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Tara J. Melish
University at Buffalo School of Law, tmelish@buffalo.edu

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IMPLEMENTING TRUTH AND RECONCILIATION: COMPARATIVE LESSONS FOR THE REPUBLIC OF KOREA

*Tara J. Melish**

INTRODUCTION

On September 28, 1950, Luke, a gentle and slender seventeen-year old boy was taken into custody by paramilitary forces associated with the South Korean state, accused of being a North Korean spy. He was never seen again. His family learned of Luke's fate only months later as they prepared to flee Seoul as refugees. Young Luke, they were told, had been taken to a hill in Miari where he was shot and clandestinely buried in a mass grave with others similarly accused. They should not expect his return. The family never understood more fully what happened, why, or who was responsible.¹ "For me, it defined my life," says his now 82-year old sister, who had gone to the local village office to try to secure her younger brother's release, explaining futilely but courageously to his captors why Luke could not possibly be a spy.² Haunted by his memory for over sixty years, she was for decades unable to speak about her brother's disappearance. "I don't know what happened," she says. "But there is a feeling if I walk, just walk, walk

* Associate Professor of Law and Director, Human Rights Center, SUNY Buffalo Law School, The State University of New York. The author extends her gratitude to Tae-Ung Baik, John Ciorciari, Theresa Chun, Roger Des Forges, Kim Dong-Choon, Hun Joon Kim, Lisa Laplante, Errol Meidinger, Makau Mutua, Ereshnee Naidu, Mark Nathan, Jaya Ramji-Nogales, Kristin Stapleton, and David Westbrook for their outstanding contributions to the conference "Implementing Truth and Reconciliation: Comparative Lessons for Korea," held on October 24, 2011 at the Baldy Center for Law and Social Policy. The author is particularly indebted to Errol Meidinger and Mark Nathan for their work co-organizing the conference and co-editing this Special Issue, and to Dr. Theresa Chun for inspiring it.

1. Following a three month occupation by North Korea of Seoul and its surrounding villages in 1950, South Korean authorities and associated paramilitary groups interrogated, tortured, disappeared and extrajudicially executed thousands for their supposed "collaborative" activities. See TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, COMPREHENSIVE REPORT, Vol. 1, at 180-81 (2010) [hereinafter COMPREHENSIVE REPORT] (discussing mass killings of civilians before and during the Korean War).

2. Dr. Theresa Chun, *A Survivor's Testimony: Closing Remarks to the Conference on "Implementing Truth and Reconciliation: Comparative Lessons for Korea,"* 19 BUFF. HUM. RTS. L. REV. 73 (2012).

to the end of the earth I will find Luke. That feeling . . . I know I am not alone. There are a lot of Korean people in my shoes.”³

To help uncover the untold truths and tragedies of victims like Luke and to investigate the broad array of human rights violations suffered by the Korean people over the last century, the Truth and Reconciliation Commission, Republic of Korea (hereinafter “TRCK” or “Commission”) was established in December 2005. With one of the broadest and most wide-ranging mandates of any truth commission in history, it was given four and a half years to complete its investigatory work, submit a final report, and provide a set of recommendations to the President and National Assembly.⁴ On December 31, 2010 the TRCK officially closed its doors, having investigated over eleven thousand reported cases of human rights violations taking place between 1910 and 1993, and making recommendations to the government on over eight thousand of them. These cases represent only a tiny fraction of the state-sponsored abuses committed over the investigated period.⁵ Nevertheless, their investigation represents an important turning point for a society in which discussion of past abuses by state authorities has long been censured and a highly selective past remembered.

With its final report complete, it is now time to focus on effective and timely implementation of the TRCK’s official policy recommendations. Such implementation is indispensable for helping to ensure deep and enduring preventative reform throughout society. Indeed, while truth commissions are created with a variety of objectives, key amongst them is the identification of specific measures and policy interventions for government and other stakeholders to take to ensure against the recurrence of violence and rights abuses. Accordingly, truth commissions invariably conclude by offering a variety of formal recommendations to national (and sometimes

3. *Id.* As Dr. Chun wrote in testimony to the TRCK, “All these times, our family was unable to mention Luke’s name for fear of opening the unbearable anguish. Therefore, we could not talk, console each other, and cry together. . . . I know Luke is not the only innocent victim by South Koreans. For years people talked about atrocities committed by Communists and North Korean Soldiers. They never mentioned the atrocities by South Koreans against fellow South Koreans. People were so afraid of being suspected of [being] Communist sympathizers or communists.” Written testimony of Dr. Theresa Chun to the Truth and Reconciliation Commission, Republic of Korea, Jan. 21, 2009 (on file with author).

4. See Framework Act on Clearing up Past Incidents for Truth and Reconciliation, Law No. 7542, May 31, 2005 [hereinafter Framework Act], reprinted in TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, TRUTH AND RECONCILIATION: ACTIVITIES OF THE PAST THREE YEARS 115 (2009) [hereinafter THREE YEAR REPORT].

5. See, e.g., COMPREHENSIVE REPORT, *supra* note 1, at 135 (acknowledging estimate that there are a million victims of civilian mass killings before and during the Korean War, as well as limits of TRCK’s ability to address valid claims).

international) stakeholders. These generally include major political and institutional reforms in the policies and practices of the military, judiciary, police, and intelligence services, as well as with respect to the media, education system, business sector, religious groups, and political parties. They also include measures aimed at acknowledgment, memorialization, reconciliation, honoring, recognition, reparation, peace education, and access to information, including access to the historical materials on which truth commission findings are based. Such measures aim to ensure that the institutional policies, practices and relationships that allowed abuses of the past to take place are effectively acknowledged, engaged and transformed.

And, yet, while the prevention of repetition is an overarching goal of virtually all truth commission processes, surprisingly little scholarly or policy attention is devoted to assessing whether truth commission recommendations targeted at prevention are in fact effectively implemented in practice. “No one has yet analyzed how many of the thousands of recommendations by truth commissions have been implemented.”⁶ This is true even as it is widely recognized that “[s]uccessful implementation of truth commission recommendations continues . . . to be weak.”⁷ Indeed, scholars lament the “enormous chasm” between the highly detailed recommendations truth commissions are mandated to develop and the “virtual dismissal, or at least nonimplementation, of these recommendations by governments that receive them.”⁸ Without targeted and sustained stakeholder attention, “many commissions have seen a fine list of recommended reforms receive very little governmental attention.”⁹ “There should be ways to improve this record in the future.”¹⁰

This Special Issue is devoted to identifying such measures, with a particular view to improving the implementation of the recently-released TRCK recommendations in South Korea. Those recommendations, published in English for the first time in this Special Issue,¹¹ suggest a variety of measures for the government of the Republic of Korea to take to restore

6. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 193 (2d ed. 2011).

7. *Id.* at 23.

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

9. HAYNER, *supra* note 6, at 193.

10. *Id.*

11. *Final Recommendations of the Truth and Reconciliation Commission, Republic of Korea*, 19 *BUFF. HUM. RTS. L. REV.* 77 (2012) (Mark Nathan & Eon Joo Park, trans.) [hereinafter *TRCK Final Recommendations*]. Found in Volume 1, Part II of the

the honor of victims, compensate injuries suffered, promote societal reconciliation, and reform government policies and institutions.¹² The extent to which these and other TRCK-recommended measures are implemented, it is contended, will to a large degree determine the long-term impact of the TRCK on political transition and social transformation in South Korea. Careful attention should thus be paid to the processes and dynamics that guide, constrain, and promote implementation efforts.¹³

The articles and essays in this Special Issue are devoted to exploring these issues. They aim not merely to describe comparative national truth commission experiences, but rather to analyze and reflect on lessons learned for promoting the effective implementation of truth commission recommendations. In so doing, they aim to document the reasons behind the relative success rates with implementation in four distinct national contexts: South Korea, Cambodia, Peru, and South Africa. They explain the particular approaches taken to implementation, the web of actors involved in the implementation process, and the lessons learned about what worked, what did not work, and how, looking back, the implementation process might have been restructured to achieve better results.

Drafts of these contributions were presented at a major international conference, "Implementing Truth and Reconciliation: Comparative Lessons for Korea," held at the State University of New York at Buffalo on October 24, 2011.¹⁴ Convened in response to the release of the TRCK's final report, the conference aimed to help fill important gaps in the existing literature with respect to South Korea's decades-long "transitional justice" experience.¹⁵ That experience has been notable in many respects, particularly in

TRCK's 2010 Comprehensive Report, these recommendations were not officially translated by the TRCK, as was Part I of Volume 1.

12. See discussion *infra* in Part IV.

13. A more comprehensive research agenda in this regard is proposed in the concluding contribution. See Tara J. Melish, *Truth Commission Impact: Toward a Participation-Based Implementation Agenda*, 19 BUFF. HUM. RTS. L. REV. 273 (2012).

14. The conference was convened jointly by the Baldy Center for Law and Social Policy, the Buffalo Human Rights Center, and the Asian Studies Program.

15. For purposes of this symposium, we employ Naomi Roht-Arriaza's definition of transitional justice: "that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law." Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006). South Korea's experience is not well represented in the transitional justice literature. Even within the limited scholarship that does address it, the analysis tends to be limited to mechanism-specific descriptive accounts. None focus on the process of post-mechanism implementation of recommendations or findings.

the number, diversity, and sequencing of the transitional justice initiatives undertaken. In an effort to bring these experiences to light and to glean lessons from other national experiences that might inform the Korean implementation process, experts in transitional justice were thus brought together to discuss the factors that contribute to or hinder the effective implementation of truth commission recommendations and other efforts aimed at achieving national, community and individual-level reconciliation. Such lessons are offered in the hope of assisting victim groups and other advocacy communities in South Korea as they engage the much longer process of implementing truth and reconciliation in the Republic of Korea.

In introducing the Special Issue, the present contribution proceeds in five parts. Part I provides a short introduction to the TRCK and its recommendations. Parts II and III aim to gather lessons for the implementation process from comparative national and cross-national experiences. Part II focuses on intra-national lessons, drawing from the multiple transitional justice processes that have taken place in Korea over the last sixty-five years. The accompanying essays, all by Korean scholars, cast a critical gaze at South Korea's experience with the TRCK, placing it in the context of the unusually large number of transitional justice mechanisms undertaken in South Korea since the early stages of democratization in the mid-1980s.¹⁶ By comparing the TRCK to these sister processes, the essays aim to tease out some of the strategic lessons that might be drawn from the latter's comparative successes and failures, with a view to strengthening the prospects for effective implementation of the TRCK's recommendations.

Part III further broadens the comparative lens by assessing distinct aspects of the transitional justice experiences of three other nations: Cambodia, Peru, and South Africa. While no experience can provide a blue-print for processes developed in other social, political, economic and historical contexts, important lessons, insights, and cautionary tales may nevertheless be drawn from these experiences. There is, in this sense, much to learn from the comparative experiences of the more than forty other truth commissions that have undertaken work in countries around the world.¹⁷ Such commis-

16. In December 1987, Roh Tae-woo was elected in South Korea's first free democratic elections, bringing thirty-five years of authoritarian rule to a formal end. A number of prior transitional justice measures had been initiated during brief periods of liberalization to respond to past human rights abuses in 1948 and the 1960s, but, given strong perpetrator push-back, none had produced results of note. See Hun Joon Kim, *infra* note 74, at 137.

17. See generally David Backer, *Cross-National Comparative Analysis, in ASSESSING TJ IMPACT*, *supra* note 8, at 23, 23 (defending utility of cross-national comparative analysis as a methodology for empirical research in transitional justice, while recognizing need for caution).

sions have taken a diversity of forms, responded to distinct kinds of violence over distinct periods of time, and, given the diversity of approaches taken, had a wide variety of success rates with the implementation of their final recommendations. The essays in this Part correspondingly highlight lessons that might be drawn from three prominent national experiences, particularly in the areas of community-level reconciliation (Cambodia), individual economic reparations (Peru), and memorialization initiatives (South Africa).

Part IV turns attention back to the TRCK's multiple recommendations and the details of their formulation. Such formulation, it is contended, presents important opportunities and constraints that must be taken closely into account by all relevant stakeholders in the implementation process. Finally, Part V concludes with global lessons aimed at strengthening implementation in South Korea. It highlights in particular the critical importance of active civil society engagement and creative implementation entrepreneurship, the creation of permanent follow-up bodies, pursuing truth as an ongoing project, data accessibility and independence, and the use of measurable indicators for monitoring and holding government and other key actors to account.

The Special Issue closes with an essay that returns to the question of implementation and how best to assess truth commission impact.¹⁸ Underlining recent research that suggests that truth commissions do not appear in practice to produce any direct improvements in either the human rights record or democratic development of transitional societies (and may in fact negatively correlate with human rights improvements),¹⁹ it argues for a new research agenda that focuses more directly on the social and institutional dynamics of implementation. Such a research agenda would diverge from many current directions in the scholarship. These dominant strands have tended to look either overly inward to the internal functioning of truth commissions or overly outward at perception surveys or standardized quantitative cross-national human rights and democratization metrics in assessing

18. See Melish, *Truth Commission Impact*, *supra* note 13.

19. See ERIC WIEBELHAUS-BRAHM, *TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY* (2010) (finding that truth commissions have an overall negative impact on human rights practices and no significant impact on democracy based on large-N cross-national statistical regression analysis, but pointing to four case studies of positive correlation); TRICIA D. OLSEN ET AL., *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* 153 (2010) (finding that truth commissions, when used alone, have a significant negative effect on both democracy and human rights measures); Tricia D. Olsen et al., *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 *HUM. RTS. Q.* 980 (2010) (same).

commission “success” or “impact.” Both efforts fail, I argue, at taking account of what is perhaps the most significant contributing factor to—and indicator of—truth commission success: the level of civil society engagement in the process of implementing its final recommendations and policy prescriptions.

Two opening contributions follow this Introduction. The first is a transcript of the powerful testimonial remarks of Dr. Theresa Chun, a victim-survivor of the Korean War who has committed herself to ensuring that atrocities like those that befell her brother, Luke, do not happen again. She spoke compellingly at the conference about her brother’s disappearance and its impact on her life and life project over the last sixty years. The second contribution is the first-ever English-language translation of the TRCK’s final recommendations. Although an official English translation of Volume 1 of the TRCK’s four-volume report was formally commissioned by the TRCK, the body’s final “integrated” recommendations were deliberately omitted from that translation.²⁰ At the same time, the official translation is not available on the TRCK’s official website or any other government site, and is effectively inaccessible to the global public in hardcopy.²¹ Taken together with the lack of broad public dissemination of the official Korean language report and recommendations,²² these omissions raise significant concerns regarding the government’s commitment to broad public scrutiny of and civic engagement with the TRCK’s findings and recommendations.

20. The official reason provided for this omission was that “the Truth and Reconciliation Commission had yet to approve [the integrated recommendations] when the Commission contracted to publish the English version of the Comprehensive Report.” *COMPREHENSIVE REPORT*, *supra* note 1, at 4 (translator’s note). Given the ease with which the inclusion of the recommendations could have been covered prospectively by the contract, and the insignificance of the additional resources such inclusion would have entailed, this explanation is far from satisfying.

21. A search in WorldCAT, a searchable global database of the holdings of 72,000 libraries in 170 countries and territories (including South Korea), reveals that only seven participating libraries worldwide hold a copy of the English translation of the TRCK’s Final Report. Six of the holdings are in the United States, while one is in London. See *WorldCAT facts and statistics*, <http://www.oclc.org/us/en/worldcat/statistics/default.htm>. My gratitude to John Mondo and Nina Cascio of the SUNY Buffalo Law library for running this search.

22. The Korean language report is available on the TRCK’s official website, although that website has ceased being maintained since the Commission’s mandate came to an end. In other national contexts, truth commissions have employed a variety of measures to disseminate their findings, including not only posting on the internet, but printing them in the nation’s major newspapers and widely distributing copies, including in shortened popular forms. In some cases, they have been reproduced as children’s books and graphic novels. See *WIEBELHAUS-BRAHM*, *supra* note 19, at 159.

Such concerns are deepened in light of earlier efforts in 2010 to ban distribution of the TRCK's 2009 interim English-language report.²³ That report likewise included an important set of recommendations and policy prescriptions for ensuring that the processes begun by the TRCK would have lasting societal impact.

It is emblematic in this regard that none of the contributors to the symposium, including those expert on Korean transitional justice, cited to the TRCK's final "integrated" recommendations in their original submissions. They focused instead on the *interim* recommendations issued by the more liberally constituted commission in 2009, recommendations which arguably lack the legal status of those included in the final report.²⁴

By publishing the final recommendations here in English translation for the first time, we hope to draw greater public and policy attention to them, both nationally and internationally. In so doing, we hope to aid Korean initiatives to use them as leverage for transforming the relationships, policies, and institutions that allowed abuses to manifest over so many years. It is largely on the basis of such implementation, and the civil society dynamics created in response, we contend, that the long-term success of the TRCK may be judged.

I. THE TRCK AND ITS RECOMMENDATIONS

A. *Origins and Mandate*

The TRCK was not Korea's first attempt at transitional justice. As the articles in this Special Issue stress, in the two and a half decades since the introduction of democratic reforms, South Korea has pursued not only a limited set of high-level prosecutions and non-criminal sanctions, but has undertaken more special investigations of past human rights abuses within

23. In early 2010, as one of his first acts of office, incoming TRCK President Lee Young-jo banned the further distribution of the English report citing translation errors. The real cause was widely understood to be Lee's ideological disagreement with the Commission's findings and the new ruling Conservative Party's discomfort with the report's strong conclusions, which held prior rightist governments responsible for abuses. See, e.g., *Forbidden Book Haunts Truth Commission*, KOREA TIMES, April 6, 2010; Leigh Payne, *Banning of English Report on Findings*, KOREA TIMES, April 15, 2010; Lee Tae-hoon, *Truth Commission Sued for Political Censorship*, KOREA TIMES, May 6, 2010; Hamish McDonald, *Truth in Danger in South Korea*, SYDNEY MORNING HERALD, Jan. 23, 2010. It was likewise under Lee's chairmanship that the TRCK contracted for the English translation of only Part 1 of Volume 1 of its Final Report, excluding the contents of its recommendations. See *supra* note 20 and accompanying text.

