CHAPTER 10

Colonial History at Court: Legal Decisions and Their Social Dilemmas

Nicole L. Immler

Introduction: The Legal Paradigm

The year 2011 saw a landmark decision in the Civil Court in The Hague. For the first time, the statute of limitations blocking liability for mass executions by the Dutch military in the decolonization war in Indonesia (1945–49) was partially suspended. As a result, the Dutch government had to apologize and give compensation to the victims. In 2013, a similar historic court judgment (discussed by Elkins in Chapter 7 in this volume) forced the UK government to pay reparations and apologize to some of the victims of their colonial policies in Kenya.

Though court rulings in favor of the plaintiffs signal success for human rights and transitional justice, the strictly legal framing of these processes is fraught with problems. In particular, court cases address individual claims even where, as in the contexts under discussion here, the core issue motivating the litigation is the structural and systemic violence pervading a whole society. Lawsuits targeting historical injustices are part of a larger trend. Since the Nuremberg trials, it has not just become "thinkable to put history on trial, it has juridically become necessary to do so. . . . It has become part of the functions of trials to repair juridically not only private but also collective historical injustice."[1] Literary scholar Shoshana Felman points to the flaws inherent in this process of staging the voices of the oppressed: Many injuries cannot be narrated in the language of law, and

frequently efforts to right the injuries and injustices of the past instead repeat and reproduce the trauma they are attempting to heal, what she called the "juridical unconscious."[2] This *juridification of politics*, a specific fusion of history, memory politics, and litigation, has proliferated since the late 1990s, dominated by the reckoning with the Holocaust. Instead of initiating criminal proceedings, advocates seeking justice have advanced civic restitution lawsuits, including in U.S. federal courts.[3] Some historians have critiqued the historical representation of the Holocaust advanced through these lawsuits, pointing to the way in which cases have, for example, highlighted individual cases of theft instead of focusing on the fact of mass murder.[4] Others, however, have welcomed what they consider a "fruitful model" through which the judge encourages much-needed historical investigation.[5]

A similar debate, centred on the merits of ongoing colonial lawsuits, is taking place in the Netherlands. Some historians argue that legal cases have finally brought scholarly and public attention to the violence of the decolonization period.[6] But others argue that truth needs to be established before litigation is initiated, to avoid the danger of securing forms of "justice" without truth finding.[7]

Lawsuits advanced in a postcolonial setting confront another key challenge: Who has the right to determine what counts as justice and repair? Or, as the Indonesian historian Bambang Purwanto has put it: "Is it up to the Netherlands to decide what price must be paid for our freedom?"[8] He fears that those legal cases "keep both countries in the grip of guilt and penance," and that they thereby perpetuate rather than overcome problematic colonial power hierarchies. But some historians disagree, suggesting that lawsuits can clarify the perpetrator-victim position, providing a forum for entering into a relationship and into a (historical) dialogue.[9] According to historian Selma Leydesdorff, for widows from Srebrenica who lost their husbands and sons to ethnic cleansing at the end of the Bosnian War (1992–95), "The law can be a beginning for reconnection, but . . . can never be more than a partial response to the survivors' needs."[10] Some have argued that the lawsuit-dominated discourse of transitional justice concentrates on bringing these litigation efforts to fruition, to the detriment of careful monitoring of medium- and long-term effects and of victims' needs.[11] This chapter follows up on these demands for *localizing transitional justice,* emphasizing the empirical over the normative approach to the topic.[12]

However, assessing recognition is not just an empirical problem; it is also a conceptual one.

Recognition—A Critical Theory Approach

The issue of recognition is a pressing one in transitional justice practices but also in theoretical scholarship on social and political theory. There is an enduring concern that certain types of recognition procedures stabilize identities and naturalize certain power relations (*affirmative recognition*) instead of contributing to their transformation (*transformative recognition*), to borrow the terminology of philosopher Nancy Fraser.[13] Problematizing forms of recognition that affirm primarily identities, Fraser emphasizes instead the question of economic redistribution.[14] How the symbolic and the monetary relate to one another is indeed a key question in transitional justice, including in the cases examined in this chapter. Is monetary compensation meant to add a purely symbolic weight to apologies or should this compensation have a transformative power? We see a similar move in transitional justice toward transformative justice to get more grips on the actual effects of those recognition procedures.[15]

This chapter argues that to better understand and optimize the recognition process we need to broaden the way dialogue functions in transitional justice mechanisms. Examining colonial injustice through the lens of a court case generates two main protagonists: the perpetrators (the former colonizer) and the victims (the formerly colonized). This corresponds to the classic idea of recognition being a process between two opposing parties, the simplistic victim-perpetrator or, in this case, the colonized-colonizer binary. My research, by contrast, reveals a dialogue with multiple players on multiple levels. It is a dialogue within families and local communities and with postcolonial diasporas.[16] Conceptualizing an approach to dialogue that entails more fluid concepts of identity can generate a more profound understanding of both the essentializing and transformative aspects of recognition procedures. First, I describe the Dutch-Indonesian case. I then touch on another instance where litigation addressing colonial crimes illustrates how the dilemmas explored in the main case are not unique. I conclude by reframing recognition as a dialogical practice—by making use of Hartmut Rosa's notion of recognition as "resonance"[17]—to address more

clearly how the social practice of reparations and their normative character are intertwined.

