest restorative and reparative function in relation to the harm caused'.[58] Such an approach is precisely what I have argued that a plausible form of reconciliation prescribes: instead of improving the lives of victims while letting offenders off the hook, and instead of punishing offenders without regard for improving the lives of victims, Colombia's agreement would see at least some offenders burdened in ways that serve the function of improving the lives of victims. In particular, they would be put to work for the sake of victims in ways that provide victims property and opportunities. This form of accountability is much of what has been intuitively missing from South Africa's approach to transitional justice.

Such an approach is not completely novel, having been undertaken to some degree in Rwanda, in response to the 1994 genocide. The country had flirted with the idea of a *Fonds d'indemnisation* (FIND), a compensation fund into which those convicted of genocide were supposed to pay.[59] While that did not materialise, the famous Gacaca courts did sentence more than 100,000 offenders to perform community service.[60]

55 Final Agreement (n 2) 138; see also 154.

56 ibid 175. Compare this phrase with 'reconciliatory sentencing' in Metz, 'Reconciliation as the Aim of a Criminal Trial' (n 22).

57 Final Agreement (n 2) 191; see also 137, 145, 189.

58 ibid 174.

59 For discussion, see Paul Christoph Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (OUP 2012).

60 Penal Reform International, *Eight Years On . . . A Record of Gacaca Monitoring in Rwanda* (2010) <https://cdn.penalreform.org/wp-content/uploads/2013/05/WEB-english-gacaca-rwanda-5.pdf> accessed 3 October 2022.

Finally, the Colombian agreement is specific about the ways that offenders could be put to work for the sake of improving their victims' socio-economic conditions. Included amongst a list of restorative sanctions are: repairing infrastructure, building houses and schools, engaging in waste disposal, growing crops, fixing roads, and improving access to water/electricity.[61] The document includes an awareness of the need to obtain permission from a community in order to have offenders in its presence, and to undertake reparative labour in ways that respect community cultures.

At least in theory and law, even if not yet implementation, Colombia has the makings of an approach to economic goods that would truly compensate victims while simultaneously holding offenders accountable, thereby manifesting an intuitively appealing kind of reconciliation.

5. Conclusion: Political Explanations of the Limits to Reconciliation

I close this chapter with a brief suggestion about why the favoured approach to economic goods was not adopted in South Africa and has also been contested in Colombia. My suspicion is that, whereas in South Africa politics forbade imposing retribution on offenders, or indeed holding them accountable in any real sense, in Colombia politics has required retribution as a form of accountability, with restorative sanctions (as well as amnesties and pardons) viewed as insufficient. Although in some ways these are opposite forces, what they both have in common are departures from the reconciliatory sentences that I have argued would be ideal.

In previous sections, I pointed out how reconciliation, of a sort that would include hard, but productive, treatment of offenders, was not approximated in South Africa. However, the TRC in combination with the economic policies weakly oriented towards redress *might* have been the best that South Africa could do. Perhaps democracy and distributive justice could not have been achieved without offering amnesty in exchange for truth and thereby forgoing the disavowal of facets of reconciliation that would have included restorative sanctions. According to one commentator citing several historical analyses of South Africa, 'The vast majority of accounts of the amnesty negotiations concur that in the absence of agreement on amnesty, negotiations would have faltered, with the likely result that the violent struggle would have continued, and more lives would have been lost'.[62]

In contrast, in Colombia it has been precisely the demand for punitive disavowal that is one major explanation of why the Final Agreement's non-retributive facets have been challenged. The agreement does say that the most serious crimes,

[61] Final Agreement (n 2) 183–84.
[62] Lenta (n 26) 158–59.

including crimes against humanity, are to be dealt with by normal criminal legislation or at least some heavy sentences of imprisonment.[63] However, that has not been enough to assuage a notable proportion of the public, which voted against the Final Agreement in a referendum. One commentator remarked, 'Colombians are culturally accustomed to war … Justice is seen as an eye for an eye, a tooth for a tooth'.[64] Similar sentiments have also moved the President to challenge facets of the agreement.[65]

Given the account of reconciliation advanced in this chapter, South Africa's institutional approach was too soft on offenders, while some of the Colombian public and executive are being too hard on them. South Africa should have had the architects of apartheid undergo heavy burdens that served the function of improving victims' socio-economic livelihoods, rather than get off scot free with their time and booty. Colombia should have those members of the government and the FARC who engaged in gross human rights violations do the same, rather than simply rot in jail. That would advance an attractive kind of reconciliation grounded on the values of harmony salient in the Indigenous cultures of both countries.

[63] Final Agreement (n 2) 158, 161, 307, 311, 317, 319.

[64] Pedro Piedrahita Bustamante quoted in Joe Parkin Daniels, 'Colombia's Polarised Election Raises Fears for Fragile Peace', *The Guardian* (16 June 2018) <https://www.theguardian.com/world/2018/jun/16/colombias-election-peace-ivan-duque-gustavo-petro> accessed 3 October 2022.

[65] Lally Weymouth, 'Colombia's President on a Wobbly Peace with the FARC', *The Washington Post* (27 September 2018) <https://www.washingtonpost.com/outlook/colombias-president-on-a-wobbly-peace-with-the-farc/2018/09/27/d501197e-c1f9-11e8-a1f0-a4051b6ad114_story.html> accessed 3 October 2022.