24. See discussion *infra* at Part IV.

its national borders and created more truth commissions than any other country.²⁵ This includes, by one estimate, an astonishing eighteen truth commissions since 1996 to deal with the historical legacies of Korea's authoritarian and colonial past.²⁶ Nonetheless, for multiple reasons, virtually all of these truth commissions have been created with highly limited temporal or subject matter mandates. Each has been created to respond to a discrete incident, uprising or massacre²⁷ or, alternatively, to a particular kind or target of abuse, such as "suspicious deaths" or victims involved in the "democratization movement,"²⁸ within highly constricted timeframes.

The TRCK was designed to be different. The first "comprehensive" truth commission in Korea's history (indeed, in all of Northeast Asia),²⁹ its mandate was extended to cover almost the entire twentieth century. Empowered to investigate cases and events occurring from 1910 through the 1990s, it was tasked with seeking the truth about abuses during (1) Japanese colonialism and its run-up, (2) the Korean War and the years immediately preceding it, and (3) the post-War decades of military-authoritarian rule.³⁰ It was, moreover, tasked not only with investigating the abusive acts of state actors, but also, controversially, the "terrorist acts" and atrocities committed by "parties that denied the legitimacy of or were hostile towards the Republic of Korea," that is, North Korean soldiers and local South Korean

25. This particular combination of transitional justice measures—limited trials, an effective amnesty for the vast majority of remaining perpetrators, accompanied by truth commission investigations—has, interestingly, been found by certain scholars using certain "large N" cross-national statistical regressions to be most conducive for achieving stronger democracies and human rights records. See OLSEN ET AL., *supra* note 19, at 159.

26. See COMPREHENSIVE REPORT, *supra* note 1, at 25-26. Transitional justice scholars have nevertheless disagreed about the proper definition of a truth commission and hence what the relevant universe of cases includes. See, e.g., HAYNER, *supra* note 6, at 10 ("There is still no single, broadly accepted definition of what constitutes a truth commission."); Geoff Dancy et al., *The Turn to Truth: Trends in Truth Commission Experimentation*, 9 J. HUM. RTS. 45, 47 (2010).

27. See COMPREHENSIVE REPORT, *supra* note 1, at 25-26 (noting review commissions established to investigate the "incidents" at Geochang, Jeju, No Gun Ri, and the Samcheong Training Camp, among others).

28. See *id.* (noting Presidential Truth Commission on Suspicious Deaths and Review Committee on Restoring Honor and Compensating Activists of the Democratization Movement, among others).

29. As Kim Dong-Choon points out, the TRCK is the first comprehensive past-dealing project in all of Northeast Asia that seeks to document and redress grave human rights abuses committed by the victims' own government. Kim Dong-Choon, *infra* note 65, at 98.

30. See Framework Act, *supra* note 4, art. 2(1).

communists or sympathizers.³¹ The expansive mandate even included the nationalist activities of anti-colonial crusaders in the period between 1910 and 1945, which were to be “honored.”³² The breadth of this mandate, alternately characterized as a major strength or weakness of the TRCK, can be attributed to three dynamic and overlapping influences: the powerful organized demands of civil society and victims’ rights groups; liberal political pragmatism, especially regarding victim reparations; and the self-insulating push-back of a conservative party that could no longer fully resist public demands for a more comprehensive past-dealing project.

Most immediately, the TRCK’s 2005 creation—eighteen years after formal transition to democracy—owes in major part to growing civil society dissatisfaction with the coverage gaps and limitations of the earlier, more limited truth-seeking projects. Victims’ groups, including the Pan-National Committee on Verifying Massacres and the National Committee of the Bereaved Families of the Korean War Victims, were particularly displeased by the dissolution in 2004 of the Presidential Commission on Suspicious Deaths without having resolved a number of high profile cases.³³ They were similarly irritated by the temporal limitations placed on the investigatory powers of other truth-seeking bodies, especially those tasked with investigating abuses against democracy activists.³⁴ These limitations led to nation-wide public demonstrations and growing calls for the creation of a comprehensive truth commission that would cover *all* state-sponsored abuses from the Korean War through the early 1990s. A Pan-National Committee for Clarification of the Past (PNCCP) was correspondingly formed by civil society activists in 2004 to draft a proposed legislative bill, investing the envisioned body with exceptionally strong powers of investigation and sanction.³⁵

Operating in a political system characterized by a negotiated transition and strong party competition, the ruling liberal (Uri) party, meanwhile, had long favored transitional justice initiatives; it had championed each of the

31. *Id.* at 2(1)(5); COMPREHENSIVE REPORT, *supra* note 1, at 30, 33, 100-102. The controversial nature of this mandate stems from the fact that truth commissions are often defined as bodies tasked with investigating *official state abuses*, not those of non-state actors, although this appears to be changing.

32. Such activities included those of the “anti-Japanese independence movements” and “[e]fforts by overseas Koreans to uphold Korea’s sovereignty and enhance Korea’s national prestige since liberation from [] Japanese colonial rule.” See COMPREHENSIVE REPORT, *supra* note 1, at 33.

33. See Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 PACIFIC RIM L. & POL’Y J. 579, 602, 607 (2007).

34. See *id.* at 607.

35. See COMPREHENSIVE REPORT, *supra* note 1, at 27-28.

earlier, more limited truth-seeking projects created between 1996 and 2004. By 2004, however, the limits of many of those projects had become clear. From a practical-administrative perspective, this was particularly true with respect to victim reparation. Each special act recognized a highly variable administrative reparation scheme for its recognized beneficiaries, with compensatory quanta ranging from zero to a few thousand dollars depending on beneficiary identity and legislative sequencing. The vast majority of victims meanwhile remained uncovered. The fear that such an erratic, piecemeal approach would lead to a never-ending cycle of special legislation recognizing increasingly large reparations awards for discretely organized victim groups, led President Roh Moo-hyun in 2004 to underscore the need for “comprehensive efforts to settle the past based on universal methods.”³⁶ His liberal party strongly supported the TRCK’s creation, albeit with significantly scaled back powers from those proposed by the PNCCP.³⁷

The opposition conservative (GNP) party pushed back. Although it recognized that it could not hold back the tide of public support in Korea for a more comprehensive truth commission, it demanded certain concessions as part of the negotiation process. These included radically limited investigatory powers for the TRCK³⁸ and, simultaneously, a dramatically expanded mandate to cover the activities of a wide range of non-state actors.³⁹ The fact that both demands were ultimately incorporated into the TRCK’s Framework Act suggested to some that the TRCK, a reflection of the negotiated transition and the continuing power of past perpetrators in government, would not fully escape the state-sponsored narrative of the past that had long silenced memory in Korea.⁴⁰

36. *Id.* at 27.

37. *Id.* at 28.

38. Arguing that an obsession with the past could cause disproportionate spending and a burden on the economy, the GNP party preferred that the clarification of the past be limited to an academic study of modern history carried out by a new research body under the umbrella of the National Academy of Sciences. *Id.* at 29.

39. *Id.* At the same time, the TRCK’s investigation of human rights abuses during the authoritarian regimes was limited to “gross” violations. *Id.* at 108-109 (explaining that cases based on violations of freedom of speech and press, property rights, and the right to work were dismissed unless found to be violated in combination).

40. See, e.g., Jeon Seung-Hee, *War Trauma, Memories, and Truths: Representations of the Korean War in Pak Wan-so’s Writings and in “Still Present Pasts,”* 42 *CRITICAL ASIAN STUDIES* 623, 624 (2010). The TRCK’s final report nonetheless concluded that its “biggest finding” was that “the claims of unlawful civilian killings by the military and police nationwide turned out to be true.” “For over sixty years,” the commission concluded, “there had been victims but no offenders, and some incidents were denied altogether. However, the commission’s investigation verified that the tragic killings did indeed take place.” *COMPREHENSIVE REPORT, supra* note 1, at 181.

A highly selective public memory of the past has indeed long been fostered in Korea, one in which state responsibility for war-related atrocities and subsequent human rights abuse became unacknowledgable. The Korean War has, for example, been described as the “forgotten war,” with the experiences of vast numbers of Koreans erased from public consciousness under a state-promoted narrative of the war as a Manichean contest between good and evil.⁴¹ Through decades of state manipulation, monitoring, and censorship of civilian knowledge production and civic activities, the role of South Korean and U.S. forces in committing mass atrocities has been sanitized from the record, and victims silenced from speaking about them through fear.⁴²

The TRCK was created to help broaden this unilateral memory and clarify the truth of long silenced events. In this sense, the start of its mandate in 1910 makes historical sense. It was in that year that imperial Japan colonized the Korean peninsula, initiating thirty-five years of oppressive colonial rule aimed at erasing Korean cultural and political identity.⁴³ Despite strong nationalist sentiment, Japan’s 1945 defeat in World War II did not, however, bring democratic self-rule to the Korean peninsula. Rather, a UN-backed occupation divided the peninsula into two separate Korean states north and south of the 38th parallel, one administered by the U.S. military, the other by the Soviets. Rising Cold War ideological tensions and the difficulties of foreign administration led, in turn, to two developments with devastating societal consequences. First, in an effort to ease administration, the U.S. occupation government called back into service many of the abusive officials, police, and military officers from the pre-war colonial era, effectively reconsolidating the colonial power structure.⁴⁴ Second, as independence brought growing public demands for the purging of “pro-Japanese collaborators,”⁴⁵ these reconsolidated officials responded to the na-

41. See Jeon, *supra* note 40, at 624.

42. See *id.* at 624-26 (discussing role of South Korean state in affirmatively shaping public memory and promoting unilateral memory in post-war era by strictly manipulating, monitoring and censoring civilian activities).

43. In August 1995, Japan’s prime minister issued an official apology for its colonial activities in Korea, admitting that Japan had, “through its colonial rule and invasion, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations.” Sheryl WuDunn, *Japanese Apology for War is Welcomed and Criticized*, N.Y. TIMES (Aug. 16, 1995).

44. See COMPREHENSIVE REPORT, *supra* note 1, at 12.

45. In 1948, for example, the Special Law on Punishing Anti-Nation Activities was adopted by the Korean legislature to punish pro-Japanese collaborators, with a Special Investigation Committee established to carry out its mandate. The Committee’s work was nonetheless immediately thwarted by the administration of President Rhee

tionalist threat by adopting an increasingly virulent and totalizing anti-communist ideology.⁴⁶ Local authorities and their paramilitary allies used that ideology to justify the systematic suppression of nationalist political dissent, and ultimately the mass murder of civilians.

Untold numbers of South Koreans were subsequently killed in the tumultuous and fearful years between independence and the Korean War, mostly for suspected collaborationist activities with rebel troops or as reprisals for suspected activities of others.⁴⁷ “Clean field operations” were used to wipe out entire civilian communities, and commanders were given widespread powers of immediate execution under martial law.⁴⁸ The subsequent three-year Korean War between the U.S.-backed South and Soviet and Chinese-backed North was one of the most destructive of the twentieth century. Caught in the cross-fire, ten percent of the Korean population (three million Korean civilians) were killed, with ten million separated from their families.⁴⁹ It has been reported that more bombs were dropped in Korea than on all of Europe during World War II and more napalm was used than during the more than two-decades-long Vietnam War.⁵⁰ And, yet, the details of, and responsibilities for, these civilian and humanitarian abuses have remained effectively unacknowledged; a situation solidified with the 1953 ar-

Syung-Man and right-wing attacks on the committee, and hence no meaningful outcomes were produced. *See id.* at 12-13; Cho, *supra* note 33, at 588 n. 42 (2007). This failure largely explains Korea’s 2004 adoption, fifty-six years later, of the Special Act for Finding the Truth of Anti-Nation Activities Under Japanese Occupation. For a discussion of this Act, see Baik, *infra* note 81.

46. *See* Jae-Jung Suh, *Truth and Reconciliation in South Korea: Confronting War, Colonialism and Intervention in the Asian Pacific*, 42 *CRITICAL ASIAN STUDIES* 503, 516 (2010) (“[T]he former collaborators quickly transformed themselves into anticommunists and redeemed themselves as patriots who fought against Korean communists as alleged Soviet-sponsored traitors. . . . [T]hey reintroduced torture, martial law, the National Security Law, and other oppressive measures.”).

47. *See, e.g.*, Suh Hee-Kyung, *Atrocities Before and During the Korean War: Mass Civilian Killings by South Korean and U.S. Forces*, 42 *CRITICAL ASIAN STUDIES* 553, 555-65 (2010) (reviewing cases verified by the TRCK); *id.* at 559 (“Such acts of alleged collaboration included the provision of meals, accommodations, or manual labor to help the rebel troops and guerrillas.”).

48. *Id.* at 560, 564.

49. *See* Jeon, *supra* note 40, at 624.

50. *See id.*; *see also* BRUCE CUMINGS, *KOREA’S PLACE IN THE SUN: A MODERN HISTORY* 289-90 (1997) (attributing civilian death toll of more than two million people during the Korean War to America’s use of napalm strikes on villages and policy of breaking massive dams to flood Korea’s northern valleys).

mistice between North and South Korea, which brought neither an end to the war nor peace.⁵¹

A succession of harsh military and autocratic regimes ruled South Korea for the next thirty-five years. Employing repressive and violent means to quash political dissent and make “opponents disappear in silent anonymity,”⁵² each used a rabid anti-communist ideology, the priority of rapid state-led economic growth, and the security threat from across what remains the world’s most heavily-fortified border to justify the maintenance of its own power through systematic human rights abuse. That abuse has been targeted particularly at reformers, pro-democracy activists, and their families. It has ranged from massacres, assassination and other “suspicious deaths,” to torture, ill-treatment, fabricated trials and unlawful detentions, to wide-scale censorship and “preventative” imprisonment in concentration or “re-education” camps, to systematic loss of jobs, property, academic degrees and professional employment credentials for those supporting or participating in democracy movements.⁵³

Although the period of authoritarian rule finally ended in 1987 with constitutional reforms and the beginning of democratization, twenty-five years later Korea remains a divided country, both physically and politically.⁵⁴ Significant infringements on freedoms of speech, association, and the press continue, largely justified on grounds of national security and the real and imagined threats from across the border.⁵⁵ A silence about the past has remained, carrying with it a widely-experienced, if publicly unacknowl-

51. The two Koreas remain technically at war after their 1950-53 war ended in a truce.

52. Hannah Arendt, *A Reporter at Large, V-Eichmann in Jerusalem*, THE NEW YORKER, Mar. 16, 1963, at 58 (describing common tactic of totalitarian regimes).

53. See, e.g., COMPREHENSIVE REPORT, *supra* note 1, at 82-89, 107-109, 123-33; Cho, *supra* note 33, at 597-602.

54. The Demilitarized Zone, or DMZ, still separates North and South Korea.

55. The National Security Law, for example, continues to criminalize speech in support of Communism or North Korea, giving rise to almost a hundred cases annually. See, e.g., AMNESTY INTERNATIONAL, THE NATIONAL SECURITY LAW: CURTAILING FREEDOM OF EXPRESSION AND ASSOCIATION IN THE NAME OF SECURITY IN THE REPUBLIC OF KOREA 3, 19, 20 (2012); Amnesty International, Press Release, *South Korea: The Politically Motivated Onslaught on Free Speech*, Nov. 29, 2012, available at <http://www.amnesty.org/en/for-media/press-releases/south-korea-politically-motivated-onslaught-free-speech-2012-11-29> (noting “dramatic increase in the abuse of national security laws in a politically motivated attempt to silence debate,” including “a 95.6% increase over the past four years (2008 to 2011) in the number of people questioned on suspicion of violating the National Security Law”).

edged, intergenerational transfer of trauma.⁵⁶ A fractured society with ideological fault-lines continues to engender political disputes and confrontations in the South today, even as spectacular economic growth in the 1960s, seventies, and eighties has placed South Korea among the world's highest income countries.⁵⁷

B. *The TRCK's Recommendations*

Within this fractured context, the TRCK was created to help “foster national legitimacy” and “reconcile the past for the sake of national unity.”⁵⁸ To achieve these ends, the Commission was mandated to investigate a broad set of cases from the past (as submitted within a one-year window) and, based on its findings and conclusions, to present recommendations for state remedial measures to the President and National Assembly in a comprehensive final report.⁵⁹ Such remedial measures, which the government “*shall* respect and attempt to implement,”⁶⁰ were to fall into any of eight broadly specified categories. These included measures designed to: “rectify the damage and honor” of victims; “account for unverified investigation results”; “prevent past incidents from reoccurring”; abolish or reform laws, policies and practices; support reconciliation with perpetrators; further develop national reconciliation and democracy; promote human rights education and historical consciousness; and “[o]ther matters that the Commission deems necessary to achieve the purposes of th[e] Act.”⁶¹

Liberal interpreting its mandate to issue state remedial measures in each of these broad categories, the TRCK in fact issued three distinct sets of recommendations. These included a set of “final” recommendations published in its December 2010 comprehensive report (as textually mandated in the Framework Act). They also included an important set of interim policy recommendations issued just before an internal political transition within the Commission and, most controversially, case-specific recommendations corresponding to each and every petition it verified. Context suggests that the latter two sets of recommendations were internal TRCK responses to a

56. See Jeon, *supra* note 40, at 637-39 (noting transfer to second generation Korean Americans); see also COMPREHENSIVE REPORT, *supra* note 1, at 157 (discussing post-traumatic stress disorder experienced by victims and their families).

57. South Korea is presently one of the world's fifteenth largest economies. See International Monetary Fund, *World Economic Outlook Database: Report for Selected Countries and Subjects* (2012).

58. Framework Act, *supra* note 4, art. 1.

59. *Id.* art. 32(1).

60. *Id.* art. 32(5) (emphasis added).