Framing Justice Through Litigation

The court case of the so-called widows from Rawagede started in 2009. It concerns Indonesian women from a small village in West Java whose husbands were summarily executed by Dutch military forces in 1947 during the de/recolonization war (1945–49).[18] The widows' representatives filed a claim against the Dutch state in the Civil Court in The Hague, and—surprisingly—two years later they won their case. More than sixty years earlier, on December 9, 1947, nearly all the men from their village, Rawagede, were killed in one day because they were alleged to be resistance fighters.[19] The Dutch colonial rulers were fighting to regain the colony they had lost to Japanese occupation during World War II in 1942 and then to Indonesian independence on August 17, 1945. The colony, the Dutch East Indies, had been under Dutch rule for 350 years since it was annexed by the Dutch East India Company in the seventeenth century. Anxious to re-establish the old order, the Dutch military had returned to Indonesia and tried, in so-called police actions, to recolonize their old possession. International pressure and the realization that the war could not be won pushed the Dutch finally to formally acknowledge Indonesian sovereignty in December 1949.

Though Dutch military violence in the Dutch Indies during the decolonization war was already known to both the Dutch government and the UN, it was a veteran's testimony in 1969, followed by an official government report known as *Excessennota*, that elevated the issue into a nationwide concern. There followed documentation of other "excesses" (seventy-six in all), but despite photographic evidence and press attention, these revelations had little impact on public or scholarly attention or on justice-related advocacy. This changed with the court cases: initiated by the Dutch-Indonesian Committee for Dutch Debts of Honour,[20] Liesbeth Zegveld, a Dutch lawyer specializing in human rights and war crimes litigation,[21] represented the one male survivor and the nine widows of men executed during the massacre in Rawagede petitioning the Civil Court in The Hague to claim recognition. These advocates advanced a range of different arguments on behalf of their clients. They included the severity of the crimes (unlawful summary executions), the long-standing passivity of the state in the face of well-documented

atrocities, the illegitimate use of the statute of limitations to bar the widows' from presenting their case to the courts, the availability of firsthand witnesses, and a compelling comparison with the Jewish case. These claims, coupled with the overarching point that they related to "a period in Dutch history that has not yet been settled," generated a compelling case before the court.[22]

Two years later, in 2011, the Dutch government was ordered to take responsibility for "wrongful acts of the state,"[23] to issue an apology, and pay €20,000 in compensation to the one survivor and the nine remaining widows. The claims of survivors' children were denied, as the court called them "descendants" and considered them to be "less directly affected."[24] On December 9, the Dutch ambassador issued the first official government apology at the heroes' cemetery in Rawagede. Payments into the widows' newly established bank accounts followed two weeks later. The Rawagede case, publicized on national television, prompted many new claims by widows of men summarily executed in other regions.

A New Standard: Apologies and Compensation

In 2013 an informal agreement with the Dutch state promised a similar form of recognition to Indonesian widows in the former Dutch East Indies, including those from South Sulawesi, whose husbands were shot dead without any form of trial during "cleansing operations" under Captain Raymond Westerling (and others) in 1946–47. The recognition took the form of a more informal apology announced at the Dutch embassy in Jakarta.[25] Because the state actors were slow in making payments, some widows died during the process. Because it was an informal agreement, their children could not step into the process and take over as heirs to their mothers' claims, a procedure that is guaranteed only in a legal process. Therefore, Zegveld once again took up the applicants' cause in front of the court, and again she and they met with success.

In 2014, children of executed men in the villages of Suppa and Bulukumba in South Sulawesi claimed "equal treatment" and filed claims; the child victims in Rawagede followed.[26] They argued that it was unfair that the widows alone received acknowledgment, because losing a father was as devastating a loss.

In 2015, the court held the Dutch state liable to pay compensation to both the widows *and* the children of men who were summarily executed in the former Dutch East Indies.[27] While the Rawagede decision served as a general model for the Sulawesi widows, for child victims the regulation

differs: The court held that the same lump sum of €20,000 was not applicable, instead, assuming adequate evidence was presented to the court, the state would only be liable to cover the children's lost living expenses. Zegveld's 2017 request presented to the Ministry of Foreign Affairs for a collective arrangement to cover the claims of more than five hundred child victims was rejected.

In 2016, the Dutch court held the state liable for war crimes other than executions, a first. These crimes included torture by electric shock perpetrated by Dutch soldiers in 1947, and the rape of an Indonesian woman by Dutch soldiers during a "cleansing action" in Peniwen in East Java in 1949. In the latter case, though the victim claimed damages worth €50,000, she was only awarded €7,500.

In 2017, 2018, and 2019, the Dutch state was successful in appeals against recognition petitions launched by applicants who had not filed their cases within the two-year limitation period since they received notice of the government's potential liability in their cases. While executions were considered too serious to be considered time-barred, this did not apply to the loss of property. In the same sessions, the Civil Court in The Hague heard dozens of new victims—survivors of mass executions and torture and child victims—in remarkable Skype interviews, all aimed at establishing evidence for unlawful actions by the Dutch military in the former colony. Skype hearings were a first for the court. So was the fact that the court started its hearings an hour earlier than usual, due to the time difference with Indonesia, to accommodate the very aged witnesses from Sulawesi.[28] But did those hearings serve the victims and the cause?

In 2013, I listened to three child victims who testified about their father's murder by the Dutch military. I was surprised by the amount of time the judge allowed for the victims to narrate their stories. Several years later, I sat in the same court-room, listening to those Skype testimonials. Though I was supportive of these efforts to ensure that victims had an opportunity to speak about their traumatic histories, I wondered about the extent to which they were really being heard. All testimonies are about mass violence; they clash with the defendant lawyer's search for individual evidences. Do Skype interviews really enable long-buried memories to surface in such detail? Are they conducive to justice for the victims?