61. *Id.* art. 32(4).

changing national political environment that was becoming increasingly hostile to its work. The decision to issue case-specific recommendations thus came in 2007 just before a national political election forecast to bring the conservatives back to power. The TRCK's interim measures, in turn, were issued in 2009 just as the TRCK's Presidency was set to transition to a more conservative leader known for his antagonism toward the TRCK and other past-dealing projects.⁶²

The details of these three sets of recommendations will be returned to more comprehensively in Part IV. Three points related to their effective implementation nonetheless merit special attention with respect to them here, especially in light of the dynamic political context highlighted above. First, in contrast to the specificity and detail associated with more recent truth commission reports,⁶³ the concluding TRCK made only seventeen final recommendations in 2010, each presented at a very high level of generality. Second, although put forth as "integrated,"⁶⁴ the final recommendations do not in fact substantively incorporate the commission's 2009 interim measures. The two sets of recommendations in fact appear to be in tension in many important respects. Third, direct inconsistencies appear to exist between several of the TRCK's final recommendations and those issued by concurrently operating specialized truth commissions in South Korea. All three of these considerations will need to be closely attended by advocates and other stakeholders in the implementation process ahead. They are thus useful to keep in mind in reading the important and insightful contributions that follow.

62. See *supra* note 23.

63. See HAYNER, *supra* note 6, at 192 ("While some of the earlier truth commission reports provided only very brief and general recommendations, later commissions have been much more extensive, usually including a full and detailed chapter outlining specific reforms across many sectors of government and public life."). Hayner cites multiple examples:

The El Salvador report's recommendations ran to fifteen pages, South Africa's to forty-five pages, Chile's to fifty-five pages, and Liberia's to sixty-two pages. The Sierra Leone report includes over eighty pages of recommendations, plus a useful twenty-page summary table. In Morocco, the recommendations ran for over one hundred pages, and in Peru the recommendations section reached almost 200 pages, including a proposed draft law for a follow-up committee.

Id. By contrast, the TRCK's final recommendations cover a mere 13 pages.

64. COMPREHENSIVE REPORT, *supra* note 1, at 3.

II. COMPARATIVE LESSONS FROM SOUTH KOREA

The first three essays in this Special Issue are penned by Korean scholars expert in transitional justice initiatives in South Korea. They were asked to critically assess the work of the TRCK, the prospects for implementation of its recommendations, and the lessons that might inform it from other past-dealing processes in South Korea, especially those in which final recommendations were likewise issued. Their essays raise a variety of valuable considerations that will need to be taken closely into account looking forward.

A. *Assessing the TRCK's Operations*

The first of these essays is authored by Kim Dong-Choon, a former standing commissioner of the TRCK and long-time advocate of transitional justice projects in South Korea.⁶⁵ As a commission insider, he provides a detailed descriptive analysis of the TRCK, including its genesis, mandate, and composition, as well as its jurisdictional and investigative powers. Kim acknowledges the commission's hard-fought accomplishments, including local and regional memorial services undertaken around the country, a public apology by the President for the government's illegal exercise of state power during the Korean War, the exhumation of many hidden massacre sites, the correction of the Family Registry in many individual cases, and the retrial of about twenty people wrongly prosecuted on false espionage charges to clear their names and award compensation.⁶⁶ He nonetheless focuses his analysis on the slow and uneven implementation record with respect to the majority of the TRCK's macro policy and institutional recommendations. As he notes, while the government has tended to implement the easiest and most perfunctory of recommended measures, it has effectively failed to touch any of the politically sensitive or financially burdensome recommendations. Many measures, such as official apologies from government bureaus, a comprehensive reparations law, and revision of historical records, he observes, have never even been discussed in government for possible implementation.⁶⁷

Skeptical that this record will improve in the future, he attributes this disappointing record to multiple factors. Most significant among them is the political context in which the TRCK was created and has had to operate, especially since 2008. This context is characterized by two central con-

65. Kim Dong-Choon, *Korea's Truth and Reconciliation Commission: An Overview and Assessment*, 19 BUFF. HUM. RTS. L. REV. 97 (2012).

66. *See id.* at 110-11.

67. *See id.* at 113.

straints, both a result of the negotiated nature of the Korean transition. The first is the persistence of strong anti-communist sentiments and Cold War ideology in Korea. Indeed, because the ideology used to justify human rights violations over the last fifty years is still operative in the nation, spurred to some degree by the proximity of North Korea, it has been difficult for many to recognize the wrongs committed in the name of anti-communism and that those who perpetrated them might not be national heroes.⁶⁸ This context has led not only to skepticism of the TRCK in large segments of the general public and media, but also to lack of cooperation with the Commission's investigations by prominent state institutions, especially those most actively engaged in abuses of the past, such as the Intelligence Service, the National Police, and the Ministry of Defense.

Closely related, many of Korea's most prominent offenders and perpetrators still occupy important roles in state institutions and are represented in the major political parties, including the current administration. This reality, Kim suggests, has led not only to the TRCK's premature shut down and lack of official cooperation with its investigations, but also, he emphasizes, to an overbroad mandate that significantly diluted the focus of the TRCK and constrained its ability to complete its work within the allocated time-frame.

The negotiated political compromise that created the TRCK had other limiting effects on its ability to carry out its work. Kim focuses on three. First, although the original proposal would have granted strong investigatory authority to the commission, including the ability to hold hearings, to prosecute for noncompliance, to lift statutory limitations, and to search, inspect and apply for search warrants, the final Framework Act failed to give the TRCK any significant enforcement power. As a result, it could not compel state officials or other witnesses to provide testimony or documents other than through the threat of fine.⁶⁹ At the same time, its recommendations were to be non-binding and it was not authorized to punish perpetrators, even when their wrongdoing was plainly established. Second, under the Framework Act, the commissioners were to be selected by political authorities, such that political orientation played a central role in the TRCK's composition. This had an important constraining effect on the TRCK's work, Kim observes, because the political backgrounds of the Commissioners inhibited reaching consensus. As a result, all decisions were taken by mere majority vote, rather than arrived at through deliberative consensus.

68. *See id.* at 105, 108.

69. *See id.* at 107. As Kim notes, this power was never in fact ever used. *See id.* at n.30.

The inability to reach political consensus, taken together with the TRCK's extensive mandate and time constraints, also led the commission to adopt a very narrow understanding of the "truth" it was mandated to investigate. As Kim describes, the TRCK opted for a model in which investigators focused on validating the forensic truth of each individual incident, rather than constructing a broader narrative of what happened and why. As a result, Kim observes, the TRCK was not able to document adequately the causes, conditions, and systems that gave rise to abuses, nor was it able to facilitate true reconciliation among the various sectors of Korean society that carried out and suffered those abuses.⁷⁰

Taken together with a rise in neoliberal discourse and onset of economic crisis at the TRCK's creation, these limiting effects have not only significantly hamstrung the TRCK's effectiveness and ability to carry out its work, but have also led to a waning of public interest in the TRCK's work. Especially in combination with the political rhetoric of the GNP Party and the conservative press, such limitations can, Kim suggests, thus help to explain the Korean public's sense of fatigue about repeated efforts to uncover the past.

What, then, is to be taken from this experience? Kim identifies two important lessons. The first is the imperative of recognizing that, in divided societies, political support for transitional justice processes will be variable and is very likely to wane precisely at the point when implementation is set to begin. Given this reality, questions of implementation must be taken into explicit account at the design stage. Second, and relatedly, given the likelihood of official reticence to fulfill truth commission mandates and recommendations, the ultimate goal of any truth commission should be the empowerment of civil society to take forward the justice project. That is, a truth commission's final report should not be seen as the end goal. Rather, it should be seen as a jumping off point for a much broader societal effort to transform itself and ensure that the abuses of the past cannot occur again.

In thinking through how this broader effort might be promoted in South Korea and hence how to ensure that the TRCK's efforts contribute to lasting change, Kim offers three concrete steps that should be taken by the government. First, because many victims did not bring forward petitions in the limited time available for doing so, Kim asserts, there is a need to reopen the opportunity for victims to submit petitions for investigation and historical clarification. To allow this truth-seeking process to continue, Kim proposes that either the investigative mandate of the TRCK be extended or a permanent post be created within government to serve the same func-

70. *See id.* at 106.

tion.⁷¹ This proposal mirrors in many ways the TRCK's 2009 interim policy recommendation to create a Permanent Foundation for Research, Education and Memory, a body in fact already expressly contemplated in the TRCK's Framework Act.⁷² As highlighted in Part IV, the fact that this recommendation was not integrated into the TRCK's Comprehensive Report as a final recommendation raises a question as to the government's understanding of its duty to implement it.

Second, the government should authorize a comprehensive law on economic reparations for victims and other restorative measures, such as apologies by key government bureaucracies. Doing so would assist in the reconciliation process by acknowledging officially and concretely that the state was responsible for gross human rights abuses of its citizens. In so doing, Kim suggests, the government should likewise seek to address historical abuses undertaken by the U.S. government during the Korean war, as these were insufficiently investigated by the TRCK. Again, it is concerning that the proposal for a more comprehensive reparations law, proposed by the TRCK in 2009,⁷³ was not included in the TRCK's final policy recommendations in its Comprehensive Report.

Finally, Kim observes, the government should establish mechanisms for broadly disseminating and preserving information on the history of human rights abuses in Korea. Doing so will allow civil society to take forward the justice project, including by creating their own narratives about the truth of the past, diagnoses of causes, and agendas for action.

B. *The Jeju Truth Commission*

In his piece, scholar Hun Joon Kim comes to a very similar set of conclusions.⁷⁴ He does so, however, through a different discursive path and distinct historical perspective. Recognizing that very little attention has been given to the Korean experience within the broader transitional justice community, he begins by providing a comprehensive descriptive overview of state violence in Korea over the last hundred years, including under each of the four distinct periods investigated by the TRCK: Japanese colonialism, the U.S. occupation, the Korean War, and the subsequent military and authoritarian regimes. He then details the multiple and varied transitional

71. *See id.* at 124.

72. *See* discussion *infra* Part IV(B)(2).

73. The TRCK's 2009 interim recommendation was nonetheless limited to reparations for victims of civilian massacres between 1948 and 1953. *See* discussion *infra* Part IV(B)(1).

74. *See* Hun Joon Kim, *Trial and Error in Transitional Justice: Learning from South Korea's Truth Commissions*, 19 *BUFF. HUM. RTS. L. REV.* 125 (2012).

justice initiatives that have been undertaken in South Korea to address abuses in each of these distinct periods, a set of initiatives that are globally unique, particularly in their surprising number and density.

What do these experiences teach us, Kim asks, about the kinds of policy interventions that should be pursued to enhance the likelihood that the TRCK's recommendations will effectively be implemented? To provide answers, Kim compares the experiences of two of South Korea's most prominent truth commissions: the TRCK and the National Commission for the Investigation of the Truth about the Jeju April 3 Events ("Jeju Commission"). The latter was created by special act in 2000 to investigate the mass killing of civilians by the police, military, and rightist youth group that followed a 1948 uprising on Jeju island by a group of communist rebels. The comparison between the two commissions is potentially instructive, Kim suggests, given key shared structural similarities, including an investigatory focus on physical integrity violations (massacres and disappearances) and a temporal focus on the years between independence and the end of the Korean War (1945-1954). Such issues remain politically charged and ideologically controversial in South Korea and hence have engendered strong resistance to both commissions from the conservative and anti-communist sectors of Korean society, particularly from the military and police.⁷⁵

Despite these parallels, the two truth commissions have nonetheless had very different experiences with the implementation of their respective recommendations. The Jeju Commission has had a particularly successful record, while the TRCK has fared less well. What accounts for this difference? In seeking an answer, Hun Joon Kim discounts several of the dominant explanations offered by commentators, including those by Kim Dong-Choon in his essay. Namely, given that the Jeju Commission was created and operated in an almost identical political context, with equal ideological opposition, and with even less enforcement powers than the TRCK, Hun Joon Kim rejects the explanation that built-in jurisdictional limitations or weak enforcement powers hindered the TRCK and eventually obstructed the implementation of its policy recommendations.

These factors, Kim notes, could have been overcome had the TRCK been more forward-looking and proactive in ensuring the sustainability of its work, and had it followed the example of the Jeju Commission. In particular, it was widely predicted that the conservative Lee administration would

75. According to the findings of the Jeju Commission, the conflict resulted in an estimated 25,000 to 30,000 deaths (corresponding to ten percent of the total population of Jeju Province in 1947), with eighty percent of civilian deaths attributed to state agents and thirteen percent attributed to insurgents. *See id.* at 132 (citing Jeju Commission Report).

win the 2008 elections, and Lee's party's opposition to the nation's efforts at truth-telling was well-known. Given this knowledge, Kim asserts, the TRCK should have taken steps early on to protect its work and ensure the full implementation of its mandate. This would have included working actively with the National Assembly to establish a permanent follow-up body to the TRCK to take forward its work and to focus on implementation of its recommendations. Such a body is in fact expressly provided for in the TRCK's Framework Act, but of yet has not been created or pursued. Likewise, as it became clear that the TRCK could not complete its full investigatory work in the time statutorily proscribed, the TRCK should have sought to amend the Framework Act so as to extend its operation. Both of these options were pursued by the Jeju Commission and its civil society advocates, and help to explain why its work is better known and its recommendations better implemented.

Another important step taken by the Jeju Commission, Hun Joon Kim notes, was its executive decision to make public its data archive after its first year of operation. By doing so, it allowed civil society and media actors to follow up with additional studies and publicity, thus increasing the impact of the Commission's work on society at large. By contrast, the TRCK did not make the data it relied on public, and hence its work had much less impact on broader civil society and scholarly projects and awareness.

The most important explanation for the difference in implementation rates between the two commissions was nevertheless even more basic, suggests Kim. Drawing on the work of Kim Jong Min, he attributes this difference to the way each commission understood and pursued its mandate to uncover the "truth" of the past. While the TRCK investigated the isolated truths of individual petitions, with investigators working in isolation to construct a narrative about what happened to individual victims, the Jeju Commission made an executive decision early on to combine an individualist "micro" approach to truth with a historically-oriented "macro" approach. Jeju investigators thus worked together as a team to create a comprehensive and historical truth about civilian massacres to complement the individual truths of particular cases. It was thus able to construct a single historical story or master narrative to tell society, whereas the TRCK was not able to do this. The result was that the TRCK was not able to generate the same degree of societal awareness and support as the Jeju Commission was able to do.

As Kim concludes, in order to have an impact on society as a whole, individual truth and comprehensive truth must be combined. In this regard, a comprehensive truth does not consist of individual stories alone. Rather, "[t]o achieve its objectives, and to have a larger impact on society, the

TRCK should have pursued another stream of investigations to reveal the historical and political structures that allowed past violence to perpetuate, the political, social, and ideological contexts in which the violence took place, and the chain of command in ordering massacres and other gross human rights violations.”⁷⁶

In her testimonial comments, Korean War survivor Dr. Theresa Chun likewise highlights the importance to survivors of knowing not only the narrow forensic truth of what happened to loved ones—as important as that is—but also the broader questions of why and how society allowed itself to permit such atrocities to occur in the first place.⁷⁷ These macro “why” and “how” questions are precisely those that require sustained societal examination if institutional and societal policy changes are to be identified and implemented in ways to ensure against the recurrence of gross abuses in the future. Let us not only look backward to the operations of the TRCK, Dr. Chun insists, but rather focus on ensuring that, both in Korea and around the world, “other persons do not die like my brother and other families won’t be like our family and myself.”⁷⁸

The fact that the TRCK did not pursue this broader macro set of issues—and, in its final recommendations appears to reject the need for doing so looking forward⁷⁹—is not, however, fatal to implementation efforts. It simply means that the process moving forward will need to be more dynamic and engaged. To facilitate that process, Hun Joon Kim focuses on the imperative of centering particular attention on one of the TRCK’s interim policy recommendations: the creation of a permanent memorial and research foundation. Such a foundation will be able to take forward the TRCK’s work, ensuring that scholars and civil society more broadly can continue the work of clarifying the past and working for broader recognition and justice.

In the end, then, Kim Dong-Choon and Hun Joon Kim arrive at similar conclusions, albeit through different routes. Both underscore the importance of foreseeing political resistance to the implementation of transitional justice work and hence the need to plan for such resistance proactively.⁸⁰ Likewise, both emphasize the imperative of active civil society engagement. Without such engagement, political resistance and entrenched interests will ensure that reforms are superficial if undertaken at all. Accordingly, both

76. *Id.* at 164-65.

77. Chun, *supra* note 2, at 75.

78. *Id.*

79. See text accompanying *infra* notes 221-223 (discussing recommendation 16).

80. On this point, see also Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. OF MEMPHIS L. REV. 367, 385-87 (2003).

conclude the need for Korean implementation efforts to focus on four key tasks: (1) ensuring the creation of a permanent research foundation, (2) guaranteeing the independence and accessibility of a historical data archive, (3) promoting efforts to publicize a broad narrative truth about the nation's past and the structural causes of violence, and (4) ensuring every opportunity for creative and expansive civil society engagement in deepening truth, promoting locally-relevant reconciliation initiatives, and socially mobilizing to ensure policy recommendations are fully and effectively implemented.

C. *Institutional Legitimacy: A Focus on Fairness*

These conclusions are supplemented by those of Tae-Ung Baik,⁸¹ who uses his essay to draw attention to a different set of comparative lessons that can and should inform the TRCK implementation process. He uses Korea's comparative experiences with other past dealing processes to spotlight the importance of procedural and substantive fairness in transitional justice initiatives.

As has been argued elsewhere, whether a truth commission is effective depends to a large extent upon two critical factors: (1) whether it is able to attract the attention of its constituents, and (2) whether the commission is perceived as legitimate among members of the mass public.⁸² The TRCK has faced difficulties with respect to both of these factors. With respect to the first, despite (or perhaps because of) its comprehensive mandate, the TRCK has not garnered the level of attention that other transitional justice initiatives have generated. Thus, it has been noted that its revelations, including what might otherwise have been seen as "world-shaking mega-scale news," have been met with a lukewarm reaction in the general public, with stories of government admissions to massacres tucked away on the inside pages of Korean newspapers.⁸³ This contrasts sharply with the experiences of other truth commissions, such as those in South Africa, Peru, and Guatemala, which generated sustained public attention over the course of their mandates. This difference may, in part, be due to the lack of public hearings in the Korean context. In South Africa, special reports on the TRC were aired every Sunday on national television, generating the highest viewer ratings, and radio broadcasts were aired daily. By contrast, stories on the TRCK, it has been noted, tended to be included only in the liberal press.⁸⁴

81. See Tae-Ung Baik, *Fairness in Transitional Justice Initiatives: The Case of South Korea*, 19 BUFF. HUM. RTS. L. REV. 169 (2012).