In 2020 the court finally awarded compensation to three children, thereby rejecting the state's position that these war crimes are time-barred. Subsequently, the parliament decided not to pursue further litigation, but to come up with a general compensation scheme: a civil settlement of €5,000 for all

children who can demonstrate that their fathers had been unlawfully executed by the Dutch army between 1945–49.[29]

At the time of this writing, nearly ten years have passed since the first claims against the Dutch state were filed. The first decision in 2011 was celebrated as a "milestone" for the human rights movement and the utility of international law as an instrument of accountability and justice for state crimes, as the statute of limitations was (partly) barred.[30] However, over time, it became apparent that litigation could not solve all the outstanding recognition issues and that alternative strategies for securing some form of justice were needed.

The Search for Alternatives

The victims' lawyer, Zegveld, described the adoption of a litigation strategy to address reparations and recognition issues as an emergency solution:

> We took the case to the civil court; why did we do that? The widows were not looking for time-consuming procedures, most were eighty-five or older. What is more, they were not motivated by resentment or anger. Rather, they were more looking for some kind of recognition, for someone who would reach out to them, perhaps saying sorry, and acknowledging what happened. At one point I really thought we could avoid litigation, there was a lot of media attention when we started thinking about this case. Public opinion was strongly in favour of the widows. At some point our then minister of development, Mr. Koenders, decided to donate €850.000 in development aid to the village, and I thought that this gesture perhaps could solve this matter, that the money might be used to build a school or a hospital, and that there could be a plaque attached to the building, commemorating the men of Rawagede. And I thought perhaps then it would be all right. I was not completely sure, but we discussed the issue along these lines. But the state was not willing to make any causal link between this money, which they termed development aid, and the events in 1947. And that really closed the discussion. All what remained was litigation.[31]

Once the government refused to accord symbolic meaning to the "development aid" paid, Zegveld commissioned the Amsterdam International Law

Clinic to research the chances of a claim. The clinic saw a possibility that the launch of legal proceedings could "be used in a wider campaign supporting the broader cause of the Committee: general awareness and recognition of the atrocities that took place in the village of Rawagede."[32] These legal efforts enabled colonial crimes to be addressed in a way they never had before. But in the process, the original political struggle for an apology developed into a claim for recognition of civil victims and financial compensation for personal damages. The challenge became determining which kind of collective solution would be more appropriate.

The Challenges of the Legal: Bottom-up and Comparative Views

An empirical assessment of the meaning of the apology and compensation for the victims and the families in Indonesia who received these reparatory measures is instructive. In what follows I consider the findings of interviews I conducted in various villages with victims, their families, and activists involved in reparations processes on both the Indonesian and the Dutch sides.[33]

Justice Needs to be Tangible

Was justice done? The answer depends on whom is asked. The widows—all in their late eighties and nineties at the time of the interviews—seemed happy with the recognition and the attention their cause received. As a result of the compensation, most were able to afford better living arrangements: They could buy the house they had been renting or invest in a house for themselves or their children; some were even able to help their children pay off debts. They also reported enjoying better quality food, at least for a while. Often their idea of repair was causally linked to what was lost. One widow not only lost her husband but also her house and wanted to rebuild it (she succeeded). The survivors listed desires that were very concrete: to be able to eat chicken (a symbol of being middle class), to visit Mecca (a wish all the women had, but none could fulfill), and to gain some independence ("I want my own house"). The apology by the Dutch ambassador—a ceremony at the graveyard,

the place most dear to them—was a symbolic gesture described as highly meaningful by the village head. However, without money or other concrete forms of compensation, many would not have been satisfied. As some of the child victims said in response to a question about the value of apology, it would have been "an empty gesture." The apology must be tangible, "shaking hands only is not enough."[34]

Revictimization: Sharing on One's Own Terms

The material benefits also generated social tensions. In Rawagede the widows were forced to share half of their compensation with the broader victim community, because they were considered the "representatives" of all 181 victim families buried at the local cemetery.[35] The decision that compensation was to be shared had not been clearly communicated beforehand, and the widows and survivor family members had no clear say in the decision process. As a result, they felt mistreated and robbed. Though they would have been willing to engage in some form of sharing, as community is considered important, and gift giving is highly respected, they expected to do this on their own terms. The lack of transparency and agency associated with the process unsettled both the families and the village as a whole for years.

In villages in Sulawesi, by contrast, social obligations became visible in a different way. Here, extended family networks—such as the multiple widows of local kings killed by the Dutch—disagreed over who could legitimately make claims, reviving tensions over split family loyalties. Because compensation could threaten social harmony, it was decided that any funds received would be invested in a mosque to reunite the family symbolically.[36] One already compensated widow invested the money received in a car used both by her grandson but also by the community. In effect, she enhanced her own mobility but also that of the villagers.[37]

"We Are Still Poor"

Money is always welcomed to improve living conditions. Some of the (grand)children expected more from the outcome of the litigation. "Everybody thought that we received *lots* of money, but we're still poor."[38]

One grandson was grateful that he was able to pay all his debts with his grandmother's money, but at the same time felt deeply ashamed that he could not protect her against the enforced sharing process by the village authorities.[39] It is a painful reminder of his weak position in the village's hierarchy.

Victims or Heroes?

In Rawagede these personal disappointments contrast with the sense of pride experienced by the younger generation as their village—thanks to the media attention afforded by the court cases, the infrastructure improvements funded by Dutch development aid, and the commemoration activities organized by the local widows foundation at the monument—became famous ("a place in Indonesian history") and a better place to live. We thus confront a paradox. In the Netherlands the widows are a symbol of a *colonial disaster*, but in Indonesia they represent a *heroic independence struggle*. Both these versions of history are memorialized at the very same cemetery. Does Indonesian nationalistic historiography, by turning victims into heroes, silence individual suffering? Or does the Dutch postcolonial narrative, by turning heroes into victims, deny survivors their agency and pride? Do survivors, by accepting "small money," undermine their own political agency and the dignity for which their countrymen fought?[40]

Comparative Views

Similar issues have arisen in other contemporary court cases involving decolonization struggles, such as the so-called Mau Mau case or the war of independence in Kenya (1952–59).[41] Here too, the legal process generated resentments, as some victims felt excluded by settlements paid out in 2012 by the British government only to applicants listed in the court cases. Here too, the UK government was not willing to countenance a debate on alternative, more collective, remedies.[42] Here, too, it is not a colonial reparations case; in the Kenian case it is on torture and in the Dutch case on executions, both in the context of the exercise of colonial rule.[43] Here too, the apology made to address the larger victim community was meant to compensate for the shortcomings of individual compensations. However, as the Indonesian case

showed, at a personal level the symbolic needs to be accompanied by a concrete gesture that materially benefits survivors. At the same time, individual redress brings with it the risk of social frictions and revictimizations as divisions and jealousies within the survivor community emerge.[44] In Indonesia, some people expect more from their own state than from the former colonizer; if asked, some would have preferred a hero's pension instead of a victim payment. What for some is an attempt to address colonial injustices, is for others another colonial act of "divide and rule," undermining the establishment of a collective consciousness fought for in the independence war.[45] Both approaches, one might suggest, ignore facts that do "not suit local sensibilities," such as the collaboration of locals with the colonial administration or the use of the emergency "to settle old scores."[46] And, both in the UK and in the Netherlands, scholars and media pay most attention to the treatment of those claims at home, while the effects on the people for whom they were designed remain underexposed.[47]

Reframing Recognition As a Dialogical Practice

The Dutch-Indonesian cases support the claim that dealing with colonial injustices requires greater vision in the transitional justice field than has been explored so far. Legal procedures alone, necessary though they are for survivors and their descendants, are limiting. Some of the problems are inherent in the transposition of large-scale structural violence to individual legal cases. Other problems stem from the way in which legal processes reproduce pre-existing hierarchies, promising a kind of transformation while de facto stabilizing hierarchies. In what follows, I offer some reflections on the limitations of legal practice and on the possibility of advancing colonial reparations practices by engaging in a more "dialogical perspective."

The sociologist Hartmut Rosa labelled the courtroom a "resonance-free" space, which is not about empathy, compassion, insight, or understanding, but about enforcing one's own claims against those of the other side.[48] There we find rather a strategic communication than a resonant dialogue. He describes legal recognition as a deaf institutionalized relationship with the world. In effect, being acknowledged by law does not necessarily mean that victims feel seen or acknowledged.[49] Indeed, as this research shows, for many of the victims the success of their claims is not

decided in the courtroom (when they win their cases), but when the decision is implemented (when the recognition or the money makes a difference in their life). This shifts the focus from the courtroom to the social settings.

Dialogue Within Families and Communities

Paying compensation for past injustices is not just a financial transaction and a symbolic gesture but a social process that evolves. This means, in villages such as Rawagede, that more attention is needed to ensure that former victims are not revictimized by the process, and that the decision-making and sharing is a self-directed process that creates agency and empowerment, not one that is imposed. This approach needs a form of anthropological research to establish survivors' wants and needs as well as local understandings of justice. It also requires clear communication and transparency in the procedures, so that they do not remain in the hands of a few activist individuals.

Recognition is a *relational experience*: the success of the process depends on whether the mediators who represent and communicate decisions to the claimants are accepted, whether there is a *resonant* context (a supportive environment), and whether the gendered nature of the experience is acknowledged, given that—as the interviews in the Indonesian villages showed—females' priorities (household, food, health) often differ from those of males (honor, representation, protection). In Rawagede, after the widows also the children of executed men claimed equal treatment, they were not only highlighting the fact that a selective recognition of individuals endangered the social fabric but also claiming co-ownership of the recognition process.

As Gready and Robins have noted in relation to compensation policies: "The potential for shifts in agency and power relations around reparations resides mainly in the fact that reparation campaigns usually evolve over time, from below, as a result of civil society and victim/survivor mobilization and in the face of official opposition. Herein lies the possibility for participation, constituency building and the acquisition of new skills, and fresh patterns of engagement with the state through and beyond reparation campaigns."[50] They call for a form of participation that transforms victimhood: "Transformative justice requires a radical rethinking of participation in transitional and transnational justice interventions. It seeks a form of participation that

engages with but transforms victimhood."[51] Here participatory action and grassroots involvement are crucial to a transformative process, an essential element in transitional justice.[52]

Dialogue with the Diaspora

It is not just social aspects that are excluded from the courtroom, political factors are too. Originally the Rawagede case was a claim about the "recognition of August 17, 1945, as the *de jure* date of independence of Indonesia and a general apology from the Dutch Government."[53] It turned into a struggle for compensating victims. What has looked in the courtroom like an engagement with the colonial past in Indonesia has been, from the very beginning, an engagement with the present-day postcolonial Netherlands. Those court cases were initiated by a member of the Indonesian Diaspora living in the Netherlands (Jeffry Pondaag, chair of the Committee for Dutch Debts of Honour), who translated his sense of the neglect of colonial history as shared history into a claim on behalf of the formerly colonized.[54] For him it was not just about *injured citizens* during colonialism but also about himself, and his feeling (as an Indonesian) of still not being accepted as an *equal citizen* in Dutch society today.[55] His claims, and those of an increasing postcolonial movement,[56] therefore, go far beyond the acknowledgment of historical injustice and relate to disappointments in a Dutch society that has not yet come to terms with its postcolonial legacy—a society in which many postcolonial migrants still do not feel like fully acknowledged members.