82. See James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72-SPG LAW & CONTEMP. PROBL. 123, 125 (2009).

83. Hun Joon Kim, *supra* note 74, at 163-64 (citing commentaries).

84. See, e.g., Kim Dong-Choon, *supra* note 65, at 109.

Kim Dong-Choon attributes this lack of mainstream public attention in large part to a conservative political and media campaign to discredit or undermine the legitimacy of the TRCK and other past-dealing projects.⁸⁵ Such a campaign, he asserts, has sought to promote the view that the TRCK is a leftist leaning body aiming to undermine national legitimacy by making heroes out of communists and villains out of patriots. It has also sought to promote the view that it is time to “move forward” and forget the past, and that the nation’s numerous past-dealing projects are holding up economic development.⁸⁶ This discourse has gained increased traction in the public mindset, he suggests, with the onset of the economic crisis in 2005 and the inauguration of President Lee Myung-bak in 2008. Within this context, the concerns for justice and human rights that constituted the dominant political discourse in the prior liberal administrations of Kim Dae Jung and Roh Mu-hyun were replaced by the rise of neoliberal discourse and even a “new authoritarianism.”⁸⁷

Noting a similar lack of public attention to the TRCK, Hun Joon Kim attributes this condition, as noted, to a different cause: the TRCK’s failure to articulate a comprehensive narrative about historical violence that could capture the public’s sustained attention and mobilize it to act.

In his Essay, Professor Tae-Ung Baik points to an additional possible reason: fairness—or, better yet, the public perception of fairness. In this regard, he underscores the importance of fairness or evenhandedness in the work of transitional justice mechanisms for ensuring their public legitimacy. Such legitimacy is, in turn, necessary for promoting broader processes of reconciliation throughout society at large. According to Baik, the TRCK and other recent transitional justice mechanisms in South Korea have paid insufficient attention to issues of fairness in transitional justice work. This inattention, he posits, can lead to growing public skepticism about the utility of past-dealing projects and whether they in fact constitute a firm foundation for building a fairer and most just future. At the very least, perceptions of unfairness in such bodies’ work raise questions about whether they are in fact contributing to the consensus-building process that should serve as the basis of transitional justice work.⁸⁸

85. *See id.* at 109-10.

86. *See also* COMPREHENSIVE REPORT, *supra* note 1, at 29 (noting GNP argument that “an obsession with the past could cause disproportionate spending and a burden [on] the economy, sparking political dispute”).

87. Kim Dong-Choon, *supra* note 65, at 123.

88. Legitimacy is often examined in the literature in the context of being important for enhancing citizens’ voluntary compliance with institutional decision-making, especially when they disagree with a decision taken. Credible institutions are more likely to be persuasive and to succeed in getting citizens to accept their judgments and

Baik provides two concrete examples of such unfairness. The first involves the monetary reparation schemes available today in South Korea for victims of human rights abuse through the work of the TRCK and other more specialized truth commissions. The second involves an unusual Korean property confiscation scheme pursued against those judged to be “collaborators” with Japanese colonialism. Both transitional justice mechanisms, he concludes, could have contributed far more to societal healing, public trust, and sustained attention to the lessons of the past had they taken issues of substantive and procedural fairness better into account.

With respect to the former, Baik observes the vast unfairness that reigns today with regard to individual economic reparations for past human rights abuse. Under the present regime, access to such awards is highly variable, dependent on which—if any—truth commission exercised jurisdiction over a victim’s case. Thus, a handful of victims have received multi-million dollar awards upon their cases being recommended for retrial by the TRCK,⁸⁹ a small minority has received administrative awards of a few thousand dollars under special incident-related compensation schemes,⁹⁰ while the vast majority of victims have received nothing at all. This latter set includes not only those whose cases have not been taken up by the TRCK or any other truth commission, but also victims whose cases have been verified by specialized commissions that do not, often for political motivations, recognize direct compensation awards.⁹¹ Both in relation to availability and the amounts provided, this piecemeal compensation policy may lead to resentments and frustrations, Baik argues, which may in turn threaten the credibility and legitimacy of the truth commission project moving forward.

As an interim recommendation, the TRCK did propose the creation of a semi-comprehensive administrative reparations program, which, in the-

views. See, e.g., James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 187 (2005).

89. Baik notes four such cases. See Baik, *supra* note 81, at 180-81.

90. See *id.* at 176-80 (discussing investigatory commissions authorized to award monetary reparations). The quantum of awards seems to have varied significantly even within single schemes. Compare *id.* at 179 (identifying average payment to those involved in the “democracy movement” as of 2010 as US\$7,458) with Cho, *supra* note 33, at 592 (identifying average payment, as of 2006, as over US\$50,000).

91. See Baik, *supra* note 81, at 178 (locating cause for disparity in longstanding ideological positions and the association of certain victim groups with pro-guerrilla activities). Similar ideological issues have afflicted the reparations program in Peru. See HAYNER, *supra* note 6, at 174 (describing how government’s controversial final reparations program statutorily excluded members of illegal armed groups and their families from the definition of “victim” and hence from eligibility for reparations, disregarding truth commission’s recommendation to contrary).

ory, could help to solve this unfairness problem.⁹² It was indeed in large part precisely to *avoid* such unfairness and unpredictability in economic reparation awards that President Roh Moo-hyn called for the creation of the TRCK in the first place. That call was prompted by an administration fear that, in the absence of a “comprehensive settlement,”⁹³ a never ending succession of new specialized laws would ensue, with victims demanding increasingly expansive reparations packages in each. A better alternative, the President concluded, was to pursue a single comprehensive administrative policy.⁹⁴

Nevertheless, unlike most modern truth commissions, in recommending a semi-comprehensive administrative reparations program, the TRCK provided no specifics whatsoever as to how that policy would be administered or what quantum should be provided. At the same time, the government has taken no action on such a program, nor is it expected to in the foreseeable future. In light of this, the continuation of victim frustration regarding compensation awards may increasingly erode the progress achieved by the TRCK and increase public apathy to the transitional justice project.⁹⁵ Such a fate has, by many accounts, befallen both the South African and Peruvian TRCs, each of which began with unusually high levels of public legitimacy.⁹⁶

The second example of unfairness in Korea’s transitional justice projects examined by Professor Baik involves the work of a specialized “truth” commission created a year after the TRCK to investigate the property of persons determined to be “serious” or “significantly pro-Japanese” collaborators.⁹⁷ Once properties were verified as belonging to a named collaborator or descendant, that property was put in the process of conversion to state ownership, under a statutory presumption that any properties acquired by pro-Japanese collaborators between 1904 and 1945 were “ob-

92. See COMPREHENSIVE REPORT, *supra* note 1, at 35 (limiting proposal nevertheless to compensation only for civilian massacres occurring before and during the Korean War).

93. *Id.* at 27.

94. See Kim Dong-Choon, *supra* note 65, at 99-100.

95. *Cf. id.* at 102 (suggesting Korean victims not particularly concerned about reparations). There is a need in this regard for better empirical and survey data on victims’ preferences and priorities regarding reparation in the Korean context. Beyond perception studies, one important way to do this is to see how victims’ rights groups organize around the TRCK’s policy recommendations and put forth their own proposals. See Melish, *Truth Commission Impact*, *supra* note 13, at 301-07.

96. See, for example, the contributions by Ereshnee Naidu and Lisa Laplante in this special issue, *infra* notes 125 & 107.

97. See Baik, *supra* note 81, at 171 (citing mandate).

tained as rewards for pro-Japanese acts.”⁹⁸ However, as Baik notes, the procedure for doing so suffered from several important due process limitations, particularly by failing to guarantee named individuals sufficient opportunity to defend their cases in the process of investigation. These limitations have led to vigorous court challenges under claims that the transitional justice mechanism violates the Korean Constitution itself, particularly its express protection against retroactive deprivation of property. Such claims of unfairness in the application of general principles of human rights to all citizens undermine the role of the investigatory body in advancing transitional justice, Baik claims.

By contrast, the Property Redemption Commission could have contributed more to the consensus-building process of transitional justice, he argues, had it tried to enhance the procedural fairness of its work, and hence its own legitimacy in the public eye,⁹⁹ particularly by providing for more opportunities for participation in its investigatory proceedings. The failure to do so, he contends, may have serious implications for the long-term effectiveness of national reconciliation efforts given the frustration these fairness concerns are likely to engender among key stakeholders. The same is true for the opportunities such fairness concerns create for questioning the utility and effectiveness of truth commission processes, and hence for weakening public support of, and interest in, them.

In sum, the trilogy of articles on Korea’s transitional justice experience offer multiple insights into the implementation process and how it may be strengthened moving forward, even while diverging in key perspectives.

III. COMPARATIVE LESSONS FROM CROSS-NATIONAL EXPERIENCE

Given the diversity of factors that shape a country’s transitional possibilities and constraints,¹⁰⁰ every transitional justice experience is unique. Indeed, the choices individual societies make with respect to whether,

98. *Id.* at 184.

99. Procedural fairness is widely recognized as a key source of institutional legitimacy, both for truth commissions—as human rights bodies—and for other authorities such as the police and courts. *See, e.g.*, MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 154 (2006); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Authorities?*, 19 BEHAV. SCI. & L. 215, 233 (2001).

100. These factors may include the strength of groups aligned with those responsible for abuses, how vocal and organized civil society is (including victims’ and rights groups), the interest and involvement of the international community, the type and intensity of the past violence, and that “indefinable set of preferences, inclinations, beliefs and expectations” that characterize the national political and social culture. *See* HAYNER, *supra* note 6, at 17.

when, and how to pursue a truth commission process must necessarily follow from local priorities and assessments of what will most effectively advance justice, healing, and democratic transition. These assessments will vary markedly across national experience. In this respect, no single experience can provide a definitive model for any other, and efforts to seek out “blueprints” for success inevitably lead to misdirections. That said, comparative experience can provide important lessons and insights that, with care, can be incorporated into the learning processes of other national experiences.

In an effort to draw out some of these lessons and insights, the voices of experts in transitional justice and TRC processes in three diverse nations—Cambodia, Peru, and South Africa—were invited to reflect on comparative national experiences with implementing truth and reconciliation and to offer lessons for the recently-concluded TRC process in South Korea. To focus their analysis, each looks principally at a distinct aspect of implementation: community-level reconciliation, economic reparation packages, and memorialization initiatives.

A. *Opening Space for Civil Society Initiatives*

The first of these comparative articles looks at Cambodia’s experience with transitional justice.¹⁰¹ In it, John Ciorciari and Jaya Ramji-Nogales examine the long history of initiatives undertaken in Cambodia to respond to the abuses of the Khmer Rouge, culminating in the creation in 2006 of a hybrid court to try the most senior leaders and most responsible members, the Extraordinary Chambers in the Courts of Cambodia (“ECCC” or “Khmer Rouge Tribunal”). As they note, Cambodia is, at first glance, an odd case study for looking at lessons on the implementation of truth commission recommendations. Indeed, Cambodia has never had a truth commission, at least in the traditional sense,¹⁰² and there are few prospects that it will ever create one. Rather, for a variety of political motivations, it has pursued a narrower retributive approach to past-dealing, focusing on criminal responsibility for a few top perpetrators.

Cambodia nonetheless offers important lessons for Korea. As Ciorciari and Ramji-Nogales conclude, two primary lessons emerge from the Cambodian experience. Both resonate strongly with the transitional circum-

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

102. As Ciorciari and Ramji-Nogales discuss, Cambodia did nevertheless create a truth commission-type process, the *Renakse Commission*, which operated from 1980 to 1983 to expose Khmer Rouge atrocities, amass evidence of damages done to people and property, examine documents, and dig up mass graves. *See id.* at 200-01.

stances in Korea. First, given how deeply intertwined power politics are with official efforts at truth and reconciliation, the authors underscore the importance of engaging local civil society to play a central role in truth and reconciliation initiatives, including particularly at the design and implementation stages. This follows, argue the authors, not only from the tendency of political elites to advance official processes that privilege narrow and constrained conceptions of “truth” and “reconciliation”—stressing dimensions that reinforce their own power—but also because the active engagement of local civil society in implementation initiatives generally leads to greater responsiveness to survivors’ needs and a strengthening of the deliberative processes that lead to a more stable democratic future.

In Cambodia, as in Korea, multiple transitional justice mechanisms have been pursued by state authorities over the last forty years. None of these, however, has sought to foster broad revelations of truth, nor has any sought deep grassroots reconciliation. Rather, each has been designed primarily to serve the political needs of those in power. Thus, from the 1979 “People’s Revolutionary Tribunal,” to the 1980 *Renakse Commission*, to the 2006 Khmer Rouge Tribunal, the “truth” pursued in Cambodia has tended to be a narrow and partial one. It has, on the one hand, focused selectively on atrocities committed during the Khmer Rouge period only, not those of more recent abusive regimes. On the other, it has focused on a few high-profile actors for a few high-profile crimes. This approach has tended to obscure the causes and responsibilities associated with the great majority of abuses suffered by the Cambodian people, with the rules of evidence significantly limiting the ability to illuminate victim perspectives even with respect to these limited dimensions of truth. As a result, transitional bodies like the Khmer Rouge Tribunal, to the extent they can be construed as truth-telling exercises, have had a very modest impact on public knowledge and victims’ healing. In particular, they have not served as a means of understanding why abuses happened or how the broader system of repression functioned. The airing of these truths requires a different kind of mechanism or mechanisms and a different transitional justice approach.

The form of “reconciliation” pursued in Cambodia has likewise been partial and politically-directed. It has focused on “macro-reconciliation,” with institutional design decisions prioritizing the goals of peace and stability and political consolidation over more community-oriented and individualized processes of “micro-reconciliation” that enable former adversaries to engage positively with one another. As a result, many survivors continue to cite numerous barriers to reconciliation, including their inability to understand the atrocities and to know what happened. Indeed, eighty-five percent of Cambodians today say that they would like to know more about the Pol

Pot era.¹⁰³ Similar charges have been leveled against the Korean TRC, which has been criticized for pursuing a very constrained understanding of “truth” and an underdeveloped concept of “reconciliation.”

And yet, such limitations in official efforts at truth and reconciliation should not necessarily lead to cynicism, conclude Ciorciari and Ramji-Nogales. The second lesson from Cambodia, they stress, is the importance of seizing the perhaps unexpected benefits that can be derived from particular institutional sequences in transitional justice efforts. Thus even transitional justice mechanisms that are not aimed primarily at promoting broad truth and deep reconciliation may create the political space necessary for individual citizens and civil society organizations to take forward other important and innovative truth and reconciliation measures or processes. Such a lesson resonates deeply in South Korea, a nation in which multiple transitional justice projects have been pursued over the last several decades, with each opening important political spaces for the next generation of efforts.

In Cambodia, the authors observe, non-governmental groups have taken advantage of the political space opened by the EEEEC to become the *unofficial implementing agencies* of many of the kinds of measures recommended by the Korean TRC, often working together in creative partnerships with the government. While many of these initiatives have taken place at the grassroots level, some, the authors note, have translated into key national policy programs. Thus, the non-governmental Cambodian Documentation Center (DC-CAM) has, with authority from the government, established an extensive publically available archive of accessible documents on Khmer Rouge history that is available for researchers and the public at large. Since 2008, DC-CAM has likewise undertaken a major nationwide project with the Ministry of Education to reform school curricula and to train teachers to better address Khmer Rouge history at the secondary and university levels. It has likewise sought to promote deeper and more enduring community-level reconciliation processes by engaging Cambodians at the village level through structured dialogues on the ECCC trials and losses suffered at the hands of the Khmer Rouge.

It is the seizing of such spaces by civil society groups, stress Ciorciari and Ramji-Nogales, that provides hope for pursuing comprehensive and dynamic understandings of the past and deep grassroots reconciliation, even where this has not been the primary aim of official processes. It is particularly important, they stress, “in societies in which political gridlock slows progress at the official level and draws initiatives into partisan debates,”¹⁰⁴ a characteristic that could just as easily describe national politics in South

103. *See id.* at 213.

104. *Id.* at 216.

Korea. The ability of civil society to rise above such gridlock and to have an enduring impact on community-level processes derives in large part from such groups' non-partisan mandates, their ability to tap into local cultural and religious norms, and their relative dynamism and ability to adapt quickly to varying political conditions and group sensibilities. They can, in this way, penetrate more deeply into community processes of coming to terms with the past and reconciling former adversaries, something which national level authorities can rarely, if ever, do on their own.

The example of the non-governmental organization DC-CAM is again highlighted in this regard, particularly in its efforts to promote structured community dialogues across the nation. These dialogues not only raise awareness of, and enhance the legitimacy of, national processes, such as the ECCC, that may otherwise remain inaccessible and irrelevant to local communities (and in any case are not expressly directed to exposing a broad truth or at achieving reconciliation). They also move beyond official efforts to promote creative community ownership over their own diverse processes of truth-telling and reconciliation.¹⁰⁵ They thus serve to empower Cambodians themselves to structure a healing process that is most appropriate to address their unique needs.

The authors stress, in this regard, three interrelated facets of local reconciliation processes that have been particularly important in Cambodia. The first is the importance of building "safe spaces," neutral, non-political fora for truth-telling that involves genuine dialogue between survivors and perpetrators. Such spaces should not only be participant-designed and driven, stress the authors, but also inclusive of all societal groups, including perpetrators. In this way, dialogue can humanize complex historical conflicts, allowing multiple stories to be told and promoting a deeper understanding of the many conflicting motivations and frailties that compel individual and group conduct in diverse situations. By complicating and humanizing conflict—in ways that may often conflict with official "national reconciliation" goals—communities can thereby help to avoid the political imposition of monolithic narratives or labels that may serve (intentionally or unintentionally) to perpetuate or even accentuate divisions within communities, leading to further violence in the future. Such fora can, correspondingly, contribute to a more comprehensive and accurate historical picture, better capable of answering the critical question "Why?"