Recognition as Dialogue

While the Rawagede and the follow-up court cases can be interpreted as a kind of "reconnection" with the colonial past, providing new facts on the re/decolonization war but also a value judgement, both stimulating a scholarly and public debate, a key dilemma of those legal cases also becomes evident: a discussion in which the categories colonizer and colonized are constantly repeated. This also stabilizes hierarchies.

While the classic idea of a "struggle for recognition" is seen as an inherently emancipatory practice that tends to continually call into question oppressive social arrangements,[57] critics show how recognition can easily

become an essentializing tool, as the other is placed in an "otherized" position from which to be recognized. Kristina Lepold has called it an "ideology critique of recognition" to stress that recognition can "be implicated in the reproduction of problematic social orders,"[58] An example is the gender-blindness of many recognition procedures; another example is the "format" of many colonial apologies: following Tom Bentley they rest "on the colonizer voicing a narrative, while the colonized remain less audible . . . maintaining hegemonic narratives and speaking positions [rather] than overturning them."[59] Recognition in this context is not so much enabling as constraining.[60] To address this, Nancy Fraser distinguished between *affirmative recognition*, naturalizing certain power relations, and *transformative recognition*, which restructures "the underlying generative frameworks and relationships."[61]

This chapter suggests that making use of Hartmut Rosa's idea of recognition as "resonance" could help exploring further what qualifies as transformative recognition. Rosa defined "resonance" as a dynamic process of encounter in which opposing sides intersect and transform. He sees the precondition for resonance in a kind of "participatory parity" so that "we hear each other and speak to each other as 'equals.' . . . Social actors can only establish resonant relationships (and hence parity of participation) when they take the stance of listening and responding on equal terms."[62] Only then is a transformative act possible. Rosa argues that recognition is felt only when a mutual transformation has taken place, when it has enabled *both* parties to overcome their original positions.

Looking at current Dutch debates on independence, decolonization, violence, and war in Indonesia in 1945–50, a key question is whether there will be a space created in which Dutch and Indonesian voices are equally represented to find a broader truth rather than being constrained into performing colonial role patterns. If recognition measures could function as a space in which dominant readings of histories and alternative readings of history meet and make room for more fluid identities, allowing people to leave narrow "victim" or "perpetrator" identities, this might help to deconstruct the dichotomized (and also legal) logic of "who acknowledges" and "who is acknowledged," of "who gives" and "who receives," which in itself carries the signature of historical violence and power relationships. So far, the Dutch have determined what price to pay, as the Indonesian historian Purwanto has put it.[63] In its place, "to learn from the bottom," to paraphrase Gayatri Spivak, would provide a plurality of voices and therewith "a broader truth" and

also different answers to what justice is about.[64] Hearing those different answers could qualify as resonant dialogue.

Future Research Agenda

The lawyers behind the colonial reparations cases are aware that legal action is constrained. One is also increasingly aware that the monetarization of the debate tends to overstate the value of money.[65] While financial compensation is just an instrument to achieve recognition, it has become a means in itself. However, by *expanding the law*, they hope to initiate a "much broader political solution."

But, what kind of solution? How can one improve existing recognition and compensation processes so that no secondary victimizations take place? How can one translate anthropological or oral history research results into legal and/or extra-legal procedures that can then be followed up by local initiatives that do more justice to the experiences and needs at the grass roots, within survivor communities themselves? More broadly, how can the legal cases be used as a starting point to stimulate a process of transformation in postcolonial societies that takes the historical legacy of colonialism into account? This might require further scrutiny of the concept of recognition as a desirable good, whether it can do justice to the multiple voices and identities people have and need to have in our globalized societies. These are questions that need to be investigated further, not just in Indonesia, Kenya, or Namibia but also in Europe. Being more aware of the limitations of legal processes will feed thinking about additional, supplementary, instruments, and create awareness that those legal cases indicate a possible shift in hegemonic structures, a shift that has not yet been made.

62. Unión Nacional de Mujeres Guatemaltecas, "Li wam sa sa' xch'ool."

63. Plaza Pública, "Sepur Zarco."

64. Programa de las Naciones Unidas para el Desarrollo, "Mujeres Maya Q'eqchí de Sepur Zarco - Colectiva Jalok U," published November 30, 2016 to *YouTube* in Guatemala, Video, 10:47, https://www.youtube.com/watch?v=A5_yutKxd7A.

65. Juan José Guerrero, "La patología del negacionismo guatemalteco," *Plaza Pública*, March 5, 2016, https://www.plazapublica.com.gt/content/la-patologia-del-negacionismo-guatemalteco.

66. Steven Dudley, "Guatemala Elites and Organized Crime: The CICIG," *InSight Crime*, September 1, 2016, https://www.insightcrime.org/investigations/guatemala-elites-and-organized-crime-the-cicig/; Edgar Gutiérrez, "Guatemala Elites and Organized Crime: Introduction," *InSight Crime*, September 1, 2016, https://www.insightcrime.org/investigations/guatemala-elites-and-organized-crime-introduction/.

Chapter 10. Colonial History at Court

1. Soshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2002).

2. Ibid., 11–12.

3. Leora Bilsky, "The Judge and the Historian: Transnational Holocaust Litigation as a New Model," *History and Memory* 24, no. 2 (2012): 117–56.