105. For a similar perspective on local efforts at dialogue, truth-telling, and community self-healing in Guatemala, see Laura Arriaza & Naomi Roht-Arriaza, *Social Repair at the Local Level: The Case of Guatemala*, in *TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE* 143 (Kieran McEvoy & Lorna McGregor eds., 2008).

The two other facets stressed for the Cambodian context include the engagement of civic and religious leaders in such community dialogues. This follows from their ability to ensure that dialogues are tailored to local sensibilities and therefore more effective as reconciliation processes. Second, the authors stress the value of neutral, non-political public memorials and ceremonies, such as a monument to the departed or a national day of remembrance. According to the authors, these have been most conducive to healing in the Cambodian context when focused on sharing communal suffering and honoring loved ones, rather than focusing enmity on perpetrators and their kin.

These lessons are particularly compelling for South Korea, where it has been argued that the TRCK has pursued a particularly limited notion of both “truth” and “reconciliation.” As described by Hun Joon Kim and other Korean scholars, the truth pursued by the TRCK and other past dealing projects has been a selective one. Likewise, there has been little work done to truly understand what is necessary for deep reconciliation, both at the national and community levels, and for understanding the structural and ideological causes of violence such that preventative reforms can be put in place.

The Cambodian experience thus reinforces the conclusion that the TRCK cannot be seen as an end product. Rather, it is merely the jumping off point for a much longer and more dynamic process of constructing the “truth,” reconciling communities with one another, and promoting deep institutional reforms. As Kim Dong-Choon notes, civil society actors in South Korea are already beginning such efforts.¹⁰⁶ But a much larger national effort is necessary, with support and appropriate orchestration from above.

B. *Implementing Economic Reparation Packages*

Lisa Laplante¹⁰⁷ follows with an Article that echoes many of the broader themes highlighted by Ciorciari and Ramji-Nogales, including the importance of both civil society participation and attention to community-level needs. Her contribution nonetheless focuses concretely on the process of quantifying individual economic reparation awards as part of a comprehensive program of reparations. This issue is of particular relevance to the Korean experience given the TRCK’s explicit interim recommendation for the government to create a special law on victim reparations, a recommendation that the government has to date chosen to ignore.¹⁰⁸ The govern-

106. See Kim Dong-Choon, *supra* note 65, at 124.

107. Lisa Laplante, *Negotiating Reparation Rights: The Symbolic and Participatory Quotients*, 19 BUFF. HUM. RTS. L. REV. 217 (2012).

108. See Kim Dong-Choon, *supra* note 65, at 117.

ment's position has instead been to continue a piecemeal, politicized approach to individual economic reparations; an approach that, Tae-Ung Baik observes, threatens to increase popular disillusionment given the exceptional unfairness it creates across victim groups. The Peruvian experience with a similar lack of government will to implement a comprehensive reparations program, and the unfair set of packages it has endorsed for different political groups, may thus be particularly instructive for the Korean implementation process looking forward.

In her article, Laplante explores the complicated problem of how to determine an appropriate quantum for administrative reparation programs, a determination that has caused difficulties at the implementation stage in many reparations processes.¹⁰⁹ These difficulties arise in particular from the inevitable tension that exists between civil tort and administrative approaches to reparations.¹¹⁰ Indeed, because administrative reparations schemes, which tend to define victims in standardized terms and provide a relatively fixed, tabulated amount of compensation for all, will almost always grant an award significantly lower in quantum than what a given victim could expect through individual litigation¹¹¹—a conundrum clearly borne out in the Korean example¹¹²—there is always a risk that victim and survivor groups will reject administrative reparation awards administered by the state. This, argues Laplante, has been the case in Peru.

For Laplante, the government might have safeguarded against the rejection of its recent individual economic reparations proposals by better incorporating two critical elements into its program. She calls these the “participatory quotient” and “symbolic quotient.” The “participatory quotient” refers to the right of civil society to participate, through ongoing consultation and negotiation, in the process of determining an appropriate

109. See, in particular, *THE HANDBOOK OF REPARATIONS* (Pablo de Grief ed., 2006) (offering multiple examples in national case studies).

110. See Jaime E. Malamud-Goti & Lucas Sebastián Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, in *THE HANDBOOK OF REPARATIONS*, *supra*, at 539 (describing differences in two approaches).

111. See, e.g., Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS*, *supra* note 109, at 451 (attributing this largely to fact that “all legal systems work on the assumption that norm-breaking behavior is more or less exceptional,” whereas administrative reparations schemes respond to massive and systematic violations); *id.* at 456-57 (noting that had Peru provided reparation awards to all victims comparable to those ordered by the Inter-American Commission and Court of Human Rights, it would have exceeded its entire national budget for 2003).

112. See Baik, *supra* note 81, at 171-72, 176-83 (underscoring inequities between multi-million dollar compensatory settlements awarded through the Korean courts and administrative reparations schemes offering victims a few thousand dollars each).

quantum. Such a process, Laplante argues, has two critical effects—a legitimating effect and a democracy-building, reparative effect. The first draws on a substantial body of work addressing why citizens comply with decisions that conflict with their immediate interests. That is, citizens are more likely to accept a smaller quantum if they feel genuinely listened to and considered in the technical calculation. Participation in this sense promotes beneficiary buy-in and policy compromise, Laplante asserts.

At the same time, participation in decision-making can itself serve as a form of reparation, especially in transitional societies in which victim groups have long been denied citizen-status through extensive social, political, and economic marginalization. In such contexts, the act of being consulted can serve to restore citizen-status, providing at times the first experience of a positive interaction with the government and creating institutional channels of democratic inclusion for groups historically marginalized and disempowered in society. By treating the formerly marginalized as equal citizens under the law, the citizen-building aspect of the participatory quotient can, in this way, serve to create what Pablo de Grief refers to as “external coherence” in reparations programs, linking economic awards to democratic institutional reforms, and strengthening citizens’ sense of ownership of those democratic reforms.¹¹³

Second, the Peruvian government should have ensured an appropriate “symbolic quotient” in its economic reparations program by reflecting state acknowledgment of and assumption of responsibility for the harm it caused.¹¹⁴ Money alone is not enough, Laplante contends; to fulfill their true reparative effect, reparations awards must be accompanied by symbolic acts of contrition, such as public statements by officials that both explicitly recognize the government’s legal responsibility for rights violations and make the link explicit between that responsibility and the reparations payments. It is indeed through the process of recognition, Laplante argues, that economic reparations create a reparative effect. Without this symbolic aspect, victim groups are likely to question and even reject economic measures, which they might confuse with development assistance or see as a new form of misrecognition.¹¹⁵ Japan’s unwillingness to admit guilt regarding its use of Korean comfort women during World War II has, for instance, been said to “depreciate the economic value of the compensation it offered

113. Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS*, *supra* note 109, at 1, 11.

114. See Laplante, *supra* note 107, at 219, 233.

115. *Id.* at 235-36.

and made it valueless.”¹¹⁶At the same time, where an apologetic stance is tied together with money, it can create greater micro effects with less money.

In the case of Peru, the government failed to ensure either of these critical quotients. Indeed, despite one of the most participatory processes of any truth commission in history in terms of drafting a highly detailed proposal for economic reparations, the government has not only failed to follow the plan, but has denied civil society participation in the design of the program it has proposed instead. It has underscored in this regard that reparations are a “unilateral” decision of the state. As a result, Laplante observes, organized Peruvian civil society groups have protested the plan, understanding it as instantiating new forms of dignitary harm that exacerbate their marginalization from democratic processes.¹¹⁷ In her piece on South Africa, Ereshnee Naidu notes a similar process in South Africa. There, too, the government has ignored the TRC’s recommendation for economic reparations, providing an amount four times less that proposed by the TRC and insisting that the determination is the exclusive prerogative of the state. Indeed, civil society groups in South Africa had to sue the govern-

116. *Id.* at 235 (citing ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 352 (2000)). Although the Japanese government long denied that the Korean, Chinese, Filipino, Dutch, and other women held in “comfort stations” for Japanese soldiers during the war were in fact coerced into providing sexual services, the coerced nature of the sexual slavery was finally recognized in 1993, and a formal apology was issued. See James Sterngold, *Japan Admits Army Forced Women Into War Brothels*, N.Y. TIMES (Aug. 5, 1993). Disquietingly, twenty years later, Japan’s new prime minister, Shinzo Abe, nonetheless signaled his intent to retract that apology as part of an effort to rewrite Japan’s wartime history, stating that his previous administration had found no evidence that the women who served as sex slaves to Japan’s wartime military had, in fact, been coerced. See Editorial, *Another Attempt to Deny Japan’s History*, N.Y. TIMES (Jan. 2, 2013).

117. Part of this anger may come from the plan’s failure to differentiate between rural and urban constituencies, many of whom experienced the conflict differently and have different social needs. See, e.g., ICTJ & APRODEH, *Perú: ¿Cuánto se ha reparado en nuestras comunidades?* (2011), available at <<http://www.ictj.org/sites/default/files/ICTJ-Peru-Reparaciones-2011-Espa%C3%B1ol.pdf>> (concluding that communities which have received collective reparation are largely satisfied with the programs implemented to date, even if they do not find them sufficient compensation for the harms incurred). Collective reparations, which have thus far been implemented in 1,492 Peruvian communities severely affected by past violence, “include irrigation infrastructure and the provision of drinking water and proper drainage, livestock projects, the construction and expansion of schools, and the construction of community centers.” *Id.*

ment under their Freedom of Information Act even to get access to the government's draft reparation policy.¹¹⁸

At the same time, the symbolic quotient has been denied in each of these contexts, likewise contributing to victim rejection. In the case of Peru, this has been done particularly by government attempts to link its reparation program not to government responsibility for its own human rights abuses, but rather to compensation for those who suffered "as a result of terrorism."¹¹⁹ As Laplante notes, by disassociating reparations from state responsibility and understanding them instead as a mere gesture of help for those unfortunate enough to be negatively impacted by *terrorism*, the symbolic importance of acknowledgment was immediately lost.¹²⁰ The same has been true in South Africa, albeit resulting from the long delay in the processing of reparations payments and hence their disconnection from the testimony given at the TRC. These delays have been characterized as the most damaging aspect of the TRC's work,¹²¹ and, as has been observed, reduced "the symbolic sense of the reparation,' thus "often doing more harm than good."¹²²

The process in Korea forebodes similar problems, both with respect to the participatory and symbolic quotients. Thus, not only did the TRCK fail to make any specific recommendations with respect to the quantum or mode of distribution for individual economic reparations, but it likewise failed to recognize any direct participatory role of victim-survivor groups in negotiating an appropriate amount of compensation (Laplante's "participatory quotient"). This is true even while the TRCK recognizes in broadly abstract terms the important symbolic aspect of providing such reparation; such provision, it notes, would "indicate recognition of the illegal acts committed by the state in the past, acceptance of responsibility, and achievement of social justice."¹²³ It would also end the state practice of justifying failure to provide reparations on account of procedural hurdles, which only "deepens"

118. See Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in THE HANDBOOK OF REPARATIONS, *supra* note 109, at 176, 202-203.

119. Laplante, *supra* note 107, at 246.

120. *Id.*

121. See Wendy Orr, *Reparation Delayed is Healing Retarded*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 239, 242-43 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) [hereinafter LOOKING BACK].

122. Yazir Henry, *Where Healing Begins*, in LOOKING BACK, *supra*, at 166, 172.

123. TRCK Final Recommendations, *supra* note 11, at 82.

the anguish of bereaved families.¹²⁴ In this context, the fact that the TRCK made no concrete recommendations with respect to a comprehensive reparations regime that would in fact fulfill this “symbolic quotient” is deeply concerning, as is the lack of any legislative or executive follow-up in creating such a program.

C. *Memorialization Initiatives*

Ereshnee Naidu¹²⁵ tells a similar story about reparations implementation in South Africa, a nation that—despite its storied fame and broad promotion as a successful model for comparative borrowing—has shown a similar lack of will to implement individual reparations packages. This lack of will at the stage of implementation has led to deep disillusionment with the TRC process, a sense of revictimization on the part of many victim-survivors, and growing sentiment that the TRC was pursued only as a political project to appease the international community.

In discussing the implementation process in South Africa, Naidu looks at a variety of measures, including individual economic and community reparations. She nonetheless focuses on one particular type of reparations: memorialization initiatives. As a form of symbolic reparation, memorialization includes such measures as building monuments, museums or other commemorative projects, renaming streets, parks, public facilities or squares, or designating special days in memory of past events or people. She focuses in particular on the establishment in South Africa of Freedom Park, an interactive memorial site for honoring and remembering those who fought against apartheid.

Such projects, Naidu explains, can contribute to important ends of reparative justice, including processes of reconciliation, healing, victim recognition, and guarantees of non-repetition. Nonetheless, they can just as easily lead to contestations and divisions, fueling ongoing feelings of victimization, and may even become a fault line for violence. This is especially so, Naidu asserts, if not adequately complemented by other reparations processes and supported by broader socio-economic transformation, as the South African case demonstrates. Borrowing on de Grief’s concept of “external coherence,” she thus suggests that memorialization initiatives can be meaningful only if linked to other forms of reparations and part of a comprehensive package that includes compensation, rehabilitation, and in-

124. *Id.* This dignitary justification is offered in conjunction with the institutional rationale of preventing social conflict and the “decline of national power due to separate lawsuits and legislation.” *Id.* at 83.

125. Ereshnee Naidu, *Symbolic Reparations and Reconciliation: Lessons from South Africa*, 13 BUFF. HUM. RTS. L. REV. 251 (2012).

creased access to health services and community reparation. These linkages, she insists, must be taken into consideration in implementing any comprehensive reparations program.

To illustrate this thesis, Naidu uses the Freedom Park Memorial Project to examine some of the challenges faced in South Africa in implementing the TRC's symbolic reparations recommendations. For Naidu, these challenges include "questions of how the past should be remembered, who should be remembered, and what to do with memorials that may not necessarily reflect the values of the new democracy and broader citizenship."¹²⁶ The Freedom Park Memorial Project has struggled with all of these challenges. In particular, it has struggled with the difficult choices that inevitably have to be made in seeking to accommodate two equally important but often competing objectives of reparative justice: the need to promote national reconciliation and unity, on the one hand, and to recognize the suffering of victims and to honor those whose lives were lost or irremediably changed in the fight against abusive state power, on the other.¹²⁷ The former implies an emphasis on inclusiveness, advancing a coherent narrative that can represent all citizens within a transition, and tends to cloak divisions of the past. The latter, by contrast, necessitates a certain exclusiveness. The honoring of those who fought on one side of a civil conflict functions in practice, in this regard, to define an ideological boundary between insiders and outsiders. That boundary may deepen past divisions or extend resentments between former adversaries and the social groups with which they align.

Such has been the case with Freedom Park, Naidu asserts, which has exposed significant fault-lines in the nation's quest for racial reconciliation. As South Africa's first major memorialization project that has utilized the language of symbolic reparation in its mission, Freedom Park aims "to celebrate all South Africans that struggled for freedom and humanity."¹²⁸ It is constituted by a memorial, an interactive museum, and a garden of remembrance, all situated on a hill directly opposite a pre-existing heritage site, the Voortrekker Monument, an icon of Afrikaaner nationalism. This carefully designed juxtaposition had a purpose: it aimed to advance a national

126. *Id.* at 265.

127. Correspondingly, in recommending a program of symbolic reparations, the Reparations and Rehabilitation Committee of the TRC emphasized the role of such measures in restoring the dignity of victims and "facilitat[ing] the communal processes of commemorating pain and celebrating the victories of the past." *Id.* at 264 (citing TRC Report). Such honoring serves the goals of individual (and often group) reconciliation, but underscores the trade-offs that often have to be made in terms of reconciliation at the national, community, and individual levels.

128. *Id.* at 265.

dialogue about the past and present. Recognizing that important segments of the citizenry may still have a symbolic stake in the major iconography of the nation's Apartheid past, it sought to reinterpret, rather than replace, that iconography. Nevertheless, in mediating the difficult tensions between inclusiveness and exclusiveness, a decision was made that the Garden of Remembrance's commemorative wall would include the names of only "liberation-aligned soldiers" who died during the struggle for freedom from Apartheid. The names of former state-aligned SADF soldiers would be excluded. Designed to honor and celebrate only one side of the conflict, this exclusion prompted immediate public outcry. Stressing the need for a re-evaluation of the roles and contributions of SADF soldiers, local Africaans-led organizations argued that the soldiers' exclusion represented their marginalization in the new South Africa, rather than their acceptance as part of an inclusive society.

The Freedom Park management offered a minor responsive concession: It agreed to include the names of SADF soldiers in its database and archives. It nonetheless refused to include them in the Garden of Remembrance. It justified this on the ground that the wall of names is "a symbolic reparations program," which is "about recognition and honoring, and *not necessarily about reconciliation*."¹²⁹ Because Apartheid was a crime against humanity, management stressed, the exclusion of the names of those who fought in its name was justified. In light of this refusal, the Voortrekker Monument management responded by providing its own space for a monument of names of all SADF soldiers. Although an access road was officially created between the two monuments as a symbol of goodwill between the vying institutions, the dispute over names underscores, Naidu argues, the continuing racial tensions in South Africa and the practical difficulties in accommodating the competing goals of recognition and reconciliation.

What lessons does this teach? In highlighting the current surfacing of longstanding racial tensions around symbolic reparations projects in post-Apartheid South Africa, Naidu links them to several failures on the part of the TRC. In particular, she attributes them to the TRC's failure to confront directly issues of *racial* reconciliation and the structural inequalities between blacks and whites that defined Apartheid. This failure was in many ways built into the TRC's mandate and the reconciliation discourse intrinsic to it. It manifested in the narrow statutory mandate given to the TRC to investigate only the limited physical integrity violations associated with direct political conflict between state agents and political activists. The mandate thus excluded attention in many ways to the structural inequalities between blacks and whites that have made it difficult for the majority of

129. *Id.* at 267 (emphasis added).