4. Michael R. Marrus, *Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s* (Madison: University of Wisconsin Press, 2009).

5. Bilsky, "The Judge and the Historian," 117.

6. Stef Scagliola, "Cleo's 'Unfinished Business': Coming to Terms with Dutch War Crimes in Indonesia's War of Independence," *Journal of Genocide Research* 14, no. 3–4 (2012): 419–39; Larissa van den Herik, "Addressing 'Colonial Crimes' Through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia," *Journal of International Criminal Justice* 10, no. 3 (2012): 693–705; Nicole L. Immler, "Human Rights As a Secular Imaginary in the Field of Transitional Justice: The Dutch-Indonesian 'Rawagede Case,'" in *Social Imaginaries in a Globalizing World,* ed. Hans Alma, Guy Vanheeswijk (Berlin: De Gruyter, 2018), 193–222.

7. Chris Lorenz, "Can a Criminal Event in the Past Disappear in a Garbage Bin in the Present? Dutch Colonial Memory and Human Rights: The Case of Rawagede," in *Afterlife of Events: Perspectives on Mnemohistory*, ed. M. Tamm (New York: Palgrave Macmillan, 2015), 219–41; Bart Luttikhuis, "Juridisch afgedwongen excuses. Rawagedeh, Zuid-Celebes en de Nederlandse terughoudendheid," *BMGN—Low Countries Historical Review* 129, no. 4 (2014): 92–105.

8. Bambang Purwanto, quoted in Anne-Lot Hoek, "Een onderzoek naar schuld en boete (An investigation on guilt and penance)," *NRC Handelsblad*, November 22, 2016.

9. Selma Leydesdorff, "Why Compensation Is a Mixed Blessing," in *The Genocide Convention: The Legacy of 60 years*, ed. H. van der Wilt et al. (Leiden: Martinus

Nijhoff, 2012), 105–14; Elazar Barkan, "Historical Dialogue: Beyond Transitional Justice and Conflict Resolution," in *Historical Justice and Memory*, ed. Klaus Neumann and Janna Thompson (Madison: University of Wisconsin Press, 2015), 185–201.

10. Leydesdorff, "Why Compensation Is a Mixed Blessing," 105–6, 114.

11. O.N.T. Thoms, J. Ron, and R. Paris, "State-Level Effects of Transitional Justice: What Do We Know?" *International Journal of Transitional Justice* 4, no. 3 (2010): 1–26.

12. Rosalind Shaw and Lars Waldorf, with Pierre Hazan, eds. *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, Stanford Studies in Human Rights Series (Stanford, CA: Stanford University Press, 2010).

13. Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Postsocialist' Age," *New Left Review* 1, no. 212 (1995): 68–93.

14. Nancy Fraser and Alex Honneth, *Redistribution or Recognition? A Political-Philosophical exchange* (London and New York: Verso, 2003).

15. Paul Gready and Simon Robins, "From Transitional to Transformative Justice: a new agenda for practice," *The International Journal of Transitional Justice* 8 (2014): 339–361.

16. The chapter draws on my previous work, notably, Nicole L. Immler, "Narrating (In)Justice in the Form of a Reparation Claim: Bottom-Up Reflections on a Post-Colonial Setting—The Rawagede Case," in *Understanding the Age of Transitional Justice: Crimes, Courts, Commissions, and Chronicling*, ed. Nancy Adler, Hinton's Human Rights Series (New Brunswick: Rutgers University Press, 2018), 149–174, and Immler, "Human Rights As a Secular Imaginary in the Field of Transitional Justice." It develops past insights, providing greater conceptual coherence and practical guidance to the critique of transitional justice. While my earlier articles studied the micro-processes those claims initiated, this chapter goes a step further aiming to theorize a research approach that allows us to strengthen awareness of the relevance of the social in recognition processes.

17. For Rosa "resonance" is a key variable in his "sociology of world-relations." Hartmut Rosa, *Resonanz. Eine Soziologie der Weltbeziehung* (Frankfurt: Suhrkamp, 2016).

18. While in the Netherlands one speaks of "keeping the colonies" and the "decolonization war," in Indonesia one speaks of a "recolonization," the "war of independence" or "revolution." I take the Dutch perspective.

19. Dutch sources assert 150 men were killed, Indonesian sources, 433 men. Rémy Limpach, *De brandende kampongs van generaal Spoor* (The burning kampongs of General Spoor) (Amsterdam: Boom 2016): 323–36.

20. The Comité Nederlandse Ereschulden was established on May 5, 2005, the fiftieth anniversary of the end of World War II, to look after the interests of the Indonesian civilian victims. The Indonesian branch was established by Batara Hutagalung, the Dutch branch by Jeffry Pondaag. Both act as individuals and have few supporters. They submitted several petitions to the Dutch parliament requesting that

the Indonesian "victims must come into the picture in the Netherlands." The success came with the court case. See www.kukb.nl.

21. Liesbeth Zegveld, "Civielrechtelijke verjaring van internationale misdrijven (Status of limitation of civil law in regard to international crimes)," inaugural lecture on November 13 (Amsterdam: Amsterdam University Press, 2015).

22. The Rawagede Verdict (September 14, 2011): 4.12, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2011:BS8793. See Wouter Veraart, "Uitzondering of precedent? De historische dubbelzinnigheid van de Rawagede-uitspraak," *Ars Aequi*, no. 4 (2012): 251–259; Immler, "Human Rights As a Secular Imaginary in the Field of Transitional Justice."