South Africans to move on from the past.¹³⁰ At the same time, it manifested in the TRC's reluctance to directly address issues of race and racism in clarifying the truth of the past. Indeed, as Naidu stresses, the TRC's enabling legislation is in fact devoid of specific reference to either "apartheid" or "racism." The TRC thus failed to make connections between the human rights violations it was investigating and the racialized power relations in which they took place. This failure, Naidu notes, has substantially diminished the relevance of the TRC and its work to the daily lives of ordinary black South Africans. This diminished relevance has significantly hampered its potential for contributing to transformation and reconciliation. Indeed, it serves as a major cause of the continuing difficulties in the credibility and legitimacy of implementation efforts.

Naidu thus calls attention to the way the limitations in a truth commission's mandate and the reconciliation discourse intrinsic to it can lead to difficulties at the stage of implementation. Recognition of these limitations points to potential lessons for other transitional experiences. Indeed, in South Africa, Naidu stresses, such limitations have resulted in some of the major challenges the nation faces today with regard to issues of transformation, reconciliation, and the realization of an equitable democracy.

These limitations and their impact on the implementation process bear important lessons for South Korea and its implementation process. Indeed, while the South Korean context does not include the same kinds of racialized violence as South Africa (or other states like Guatemala), the underlying causes of human rights abuse in South Korea have a parallel structural root: the Cold War-inspired ideological conflict promoting anti-communism as a total justification for human rights abuse. Indeed, as the contributions to this Issue make clear, anticommunist ideology and the chilling silence it long imposed in South Korea not only remain a powerful social constraint on public recognition of the past, but continue to justify human rights violations in South Korea today. The TRCK nonetheless avoided tackling this underlying structural cause directly, preferring to adopt a "forensic" approach that individualized truth discovery and failed to provide a broader narrative about the systems and ideologies that allowed abuse to occur in the first place. This failure will inevitably diminish the TRCK's relevance to the daily lives of ordinary Koreans and hence, as Kim and Baik observe, its longer-term legitimacy as an effective mechanism of transitional justice.

130. See in particular Madeleine Fullard, *Dis-placing Race: The South African Truth and Reconciliation Commission (TRC) and Interpretations of Violence*, in *RACE AND CITIZENSHIP IN TRANSITION SERIES* (2004), available at <http://www.csvr.org.za/docs/racism/displacingrace.pdf>.

Naidu's contribution thus underscores the importance of further efforts in South Korea aimed at clarifying the broader narrative about the structural and ideological causes of violence throughout contemporary history. Critically, this includes a clear narrative about how those causes continue to manifest in present times. This narrative is particularly essential to ensuring the implementation of institutional reforms that can modify the policies and practices that have long justified state abuse in the name of national security. Such policies and practices often remain stubbornly in place, raising the ever present possibility of their continuing abuse.

IV. A TRILOGY OF TRCK RECOMMENDATIONS

What, then, do these multiple lessons hold for South Korea's implementation process moving forward? Before addressing some of these global lessons more specifically in Part V, I return below to a more detailed consideration of the TRCK's actual policy recommendations: what did the TRCK produce and why? The nature of these recommendations speaks volumes to, and provides essential context for, the integrated strategies that will need to be adopted to ensure that the TRCK's recommendations and broader policy goals are effectively realized moving forward.

Under the Framework Act, the TRCK was expressly mandated to use its truth investigations to prepare two sets of reports for submission to the President and the National Assembly. The first was a semi-annual "investigation report" detailing its ongoing activities. The second was a "comprehensive report" to be submitted within six months of the expiry of its investigations,¹³¹ and to include recommendations for state remedial measures.¹³² In interpreting these provisions, the TRCK took certain important liberties. In particular, through a "liberal" reading of the Act, the TRCK interpreted its authority as allowing it to issue three distinct kinds of recommendations: case-specific recommendations issued at the time of case verification; interim recommendations issued in its ongoing activities reports; and final "integrated" recommendations to be included in the TRCK's final comprehensive report.

The chronological sequencing of these recommendations responds in large part to the evolving national political context. As both Kim Dong-Choon and Hun Joon Kim underscore, the span of time in which a truth commission operates means that political changes may predictably occur over its life time that introduce or institutionalize attempts to frustrate the goals and functionality of a truth commission. In the Korean context, such

131. See Framework Act, *supra* note 4, art. 32(1)-(2).

132. See *id.* art. 32(4).

a change occurred in early 2008, two years into the TRCK's investigatory operations. That year brought back to power the conservative GNP party, known for its general hostility to the TRCK and other past-dealing projects.¹³³ The TRCK responded by asserting its power to issue two sets of pre-final report recommendations. These included case-specific recommendations and more globally-oriented interim recommendations. The following sections describe the three distinct sets of recommendations more closely. The strengths and limitations of each, as well as their internal inconsistencies, will need to be closely attended by a range of stakeholders as they seek to develop forward-looking strategies for the full and effective implementation of the TRCK's three sets of recommendations.

A. *Case-Specific Recommendations*

The first set of recommended remedial measures issued by the TRCK took the form of case-specific recommendations. Having received over 11,000 petitions for investigation by December 2006, the TRCK made an important decision in 2007. Not only would it issue decision notes on each investigated petition in which the underlying incidents could be verified, as required under the Framework Act,¹³⁴ but it would transmit that note to the National Assembly and President with an accompanying set of recommendations for remedial measures to be taken with respect to it. Such remedial measures, the TRCK reasoned, could fall into any of the categories of reparation specified in the Framework Act for inclusion in the comprehensive report.¹³⁵ Their timely release was necessary, it submitted, to avoid the "delay [in implementation that] can undermine the effectiveness of the recom-

133. The elections followed a decade of liberal party rule, during which time transitional justice initiatives received express state support.

134. See Framework Act, *supra* note 4, art. 26.

135. See *id.* art. 32(4). The power to issue these recommendations and the state's corresponding obligation to implement them, the TRCK reasoned, followed from the Framework Act's broad articulation of the duties of the state and Commission, particularly in Chapter 4. See COMPREHENSIVE REPORT, *supra* note 1, at 35 (interpreting article 32 and Chapter 4 references to the reconciliatory measures for the state and commission to take). These provisions specified not only a set of state implementation duties, but also a series of specific kinds of recommendations the Commission could make with respect to victims and perpetrators, each suggesting an ability to make recommendations with respect to individual cases. These included investigation-specific damages, pardons or exonerations for those wrongly convicted or sanctioned, immunity or mitigation of punishment for perpetrators who confess, and apologies and forgiveness between specific perpetrators and victims. See Framework Act, *supra* note 4, arts. 34, 36-39.

mentations” should they be held until the release of the comprehensive report.¹³⁶

Although this interpretation of the TRCK’s powers was controversial at the time, the liberal Roh Moo-hyun government responded decisively to it as a last act of office.¹³⁷ In January 2008, just a month before being replaced by the conservative Lee Myung-bak government, President Roh executed Presidential Decree No. 20532, *Regulations on Processing Recommendations Related to Past Affairs*, by creating a high-level inter-agency system for implementing the petition-specific recommendations submitted to it by the TRCK. Initially framed as a Recommendations Follow-up Board,¹³⁸ this system was designed to officially recognize the recommendations and fast-track their interagency implementation.

The Follow-up Board was correspondingly comprised of three bodies: a Review Committee, a Working Committee and a Taskforce, all comprised of inter-agency officials operating through the Ministry of Public Administration and Security.¹³⁹ These three bodies were to work with the Commission to create and supervise action plans with respect to the execution of all TRCK recommended measures associated with decision notes, including those directed to specific government agencies.¹⁴⁰ The result of this system is that a massive number of recommendations have been transmitted to the government since 2008. Indeed, as of mid-2010, the TRCK had made petition-specific recommendations in 8,691 cases—that is, in all cases duly verified with accompanying decision notes.¹⁴¹ These included 885 agency-

136. THREE YEAR REPORT, *supra* note 4, at 32. This lesson had, of course, already been learned in other nations, such as South Africa. See text accompanying *supra* notes 121-122.

137. Whether read positively or cynically, the decision as a last act of office represents a shrewd political move to make sure the incoming administration would be held immediately accountable for its record on implementing the TRCK’s recommendations.

138. See THREE YEAR REPORT, *supra* note 4, at 32-33. The TRCK’s final report, by contrast, refers to it as the Review Committee for the Execution of Recommendations on Past Affairs. See COMPREHENSIVE REPORT, *supra* note 1, at 196.

139. Compare THREE YEAR REPORT, *supra* note 4, at 32-33 with COMPREHENSIVE REPORT, *supra* note 1, at 196-198. This system was originally installed under the Office of the Prime Minister, but was moved with the inauguration of President Lee a month after its creation as part of a government organizational reform.

140. See THREE YEAR REPORT, *supra* note 4, at 33; COMPREHENSIVE REPORT, *supra* note 1, at 196 (“A review committee was installed to review the recommended steps and to make sure related agencies execute the recommendations.”).

141. See COMPREHENSIVE REPORT, *supra* note 1, at 199. The Commission received 11,174 cases based on petitions from individuals. The body confirmed 8,468 cases (76%), rejected 1,729, and sent another 957 cases to other instances or closed them because of insufficient information. Of the confirmed cases, the vast majority

specific recommendations made in 289 cases, mostly directed to the Ministry of National Defense and the National Police Agency.¹⁴²

Nevertheless, despite the delay-reducing intentions that prompted them, the TRCK's case-specific recommendations exhibit several key features that impose important challenges for their effective uptake and implementation. The first is the extreme generality of their framing and the inaccessibility to the public of their programmatic details. Indeed, the specific contents of the recommendations are not laid out systematically in the final report;¹⁴³ they are referenced by broad strokes only, their descriptions corresponding to the general categories in the Framework Act.¹⁴⁴ Moreover, even where summaries of "main verified cases" are included, they tend to confirm that case-specific recommendations are issued at a very high-degree of generality.¹⁴⁵ Such generality can significantly complicate individual efforts to seek follow-through on petition-specific recommendations, accentuating the need for collective action in monitoring and implementation and the enactment of comprehensive legislation. While the final report does include a set of tables that breakdown certain case-related recommendations into remedial categories and show the status of their implementation, the results are limited to the small subset of cases in which

(7,099) involved Korean War related civilian mass killings. A surprisingly small number (258) involved human rights violations during the authoritarian regimes. At the same time, 1,331 involved "anti-ROK elements" while a negligible one and two cases, respectively, involved anti-Japanese independence movements and the history of overseas Koreans. *See id.*

142. *See id.* at 200. As of the first half of 2010, implementation was complete in only eight of these cases, or 2.8 percent. *Id.*

143. This is true despite the TRCK's 2009 affirmation of its "responsibility" to "indicat[e] and document[] the recommendations for each truth verification in a comprehensive report." THREE YEAR REPORT, *supra* note 4, at 112.

144. *See* COMPREHENSIVE REPORT, *supra* note 1, at 199 ("The recommendations [in petition-specific cases] mainly involve state measures to reinstate the honor of victims, government measures to prevent recurrences; corrections and revisions of related laws, systems, policies and practices; government efforts for national reconciliation and democracy; and education and advocacy efforts to encourage correct understandings of history."). Similarly broad and unspecific descriptions are made in other parts of the Final Report. *See also* THREE YEAR REPORT, *supra* note 4, at 107 (similar generality in description).

145. *See, e.g.,* THREE YEAR REPORT, *supra* note 4, at 70-81, 86-101 (describing main verified cases involving "massacres" and "human rights abuses," respectively). Although not translated into English, "summaries of the results of investigations" are included in Volumes 2 through 4 of the TRCK's Comprehensive Report. *See* COMPREHENSIVE REPORT, *supra* note 1, at 3.

recommendations were directed to specific government agencies.¹⁴⁶ The nature and implementation status of the remaining ninety-seven percent of cases are not tracked.

Other critical information about petition-specific recommendations is likewise missing from the final report. This includes whether individual petitioners were directly and timely informed of the recommendations associated with their petitions and, perhaps most importantly, whether any mechanism exists within the inter-agency implementation system for directly involving petitioners or other concerned stakeholders in the monitoring and implementation process. The absence of information to this effect would suggest that no such mechanism exists.¹⁴⁷

Without these mechanisms for facilitating stakeholder participation many of the potential advantages of a petition-specific approach, it would seem, are effectively surrendered. The effect may be reflected in the implementation rate, which, by the TRCK's admission, remains uncomfortably low. By the end of the commission's mandate, implementation was complete in only eight of the 289 cases in which case-specific recommendations were made to discrete government agencies.¹⁴⁸ Of these, most of the recommendations had been directed to the Ministry of National Defense and the National Police Agency, and involved simple official apologies and memorial activities. Perhaps more disturbingly, implementation rates in human rights abuse cases for compensation, relief programs, and government apol-

146. See COMPREHENSIVE REPORT, *supra* note 1, at 199-204 (showing status of implementation by government agency, by type of recommendation, and by type of incident). The Commission's three year "Activities Report" summarizes the 1,679 recommendations made as of September 30, 2008. With regard to the 1,461 cases involving civilian massacres, the Commission recommended "official state apologies, revision of family registers, memorial events, additions or revisions regarding historical records, peace and human rights education, revision of related laws, and medical subsidies for the wounded." THREE YEAR REPORT, *supra* note 4, at 32. In the 162 cases involving "groups opposing the legitimacy of the ROK," it recommended a similar set of measures. *Id.* at 32-33. There were only fifty-six cases involving human rights abuses. Of these, the commission recommended an official state apology and retrial in the thirty-five cases involving irrevocable court rulings. In the seventeen related to illegal arrest, detention, and death, it recommended an official state apology, medical services, deletion of records, and damage reparation. Finally, with regard to the disqualification of national bar exam students who participated in demonstrations, it recommended government apology and nullification of the disqualification. See *id.* at 33.

147. See THREE YEAR REPORT, *supra* note 4, at 33 (schematic showing follow-up structure and noting opening in Working-level Committee exclusively for TRCK members to participate and speak).

148. See COMPREHENSIVE REPORT, *supra* note 1, at 200 (less than 2.8%).

ogies were, according to the TRCK's final report, "extremely low."¹⁴⁹ Kim Dong-Choon likewise notes this suboptimal implementation record in his contribution.¹⁵⁰

B. *Interim Policy Recommendations*

Attuned to the effects of national political changes and with likely growing awareness of the limits of the case-specific approach, the TRCK issued three major "interim" policy recommendations to the government in mid-2009.¹⁵¹ Proposed by a more politically liberal and pro-TRCK commission than the one that replaced it in late 2009,¹⁵² these included a special compensation law for victims of mass civilian killings, the establishment of a permanent research foundation, and the continuation of burial and excavation projects. These recommendations had the benefit of consolidating the thousands of otherwise identical case-specific recommendations into three major policy initiatives that could be pursued by organized society and victim groups as a whole.

Descriptions of these three policy recommendations are included in the TRCK's 2010 comprehensive report.¹⁵³ Nevertheless, while the language used appears to endorse them in fairly strong terms, it is of note that they are neither structurally nor substantively integrated into the TRCK's "final recommendations." Rather, they are set off in a separate, preliminary chapter that likewise includes examples of recommendations issued by *other* domestic truth commissions in South Korea and a set of *foreign* truth commissions.¹⁵⁴ This placement, and the corresponding lack of integration into the TRCK's own final set of recommendations, raises questions about the 2010 TRCK and Korean government's understanding of their status, both legally and politically. Such questions are underscored by the TRCK's reference to the interim measures as policy "suggestions" or "proposals"

149. *Id.* at 203.

150. See Kim Dong-Choon, *supra* note 65, at 113.

151. See COMPREHENSIVE REPORT, *supra* note 1, at 35 (noting recommendations made in August and October of 2009).

152. In late 2009, TRCK President Ahn Byung-Ook was replaced by the more conservative Lee Young-jo, known for his view that the TRCK is not cost-effective or productive and should be shut down. At the same time, "[a]dvocates say the commission is being shuttered because current President Lee Myung-bak and his conservative ruling party are uncomfortable with the scrutiny of the country's past." See, e.g., Ashley Rowland & Hwang Hae-Rym, *Time is Running Out on South Korea's Truth and Reconciliation Commission*, STARS & STRIPES, Jan. 19, 2010.

153. TRCK Final Recommendations, *supra* note 11, at 81-84.

154. *Id.* at 79-81.

(*konui*) rather than plenary “recommendations” (*kwanggo*),¹⁵⁵ and the direct recognition that it drafted its own final recommendations in light of others (both domestic and foreign) in order that they be “more objective and practically possible.”¹⁵⁶

1. Special Law on Victim Reparation

The first interim policy recommendation proposed the enactment of a special law on reparations for victims of civilian massacres in the period immediately preceding and during the Korean War. The necessity of such legislation derived from three factors: the massive number of petitioned cases involving such massacres (over 80 percent of the cases in which recommendations were made),¹⁵⁷ the active lobbying of bereaved families,¹⁵⁸ and, perhaps most importantly, the lack of any common standard or methodology for determining appropriate compensation in the thousands of case-specific recommendations calling for victim indemnification, honoring, and other forms of reparation. Because such case-specific recommendations were crafted without specifying any particular quantum of compensation, package of relief, or mechanism for distribution, it was difficult to see how they could be implemented individually on a fair and efficient basis without a special law establishing principled grounds for determining such questions. The absence of such a law and other procedural hurdles had indeed provided a continuing justification for the state to drag its feet in providing victim reparation, thereby undermining the Commission’s very justification for initially issuing case-specific recommendations.¹⁵⁹

The TRCK thus called for a special law that would embrace the “earnest demand” of bereaved families “with fairness and a consistent standard.”¹⁶⁰ That standard, said the commission, should be anchored in the “scope and extent of the damage” actually endured and be based on “current living conditions.”¹⁶¹ It should, however, be provided as a “specially fixed

155. I am indebted to Mark Nathan for this point of translation.

156. *TRCK Final Recommendations*, *supra* note 11, at 78.

157. See COMPREHENSIVE REPORT, *supra* note 1, at 82, 199 (noting verification of 7,992 petitions related to civilian massacres by government-aligned forces during war years, and fact that recommendations were made in 7,099 of these—of 8,691 total cases in which recommendations were made).

158. The Pan-National Committee on Verifying Massacres and the National Committee of the Bereaved Families of Korean War Victims, in particular, have long been active in demanding a final and complete resolution of the civilian massacres issue.

159. See text accompanying *supra* note 136.

160. *TRCK Final Recommendations*, *supra* note 11, at 82.

161. *Id.*

amount of consolation money.”¹⁶² The TRCK thus appeared to embrace a comprehensive administrative approach to victim reparation, rather than an individualized methodology.¹⁶³ It stressed in this regard the value of such an approach not only in its symbolic reparatory sense “for accomplishing reconciliation and for preventing social conflict,” but also for avoiding the “decline of national power” that would result from “separate lawsuits and legislation.”¹⁶⁴

The TRCK nonetheless did not go further in developing a concrete proposal or set of proposals as to any specific quantum that should be provided. Nor did it specify how that quantum should be determined, whether it would be fixed across all categories of injury, or how it would be dispersed to identified beneficiaries, as has usefully been done by many recent truth commissions.¹⁶⁵ As Lisa Laplante underscores in her contribution on Peru, such determinations and their negotiation with victim-survivor groups constitutes one of the most fraught and contested, albeit important, issues in truth commission practice.¹⁶⁶

Special attention will correspondingly need to be directed to these critical reparation issues in the post-TRCK implementation period. Given South Korea’s own recent experience with incident-specific special compensation laws—as highlighted in Tae-Ung Baik’s contribution¹⁶⁷—special attention will likewise need to be directed to the scope of this recommendation, and whether it should appropriately be broadened to include *all* classes of victims, not only those from the Korean War era. Other nations that initially pursued narrow reparation plans have indeed seen the need to expand them to equalize benefits across victim groups. The experiences of Argentina and Chile may be especially instructive to South Korea in this regard.¹⁶⁸

162. *Id.*

163. See Malamud-Goti & Grosman, *supra* note 110, at 540 (describing two approaches).

164. *TRCK Final Recommendations*, *supra* note 11, at 83.

165. Consider the detailed proposals in this regard by countries such as South Africa and Peru. See Colvin, *supra* note 118; Lisa Magarrell, *Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice*, 22 WINDSOR Y.B. OF ACCESS TO JUSTICE 85 (2003).

166. Laplante, *supra* note 107. At the very least, a detailed Commission proposal can be used by advocates as leverage and a negotiating baseline in pushing the government to enact a just and comprehensive reparations law.

167. Baik, *supra* note 81, at 176-83.

168. See, e.g., María José Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentinian Experience*, in THE HANDBOOK OF REPARATIONS, *supra* note 109, at 21; Elizabeth Lira, *The Reparations Policy for Human Rights Viola-*

2. Permanent Research Foundation

The TRCK's second interim policy recommendation recognized forthrightly that the TRCK would leave a great deal of critical work unfinished at its scheduled expiry. It correspondingly called upon the government to set up a permanent foundation to continue research on past affairs. Such research would include investigations not only into incidents considered but unverified by the TRCK, but also into new petitions from the tens of thousands of victims who had not submitted petitions within the TRCK's one-year submissions window. In addition to research, the permanent foundation would likewise serve as a permanent archive for documents and records related to the past, as well as sponsor or support ongoing memorial projects, cultural activities, and exhumations.¹⁶⁹ The TRCK thus recognized that the work of uncovering truth and promoting reconciliation could not take place in "one fell swoop."¹⁷⁰ Rather, it would need to proceed "step by step," with a plurality of overlapping measures needing to be taken by many distinct actors over time.¹⁷¹ Serving as the "brightest shining achievement" of what Korean society has done to date in terms of settling historical affairs, a permanent research foundation would correspondingly allow such measures to develop on a continuing basis.¹⁷²

Significantly, such a foundation was already contemplated by the drafters of the Framework Act. That Act provided that the state "*may* fund" the establishment of a research foundation for past incidents, which would operate and manage a "memorial business and historic materials center" and whose independence would be "guaranteed."¹⁷³ In issuing a targeted policy recommendation to implement this provision, the TRCK thus presumptively sought to remove the government's ability to invoke the Act's discretionary language, converting it into a government duty under the mandatory "shall" provisions of the Act's provisions regarding the TRCK's recommendations.¹⁷⁴

tions in Chile, in THE HANDBOOK OF REPARATIONS, *supra* note 109, at 55; HAYNER, *supra* note 6, at 167-71.

169. See TRCK Final Recommendations, *supra* note 11, at 84.

170. *Id.*

171. *Id.*

172. *Id.*

173. Framework Act, *supra* note 4, art. 40 (emphasis added).

174. *Id.* art. 32(5). While the Framework Act's mandatory language recognizes that there may be circumstances in which a particular recommendation could not be implemented, it nonetheless requires that the government "*shall* . . . attempt to implement" any recommendation proposed to it. *Id.* (emphasis added). This language should,

The need for such an implementation hook may have seemed particularly urgent for two reasons. On the one hand, as Kim Dong-Choon observes, with the onset of the economic crisis, conservative calls for shutting down all truth commission work and ceasing to focus on uncovering incidents of the past were gaining force on the ground that they were harming the nation's economy and international standing.¹⁷⁵ There was thus little likelihood that the TRCK's mandate would be extended. On the other, as Hun Joon Kim notes, the creation of a similar research foundation with respect to the unfinished work of the Jeju 4.3 Commission had proved decisive in accounting not only for its higher level of public attention and support, but also, critically, for the higher rate of implementation of its final recommendations.¹⁷⁶

3. Excavation and Burial Projects

The third interim policy recommendation, by contrast, spotlighted one discrete area of work that would remain unfinished at the TRCK's expiry: exhumations of massacre sites and reburial of victim remains. Indeed, while the TRCK had presided over the successful exhumation of over 1,500 bodies, large numbers of known massacre sites remained untouched and many unearthened bodies remained temporarily housed in university research centers in need of proper burial.¹⁷⁷

The TRCK thus called upon the government to promote exhumation and reburial projects for civilian victims of massacres as "a long-term government policy."¹⁷⁸ Toward this end, it recommended the enactment of a special law relating to exhumations that would contribute to the efficient implementation of "government-led" policies designed to ensure "permanent burials" for victim remains.¹⁷⁹ Such a policy, it was recognized, was essential for healing historical wounds and comforting the pain of bereaved families.¹⁸⁰

As with individual victim reparation and pursuit of permanent measures of truth and reconciliation, the interim recommendation on exhumations thereby recognized the implementation limits of a case-specific approach. It correspondingly sought comprehensive framing legislation to

in effect, be read as a "show cause" provision, requiring that any decision not to implement a recommendation be affirmatively explained by public authorities.

175. See Kim Dong-Choon, *supra* note 65, at 108-10.

176. See Hun Joon Kim, *supra* note 74, at 161-63.

177. *TRCK Final Recommendations*, *supra* note 11, at 83.

178. *Id.*

179. *Id.*

180. *Id.*

provide a firmer basis for individuals and organized society to press for implementation of the TRCK's victim redress recommendations.

C. *Final Policy Recommendations*

The third set of recommendations issued by the TRCK—its “final” or “integrated” recommendations—is the only set recognized expressly in the Framework Act. Those recommendations were issued in December 2010 by a Commission notable for the political shift that had taken place in its membership from only a year earlier. It was nonetheless this particularly constituted Commission that would consolidate the body's investigatory findings and conclusions over four and a half years and prepare its final recommendations for state remedial measures. Ultimately, it agreed upon and presented a mere seventeen policy recommendations in its final report.

As noted, these seventeen recommendations are noteworthy in three particular respects: their high level of generality and lack of programmatic detail; the lack of substantive integration between the petition-specific, interim, and final recommendations; and the tensions or inconsistencies they exhibit with respect to the final recommendations of certain more specialized truth commissions operating concurrently in South Korea. All three of these considerations will need to be closely attended by advocates and other stakeholders in the implementation process. The following sections discuss each final recommendation, organizing them—as the final report does—under seven headings corresponding to the respective remedial categories specified in the Framework Act.¹⁸¹

1. Victim Honor and Relief

The first four of the Commission's seventeen final recommendations are organized under the heading “Measures for Restoring Honor and Providing Relief for Victims.”¹⁸² They are notable in several respects. Perhaps most importantly, by adopting a highly individualized and substantively narrow approach to victim reparation, they appear to be in tension with the comprehensive approach endorsed by the Commission's interim recommendations. Recommendation 1, for example, focuses on the reparatory power

181. See text accompanying *supra* note 61. Although the Framework Act specifies *eight* broad types of state remedial measures, the TRCK organizes its recommendations into seven chapters, apparently integrating “State measures to account for an unverified investigation result to its victim and sufferer” into “Other measures that the Commission deems necessary to achieve the purpose of this Act.” *TRCK Final Recommendations*, *supra* note 11, at 94-95.

182. *TRCK Final Recommendations*, *supra* note 11, at 84-87.

of truth in restoring victim honor, focusing on the social “stigma” effect of being called a rebel or spy (rather than acknowledgment of state atrocities committed against millions of Koreans). It thus calls upon the state to “mak[e] widely known the truth” about individually verified incidents “that are not well known,” suggesting that doing so is sufficient to “respect” the TRCK’s case-specific recommendations.¹⁸³ No reference is made to the need for either a comprehensive or even a special law on reparations. Indeed, no mention is made of the need for *any* monetary compensation at all, nor any type of reparation beyond TRCK verification of the facts of a case, even though the TRCK’s case-specific recommendations suggested a far broader range of remedial measures to be taken by the state to repair individual victims.

The vagueness of the recommendation thus leaves unanswered the important policy questions raised by earlier recommendations, especially related to the appropriate reparation package and compensation quantum for distinct victims, how they should be determined, and what the administrative distribution mechanism should look like. These questions will require sustained attention by victims and broader civil society in the post-TRCK implementation process, both to ensure actual implementation of victim redress and to avoid extending the current inequities in existing incident-specific reparation laws and in the results of individual litigation.

Recommendation 2 is similarly limited in scope. It calls expressly for state provision of medical treatment and psychological counseling to victims of both civilian massacres and more recent human rights abuses.¹⁸⁴ It nonetheless does not specify how this should be done, nor does it provide any other programmatic detail. Finding “precedent” for the provision of medical treatment in earlier specialized acts,¹⁸⁵ it stops short of calling for comprehensive legislation. It likewise fails to recognize the need for any other form of reparation, including money awards, despite substantial domestic (and foreign) precedent,¹⁸⁶ and the explicit inclusion of such broader

183. *Id.* at 84-85.

184. *Id.*

185. *Id.* at 85-86 (citing special laws on victims of the Jeju 4.3 and No Gun Ri incidents, respectively, both of which specify the provision of medical treatment).

186. For more on the kinds and quantum of reparation provided to victims of distinct historical incidents in the Korean context, see Baik, *supra* note 81, at 176-80. As just one example, the Review Committee for Restoring the Honor and Compensating Persons Involved in the Democratization Movement had issued \$28.7 million in compensation to 543 persons involved in the democratization movements by December 28, 2008. See Cho, *supra* note 33, at 592. For an excellent resource on foreign precedent, see HANDBOOK ON REPARATION, *supra* note 109.

reparation in both the case-specific and interim recommendations.¹⁸⁷ As one of the richest nations in the world, South Korea cannot claim resource limits as a justification for the prioritization of non-monetary forms of reparation. Again, civil society and victim groups will need to organize actively to ensure appropriate legislation that includes *all* aspects of reparation for *all* victim groups.

While recommendations 1 and 2 focus on reparation for abuses committed by the Korean state, recommendations 3 and 4 turn to reparation for incidents involving *foreign* nations. Specifically, they call upon the Korean government to engage in diplomatic efforts with the United States and Japan, with a view to ensuring that *those* governments provide appropriate reparation to victims. In this respect, they suggest the need for the United States to enact special legislation establishing reparation for victims of U.S. military incidents and for Japan to grant special permanent residency status to those denied it as a result of the “Korean-Japanese spy incidents.”¹⁸⁸

Advocates might question why these four measures are dealt with separately, rather than calling for a comprehensive reparation law that deals with all of them. Indeed, Korea’s experience with the unfairness of special incident-related reparation laws would seem to counsel in favor of a comprehensive approach. Likewise, the experience of other nations would tend to suggest that such a comprehensive approach would best serve not only the dignitary and psychological needs of victims, but also the administrative and financial interests of the state in ensuring timely and efficient closure to the massive number of reparation demands legitimately made upon it.¹⁸⁹ As the TRCK recognizes in its own final report, it was indeed in part to promote such a comprehensive approach that the TRCK was pursued in the first place.¹⁹⁰

2. Preventing Recurrence

The TRCK’s final report recognizes “preventing the recurrence of past atrocities” as a—if not *the*—primary purpose behind the body’s establishment.¹⁹¹ It is thus astonishing that it includes only a single, exceedingly circumscribed recommendation under the associated chapter heading. Recommendation 5 calls upon the state to “devise institutional mechanisms for

187. See, e.g., *TRCK Final Recommendations*, *supra* note 11, at 82.

188. *Id.* at 86-87 (citing as precedent the “Act to Indemnify Damages Caused by American Forces Abroad,” adopted by the United States during WWI to provide compensation and reparation for injured French civilians).

189. See, e.g., Malamud-Goti & Grosman, *supra* note 110.

190. COMPREHENSIVE REPORT, *supra* note 1, at 27.

191. *TRCK Final Recommendations*, *supra* note 11, at 78.

the punishment of perpetrators of mass killings . . . surrounding the Korean War.”¹⁹²

Advocates may be forgiven for reading this recommendation with a measure of cynicism. This is not only for the narrow retributive approach taken to prevention, but also for the proposed measure’s practical obsolescence: The war having ended over sixty years ago, few if any such perpetrators remain available for prosecution.¹⁹³ The war-focus of the recommendation, moreover, conspicuously excludes attention to the perpetrators of the more recent human rights abuses occurring under Korea’s authoritarian regimes, especially under the National Security and Anti-Communist Acts. For these punishing laws, statutes of limitation often remain stubbornly in place. In this regard, the TRCK’s reference to a 1995 special act recognizing the non-applicability of statutes of limitations for certain mass killings only accentuates its failure to recommend the removal of statutes of limitations for other state-sponsored human rights abuses, a recommendation that *was* made by the Presidential Commission on Suspicious Deaths in 2002, and again in 2004, as part of its recommendations for preventing the recurrence of suspicious deaths.¹⁹⁴

3. Reforming Laws, Institutions, Policies and Practices

The narrowness of the above “prevention” measure may partially be attributable to the Framework Act’s inclusion of a separate remedial category on “[m]atters relating to the alteration, abolition, and rectification of laws, institutions, policies and customs/practices.”¹⁹⁵ The importance of such legal, institutional and policy reforms for preventing the recurrence of past atrocities is indeed recognized by the TRCK forthrightly in its final report. Thus, the “main reason” for civilian massacres and human rights violation in times of emergency is attributed directly by the TRCK to “the deficiencies in the policies and practices of state institutions with respect to basic human rights and humanitarian law protections.”¹⁹⁶

Given the clarity of this conclusion, the narrowness of recommendations 6 through 8 is striking. Recommendation 6, for example, does not call for the abolition or even amendment of the notorious National Security Act,

192. *Id.* at 87.

193. This constraint, it has been noted, in fact constituted a major reason for pursuing a truth commission rather than a more retributive approach in the first place. See Kim Dong-Choon, *supra* note 65, at 101.

194. *TRCK Final Recommendations*, *supra* note 11, at 79-80 (noting such recommendations were “not accepted” or “not implemented”).

195. *Id.* at 78.

196. COMPREHENSIVE REPORT, *supra* note 1.

which criminalizes core free speech and association rights and has long been used to justify highly repressive state conduct. It instead calls merely upon the state to “use caution” when applying it, given the “risk of misuse and abuse” it carries.¹⁹⁷ The Presidential Truth Commission on Suspicious Deaths, by contrast, called in its 2002 and 2004 reports for the express *abolition* not only of the National Security Act, but also the Security Surveillance Act and the Protective Custody System, as well as the Research Institute of Public Safety Affairs and the Democracy Research Institute.¹⁹⁸ National and international human rights groups have been calling for the same ever since.¹⁹⁹

Recommendation 7 likewise calls on the state simply to “*minimize* restrictions on basic rights”²⁰⁰ during national emergencies, including in such areas as preventive custody, residency restrictions, and freezing assets. Suggesting that laws identified as giving rise to severe human rights abuses do not necessarily need to be changed, the Commission recommends that the state merely “prepare institutional plans” for use during national emergencies.²⁰¹ This is done even as the TRCK recognizes the very real possibility of a renewed state of emergency given the unstable peace that exists with North Korea on account of the 1953 armistice.²⁰² The effect of such a recommendation is thus largely to legitimize past restrictions of rights in the name of national security. Faced with similar abuses, other national truth commissions have taken a different approach, unambiguously denouncing the use of “national security” rationales to restrict the civil liberties of citizens in wartime.²⁰³

197. *TRCK Final Recommendations*, *supra* note 11, at 88.

198. *Id.* at 78-80, tbl. 8-1.

199. *See, e.g.*, AMNESTY INT’L, THE NATIONAL SECURITY LAW, *supra* note 55, at 4 (“The abuse of vaguely worded clauses in the NSL [National Security Law], especially Article 7, has caused such concern that UN human rights mechanisms, domestic human rights bodies like the National Human Rights Commission of Korea (NHRCK), Amnesty International and other national and international human rights organizations have all urged the South Korean government to fundamentally review or abolish the NSL.”); *id.* at 4, 20 (calling on the government of South Korea and 2012 presidential candidates to “[a]bolish or substantially amend the [National Security Law] in line with the country’s international human rights obligations and commitments”).

200. *TRCK Final Recommendations*, *supra* note 11, at 89 (emphasis added).

201. *Id.*

202. *Id.* at 89-90.