23. "War crime," argues Liesbeth Zegveld, "is a legal term, which we in court did not use because this term did not yet exist. That is why in the judgment it is spoken of as a 'crime' or 'wrongful act of the state.'" Zegveld, "Decolonization or recolonization?," discussion, September 13, 2018, Pakhuis De Zwijger.

24. Rawagede Verdict (September 14, 2011).

25. Based upon an informal agreement with the Dutch government: Staatscourant van het Koninkrijk der Nederlanden, no. 25383 (September 10, 2013). https://zoek.officielebekendmakingen.nl/stcrt-2013-25383.html.

26. Shafiah Paturusi, interview with author, Amsterdam, August 19, 2014.

27. An interlocutory judgment, NJF 2015/221 (March 11, 2015), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:2442.

28. See "Indonesian Eyewitness Testimony via Skype," Independence, Decolonization, Violence and War in Indonesia, 1945–1950, https://www.ind45-50.org/en/indonesian-eyewitness-testimony-skype.

29. Staatscourant van het Koninkrijk der Nederlanden, no. 50507 (October 19, 2020).

30. Veraart, "Uitzondering of precedent?," 258.

31. Liesbeth Zegveld in a debate on "Reparations for Historical Wrongs," The Hague Institute of Global Justice, October 14, 2016.

32. "The case concerning the village Rawagede. Final report," Amsterdam International Law Clinic, September 2007, 46. The report explored the classification of the conflict, the possibility of a criminal case and of a civil case.

33. This case study is based upon semi-structured interviews conducted by the author with the help of a translator in October 2015 with victims, family members, and activists. These included more than forty interviews with eight families in Rawagede and twelve in Sulawesi, including five local experts/activists. For more details on the case and the interviewees, see Immler, "Narrating (In)Justice in the Form of a Reparation Claim," 2018.

34. Author interviews with Ibu Tijeng (1927–2018) and Ibu Wanti (1925–2016) and their families, and child survivor Warjo (b. 1936), Rawagede, October 26, 2015.

35. Author interviews with village head Mamat (b. 1971) and head of the widows foundation Sukarman (b. 1949), Rawagede, October 26, 2015.

36. Author interview with Andi Mangkiri (b. 1948), daughter of Ibu Makku (b. 1926), one of the four widows of the local king Andi Cori, Pangkajene Sidrap, October 12, 2015.

37. Author interview with Mutawakkil, grandson of Ibu Ceddung (1928–2015), Pinrang, October 13, 2015.

38. Author interview with Karmas (b. 1946), daughter of Ibu Tijeng, Rawagede, October 26, 2015.

39. Author interview with Luus Rusmanto (b. 1971), grandson of Ibu Tijeng, Rawagede, October 26, 2015.

40. Author interview with Batara Hutagalung, Jakarta, October 18, 2015.

41. See for more information on this case Chapter 7 by Elkins.

42. Author interview with Daniel Leader, February 12, 2016. See "Victims of British Torture in Kenya. Options for justice," report by Leigh Day & Co Solicitors, December 2, 2009. This proposal represented suggestions by victim organizations, inviting the British Government "to adopt a creative approach to resolve this issue promptly": Acknowledgement, Community Health and Welfare Provision, A Welfare Fund (for individual victims), Transitional Justice (such as supporting a Truth, Justice and Reconciliation Commission), Working Group (to develop recommendations most effective to meet the victims' needs).

43. "This is not a colonial reparations case," it is "about torture and it is brought by the surviving victims who live with the consequences of their torture to this day" (ibid., 3, 11). The Dutch case is on "executions by Dutch soldiers of unarmed subjects of the then Kingdom of the Netherlands . . . in the context of the exercise of the colonial rule of the State over a now former colony. . . . The State was under an obligation to protect the physical integrity and life of its nationals" (Rawagede verdict, 4.14). However, the public debate caused by both court cases developed into one on colonial history and colonial wrongs.

44. Some irregularities are mentioned by Katie Engelhart, "40,000 Kenyans Accuse UK of Abuse in Second Mau Mau Case," *Guardian*, October 29, 2014, http://www.theguardian.com/world/2014/oct/29/kenya-mau-mau-abuse-case.

45. Reparations expert and activist Esther Stanford Xosei, presentation, the International Civil Society Roundtable on WCAR Durban Plus 15, Rotterdam, March 19–20, 2016.

46. Klaus Neumann and Janna Thompson, "Introduction. Beyond the Legalist Paradigm," in *Historical Justice and Memory*, ed. Klaus Neumann and Janna Thompson (Madison: University of Wisconsin Press, 2015): 3–24, 22.

47. See Marc Parry, "Uncovering the Brutal Truth About the British Empire," *Guardian*, August 16, 2018, https://www.theguardian.com/news/2016/aug/18/uncovering-truth-british-empire-caroline-elkins-mau-mau.

48. Rosa, *Resonanz*, 28.

49. Elsewhere I call this the "distinct rationalities" of a legal procedure, looking for plain evidence, while victims in their testimonies also aim for comprehension.

Nicole Immler, "Individual Desire or Social Duty? The Role of Testimony in a Restitution Procedure. An Inquiry into Social Practice," in *Tapestry of Memory: Evidence and Testimony in Life Story Narratives*, ed. Nancy Adler and Selma Leydesdorff (Transaction Publisher, 2013): 219–236, 232.

50. Gready and Robins, "From Transitional to Transformative Justice," 58.

51. Ibid.

52. Birgit Bräuchler (ed.), *Reconciling Indonesia. Grassroots agency for peace* (London and New York: Routledge, 2009); Kiran McEvoy and Lora McGregor (eds.), *Transitional Justice from Below. Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing 2008).

53. "The case concerning the village Rawagede. Final report," 7.

54. See Immler, "Human Rights As a Secular Imaginary in the Field of Transitional Justice," 209.

55. "I am concerned that we are not considered as human. There is a ladder, isn't it? You first get the Dutch, then the Europeans, then the half-breeds, then the Chinese, and then we come, the indigenous people, let's say, the natives. That's how we were called." Jeffry Pondaag, interview with author, Heemskerk, November 13, 2014, and Amsterdam, February 5, 2015.

56. Specific debates on folkloric traditions such as "Black Pete" developed into a much broader debate on institutional racism. Gloria Wekker, *White Innocence. Paradoxes of Colonialism and Race* (Durham and London: Duke University Press, 2016).

57. Alex Honneth, *Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press, 1996).

58. Kristina Lepold, "An Ideology Critique of Recognition: Judith Butler in the Context of the Contemporary Debate on Recognition," *Constellations* 25 (2018): 474–484, 474.

59. Tom Bentley, "Colonial Apologies and the Problem of the Transgressor Speaking," *Third World Quarterly* 39, no. 3 (2017): 399–417.

60. Patchen Markell, *Bound by Recognition* (Princeton, NJ: Princeton University Press, 2003).

61. Fraser, "From redistribution to recognition?," 73.

62. • Rosa reaches beyond the classic debate of recognition versus redistribution by Fraser and Honneth. Hartmut Rosa, "(Parity of) Participation—The Missing Link Between Resources and Resonance," in *Feminism, Capitalism, and Critique. Essays in Honor of Nancy Fraser*, ed. Banu Bargu and Chiara Bottici (New York: Palgrave Macmillan 2017), 157–166, 164. This approach will be further explored in the author's new research on the "Dialogics of Justice."

63. Purwanto, *Een onderzoek naar schuld en boete (An investigation on guilt and penance).*

64. Gayatri S. Spivak, "Righting Wrongs," *The South Atlantic Quarterly* 103, no. 2–3 (2004): 523–581.

65. Author interview with Leader; also discussion between lawyers at the debate "Reparations for Historical Wrongs," The Hague Institute of Global Justice, October 14, 2016.

Chapter 11. Unhealed Wounds of World War I

1. Aerial bombardment was first employed—against civilians—by Italy in 1911 during its colonial war in Libya. Following its utilization with limited effect against urban centers during World War I, interwar colonial theaters like India's Northwest Frontier, Egypt, Iraq, Morocco, Syria, Palestine, Ethiopia, and China were the scenes of the most intensive employment of air attacks on civilians. This was the prologue to the massive Spanish Civil War and World War II air raids on cities like Guernica, Coventry, London, Hamburg, Berlin, Tokyo, Hiroshima, and Nagasaki. The British, French, Italian, German, and Japanese officers responsible for such attacks on nonmilitary targets learned their trade in these colonial wars, among them Air Marshal Sir Arthur "Bomber" Harris, the World War II commander of the RAF Bomber Command, who in the 1920s and 1930s was responsible for bombing civilians in Iraq, India, and Palestine.

2. For further details, see Hikmet Ozdemir, *The Ottoman Army, 1914–1918: Disease and Death on the Battlefield* (Salt Lake City, UT: The University of Utah Press, 2008); Edward Erikson, *Ordered to Die: A History of the Ottoman Army in the First World War* (Westport, CT: Greenwood, 2001); Kristian Ulrichsen, *The First World War in the Middle East* (London: Hurst, 2014); and Eugene Rogan, *The Fall of the Ottomans: The Great War in the Middle East* (New York: Basic Books, 2015).

3. Santanu Das, "World War I: Experiences of Colonial Troops," British Library, January 29, 2014, https://www.bl.uk/world-war-one/articles/colonial-troops.

4. *Ibid*. See also Victor Kiernan, "Colonial Africa and its Armies," in *Imperialism and its Contradictions* (London: Routledge, 1995), 77–96.

5. For a discussion of the contestation over some of these borders, see Rashid Khalidi, "The Persistence of the Sykes-Picot Frontiers in the Middle East," *London Review of International Law* 4, no. 2 (2016): 347–57.

6. Perhaps the most comprehensive history of the genocide of the Armenians is by Ronald Suny, *"They Can Live in the Desert but Nowhere Else": A History of the Armenian Genocide* (Princeton, NJ: Princeton University Press, 2015). See also Taner Akcam, *The Young Turks' Crime against Humanity: The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire* (Princeton, NJ: Princeton University Press, 2012); and Ronald Suny, Fatma Gocek, and Norman Naimark, eds., *A Question of Genocide: Armenians and Turks at the End of the Ottoman Empire* (Oxford: Oxford University Press, 2011).

7. Several months of fighting in the fall of 2020 in the Nagorno-Karabakh region between Armenian and Azeri forces, the latter supported by Turkey, revived these traumas.

Time for Reparations

Edited by

Jacqueline Bhabha, Margareta Matache, and Caroline Elkins

PENN

UNIVERSITY OF PENNSYLVANIA PRESS

PHILADELPHIA

—-1
—0

Published by
University of Pennsylvania Press
Philadelphia, Pennsylvania 19104-4112
www.upenn.edu/pennpress

Printed in the United States of America on acid-free paper
10 9 8 7 6 5 4 3 2 1

Library of Congress Cataloging-in-Publication Data

-1—
0—

ISBN 978-0-8122-5330-6

CONTENTS

—-1
—0