203. *See, e.g.*, Eric K. Yamamoto & Liann Ebesugawa, *Report on Redress: The Japanese American Internment*, in THE HANDBOOK ON REPARATIONS, *supra* note 109, at 257 (highlighting creation of fund to educate U.S. public about the government’s false assertion of national security to restrict the civil liberties of Japanese Americans

Recommendation 8 is similarly constrained in its remedial scope. Referring to the need to declassify certain documents relating to the past that have been designated as secret on national security grounds, it nevertheless calls vaguely on the state to make public those documents only “after a fixed period of time.”²⁰⁴ It likewise calls not for specific reforms to current laws and procedures for the declassification of secret documents, but rather for their mere “supplementation.” No programmatic suggestions are offered as to what such supplementation would look like, nor on what the appropriate criteria should be for the release of documents. Civil society will need to take these issues up directly as part of the implementation process.

Recommendations 9 and 10 are more targeted and hence more instrumentally useful. Recommendation 9 calls specifically on the state to amend the Family Registry Law to allow people to correct information concerning family members’ deaths in the official registry without incurring financial penalties.²⁰⁵ Recommendation 10, for its part, recommends that the state find ways to improve the reliability of the autopsy system.²⁰⁶ Such improvements would include requiring that autopsies be conducted by medical professionals (not investigative agents, as so often led to cover-ups in the past), expanding financial support, and revising the Criminal Procedure Code and other relevant laws.²⁰⁷

4. Victim Reconciliation with Perpetrators

Predicated on the oddly simplistic view that “[r]econciliation is *accomplished* when perpetrators first confess and apologize, and then victims forgive the perpetrators,”²⁰⁸ recommendation 11 asserts simply that “[t]he state must go further in actively supporting institutional mechanisms for realizing reconciliation by means of perpetrators repenting and victims or their families forgiving.”²⁰⁹ It provides no detail as to what such institutional mecha-

during WWII). The Civil Liberties Act of 1988 likewise directed the President to apologize for the internment and authorized over \$1 billion in reparations. *See id.*

204. *TRCK Final Recommendations*, *supra* note 11, at 90.

205. *Id.* at 90-91.

206. *Id.* at 91.

207. *Id.*

208. *Id.* at 92 (emphasis added). For interesting essays on the psychology of victims’ sense of repair and reconciliation, see Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in *The Handbook of Reparations*, *supra* note 109, at 560; M. Brinton Lykes & Marcie Mersky, *Reparations and Mental Health: Psychosocial Interventions Towards Healing, Human Agency, and Rethreading Social Realities*, in *THE HANDBOOK OF REPARATIONS*, *supra* note 109, at 589.

209. *TRCK Final Recommendations*, *supra* note 11, at 92 (emphasis added).

nisms might look like. Nor does it specify what kind of “active support” would be necessary in this regard.²¹⁰

5. National Reconciliation and Democracy Enhancement

Turning to national-level reconciliation and democratic development, recommendations 12 through 14 refer to measures of symbolic reparation, such as apologies and memorialization. Recommendation 12 thus calls for a direct apology by the state to victims and their families for the illegal abuse of power. While noting an official presidential apology in 2008 for a set of prominent massacres, it underscores the necessity of state apology for all verified incidents as a way to heal national wounds and promote national unity.²¹¹

Recommendations 13 and 14 focus on distinct types of memorialization. Recommendation 13 calls on the state to find “proper burial places” for the remains of victims of mass killings and to “build reconciliation and memorial facilities.”²¹² The latter facilities would be formed as a “symbol of national reconciliation” by promoting a “comprehensive understanding” of incidents involving both state agents and “hostile” parties.²¹³ They would also serve as a “ground for national education about security, human rights and peace.”²¹⁴ Similarly, recommendation 14 calls for state support of local joint memorial services and monuments in which communities work to remember those killed by both sides of the ideological conflict.²¹⁵

Significantly, as with recommendations 1 through 4, these recommendations nonetheless call into question the TRCK’s understanding of the relevance of the body’s own interim policy recommendations. This is especially so as many of the activities specified would be covered comprehensively by the work of the Permanent Research Foundation and by the proposed law on exhumations and reburials, neither of which the TRCK’s final recommendations specifically endorse.²¹⁶

210. It states merely that “courageous confessions” should be promoted through “supportive plans at an institutional level for fostering an environment of reconciliation.” *Id.*

211. *See id.* at 92-93.

212. *Id.* at 93.

213. *Id.*

214. *Id.*

215. *Id.*

216. See discussion *infra* at 61-62.

6. Human Rights Education and Historical Consciousness

Recommendation 15 serves as an important, if unrefined, education catch-all. It calls on the state to implement educational and promotional activities and to develop educational materials as a way of fostering respect for life, peace and human rights.²¹⁷ This is necessary, it asserts, as a way to both express “the state’s willingness to make efforts to prevent a reoccurrence” of gross human rights violations and to foster “a climate that values human rights.”²¹⁸ No detail, however, is offered as to what kinds of promotional materials or education services should be pursued, nor why these would be most conducive to healing in the Korean context. The absence of specific recommendations with respect to publicity and education around even the TRCK’s own final report is noteworthy, especially in light of the state’s failure to publicize and make it widely available.

7. Other Necessary Measures

Finally, recommendations 16 and 17 are offered as “other measures the commission deems necessary to achieve the purposes of [the Framework] Act.”²¹⁹ Both refer to continuing efforts at research and historical clarification. In so doing, they suggest similar purposes as the Permanent Research Foundation without, notably, in fact calling for the creation of one. Recommendation 17 thus appeals to the state to endeavor to get evidence from the United States or other countries about incidents involving the U.S. military around the time of the Korean War.²²⁰ Similarly, recommendation 16 calls on the government to “prepare policies” for persons who might have claims but who did not have the opportunity to apply to the TRCK, and to “support academic research” into incidents that were not investigated.²²¹

Significantly, in calling for research into additional incidents, the report nonetheless indicates that such research should focus on verifying “microscopic truths,” *not* on shedding further light on “macroscopic facts.”²²² By contrast, TRCK watchers have tended to conclude precisely the opposite: that the TRCK’s narrow investigative methodology and focus on forensic truth allowed it to do a relatively good job at exposing the former, while failing to create a broader, more comprehensive “macro” narrative that would allow for a true understanding of the deep structural and institu-

217. *TRCK Final Recommendations*, *supra* note 11, at 94.

218. *Id.*

219. *Id.* at 94-95.

220. *Id.* at 95.

221. *Id.* at 94.

222. *Id.* at 95.

tional causes of past abuse.²²³ Investigation and clarification of such causes is a key part of truth commission work, as Naidu's contribution underscores. And it is indeed to *remedy* such causes that truth commission recommendations are directed. The TRCK's narrow focus on forensic "micro" truths has in this sense been said to obscure the reforms that must take place to prevent further violence and human rights abuse.

D. *Toward Effective Implementation*

What is to be taken from these recommendations? From the perspective of promoting effective implementation, two major conclusions might be drawn. Each responds to one or more of the three highlighted traits characterizing the TRCK's recommendations.²²⁴

1. Using Generality to One's Advantage

The first observation relates to the lack of programmatic detail in the Commission's recommendations. Such generality can serve in many cases to impede effective implementation: as has been noted, "broadly sweeping recommendations are difficult to implement, awkward as an advocacy tool, and hard to measure in terms of implementation."²²⁵ As a result, truth commissions that have provided very specific suggestions have generally been more likely to see success. Indeed, a high level of specificity makes it far more difficult for public officials to ignore policy recommendations. This is particularly because it enhances the ability of national and international stakeholders to use truth commission recommendations as tools of publicity, leverage, and even aid conditionality for promoting politically difficult but necessary institutional and policy reforms.²²⁶ At the same time, it creates an important baseline in negotiations, requiring that public authorities expressly justify departures from policy specifics in terms that resonate with the truth commission's express goals of victim repair, national reconciliation, and prevention-focused reform. It is perhaps for this reason that the TRCK in 2009 underscored, as part of its "further agendas," the "ur-

223. See, for example, Kim Dong-Choon and Hun Joon Kim's contributions to this special issue, *supra* notes 65 & 74.

224. See text accompanying *supra* notes 63-64 (generality, lack of substantive integration, and internal inconsistencies).

225. HAYNER, *supra* note 6, at 193.

226. *Id.* at 191, 193 (noting role of international community in pressing Salvadoran authorities to implement truth commission recommendations and advocating linking international assistance with implementation of domestic truth commission recommendations); Kritz, *supra* note 8, at 18 (likewise advocating tying donor aid to improved implementation of truth commission recommendations).

gent” need for the Commission to provide “well planned methodologies” for achieving each of its broad ends, including “by instituting applicable regulations or laws and by securing the necessary finance and procurement measures.”²²⁷

On the other hand, generality provides space for civil society to take an active role in filling in the details of necessary measures in ways that are most responsive to local needs. Such space may be particularly important where truth commissions fail to actively consult with civil society and victim groups regarding the final content of its recommendations—as the TRCK failed to do (even as it recognized such consultations as an international best practice).²²⁸ For such a benefit to accrue, however, a strong political commitment to stakeholder participation in the implementation and follow-up process must exist. The fact that no mechanism for promoting stakeholder participation appears to exist in the follow-up structure created to implement the TRCK’s recommendations does not bode well for implementation.

Given these considerations, organized victim and civil society groups will need to pay close attention to the *processes* established for implementing the TRCK’s recommendations, insisting on active participation not only in the follow-up process, but also, just as critically, in the design elements of policy implementation. Where such structured participation does not occur, the prospects of effective implementation of the TRCK’s recommendations are decidedly limited.

2. Resolving Inconsistencies

The second major observation relates to the lack of clarity in governmental duties that results from the tensions and inconsistencies in the various sets of truth commission recommendations.²²⁹ How are such inconsistencies to be resolved? Are any set of recommendations to take priority? These questions will inevitably take center stage in the implementation process, with many likely arguing that the TRCK’s final recommendations should take priority over other sets of truth commission

227. THREE YEAR REPORT, *supra* note 44, at 111-112.

228. TRCK *Final Recommendations*, *supra* note 11, at 78 (“[T]he Commission, due to a lack of time, missed the process of holding public hearings and getting professional advice [on the content of its comprehensive recommendations], as other foreign truth commissions have done during the drafting of their recommendations.”).

229. As described above, these include the TRCK’s victim-specific recommendations, interim recommendations, and final recommendations, as well as the multiple recommendations issued in the final reports of other more specialized truth commissions operating in South Korea over a similar period of time.

recommendations, even as the former may often provide less protection to victim rights of redress.

In addressing these questions, victim advocates would do well to adopt the principled position that all recommendations are of equal legal and political weight, with a corresponding government obligation to implement each of them, absent a showing that a specific measure cannot be implemented.²³⁰ As such, all efforts should be made to read the recommendations consistently. Where such reading is not possible, the *pro homine* principle should be employed to resolve any resulting inconsistency. That principle, foundational to the international law of human rights, requires that norms be interpreted and applied in a way that most fully and adequately protects human beings.²³¹ Correspondingly, where two recommendations are in tension, the one that is most favorable to the individual human being and protective of human dignity should prevail.

To ensure the application of this interpretive principle, civil society advocates and monitors will need to remain highly vigilant and engaged in implementation work. In particular, they will need to embark on a careful mapping of all recommendations, pinpointing points of convergence and divergence, and creating an action plan to ensure all inconsistencies are resolved in favor of the more protective principle.

V. GLOBAL LESSONS?

The contributions to this Special Issue have raised a kaleidoscope of considerations to be taken into account as the Korean people move forward toward implementation. Some of these relate to how the TRCK process could have been structured differently from the start. These lessons are important to acknowledge, even if we cannot go back and do things differently, and even if it is unlikely that another official truth commission will be created in the Korean context. Indeed, recognition of these limitations can help us to understand how processes need to be structured moving forward to fill in the gaps created by the TRCK process. If the follow-up process is structured responsively, what appear as weaknesses may indeed turn out to be unexpected strengths.

230. Framework Act, *supra* note 4, art. 34; *see also id.* art. 32(5) (“The related entities receiving any recommendation under paragraph 4 shall respect and attempt to implement the proposed recommendations.”) (emphasis added).

231. H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 114 (1999); *19 Tradesmen v. Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (2004) Series C, No. 109, ¶173; *A. Azocar v. Chile*, Inter-Am. Comm. H.R. (1999), Report No. 137/99, Case 11,863, ¶ 146.

More of the lessons offered, however, speak to what must be done prospectively to ensure implementation of the TRCK's recommendations now that they have been issued and its mandate has come to a close. The Korean political context does not, at present, appear particularly hospitable to this end. As Kim Dong-Choon and Hun Joon Kim note, the vast majority of recommendations issued by the TRCK remain unimplemented. There is, moreover, little evidence of any political will to move forward with their implementation. Within this context, a comprehensive strategic plan must be pursued by civil society groups to alter the calculus and conversation surrounding implementation.

The sections below aim to consolidate five of the most important (or at least instrumental) of the lessons suggested by the contributions to this Special Issue. They include the priority need for active civil society engagement in the implementation process, the creation of permanent follow-up and orchestration bodies, the pursuit of truth as a dynamic and ongoing project, data independence and accessibility, and, finally, the use of measurable indicators for holding government and other key stakeholders to account.

A. *Civil Society Engagement and Creative Implementation
Entrepreneurship*

Perhaps the clearest lesson that comes through from this Special Issue's contributions relates to the essential role played by domestic civil society in ensuring that truth commission recommendations are in fact implemented in practice. Around the world, the implementation record for truth commission recommendations is indeed abysmal.²³² The reason is fairly straightforward: It is, simply, not in the interests of most politicians to bother with the costly and complex measures of implementation once the international spotlight directed at formal truth commission operations dims. Arguing that "we've done that," and it is "time to move on," most will undertake a few inexpensive measures or token gestures and then move on, insisting that economic recovery or putting an end to violent crime takes precedence.

A key role of civil society actors in the implementation process is thus to alter the incentive structure associated with truth commission recommendations follow-up work, finding ways to construct, monitor, and police an accountability framework in which concrete responsibilities can be distributed among stakeholders, who can then be held answerable for following through on their commitments. By tracking what distinct social stakehold-

232. See text accompanying *supra* notes 7-10.

ers are doing (or not doing), enhancing public awareness of the range of activities underway, and assessing best and worst practices, civil society networks may contribute in vital ways to enhancing accountability for poor performance, stimulating new processes and partnerships, and keeping a spotlight focused on implementation over the longer-term. Indeed, without an active public pressing for specific and targeted action, and demanding a key role in the process of carrying it out, little in the way of implementation should be expected.

Civil society actors likewise play an indispensable role in ensuring that truth commission follow-up measures (from reparations programs, to memorialization projects, to legislative reforms) are designed and implemented in ways that are in fact responsive to community needs, preferences, and priorities. It is important to underscore in this regard that implementation is not a responsibility of government alone. While certain recommendations will require action that only the political branches can take—and it is of course public officials that commit under law to implementing truth commission recommendations²³³—many other recommendations will relate to activities that may most profitably be pursued by civil society actors, either in partnership with local officials or independently. In this respect, civil society actors have a responsibility to step in and become what Ciorciari and Ramji-Nogales refer to as the “*unofficial implementing agencies*” of truth commission recommendations.²³⁴ It is indeed such local actors who generally have the greatest contact with and trust of local communities. They are thus well positioned to design creative, place-based initiatives that draw on community resources and are directly rooted in local experience.

By mapping the recommendations of truth commissions, as well as the range of social stakeholders that can and should take part in their implementation, civil society actors can thus play an indispensable role in ensuring that multi-layered and mutually-reinforcing processes are in place to help deepen and contextualize reform efforts. In so doing, they can help to unleash the creative energy and entrepreneurship of multiple actors, with potentially important feedback, learning, and scaling effects for other implementation partnerships and follow-up initiatives.

233. *But see* Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 79-83 (2010) (discussing detailed follow-up commitments to South African Poverty Hearings made by individuals throughout civil society, including in the media, religious institutions, business sector, NGOs, and the public more broadly).

234. Ciorciari & Ramji-Nogales, *supra* note 101, at 194.

B. *Permanent Follow-up and Orchestration Mechanisms*

A second key lesson relates to the importance of institutionalizing permanent follow-up and orchestration mechanisms within government to ensure high-level engagement with, and participatory implementation of, truth commission recommendations. In South Korea, a *Recommendations Follow-Up Board* (or “Review Committee”) consisting of high-level inter-agency officials was in fact created in the early stages of the TRCK’s work. Its operation has nonetheless proved largely ineffectual. This outcome owes in large measure to the system’s lack of built-in accountability mechanisms, including transparency guarantees, public reporting requirements, and victim participation. Indeed, victims have little to no ability to influence or understand the body’s decisions, even where their own case-specific measures are at issue.

Evidence suggests that implementation focal points within government will be effective to the extent that spaces or tools are created through which civil society actors can interact with, partner, and leverage their work, including at the design, implementation, and monitoring stages of follow-on activities. Examples include requirements that such bodies publish semi-annual activity and progress reports that are widely accessible to the public, that they entertain and hold public hearings as solicited by distinct civil society groups, that they consult broadly on the scope and design of programs, and that they issue express public justifications for decision-making, especially where it departs from truth commission recommendations. Effective implementation of such recommendations will indeed always involve complex processes that require deep levels of consultation, careful balancing of interests and resources, a high degree of planning, and deep responsiveness and adaptability to local circumstances and needs. As such, an inter-agency government focal point must have the power not only to make programmatic and budgetary decisions on implementation matters, but also to ensure stable institutional spaces for feedback from, and coordination with, those most affected.

The creation of a functionally-independent monitoring and protection mechanism to supplement a high-level inter-agency implementation one is, moreover, emerging as an international best practice in many fields of international law.²³⁵ Such a body would, for example, be empowered to oversee

235. See, e.g., Convention on the Rights of Persons with Disabilities, art. 33, *opened for signature* Mar. 30, 2007, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 6, 2006) (calling upon States Parties to create an implementation focal point within government, preferably within an inter-agency coordination mechanism, as well as an independent monitoring mechanism).

and independently report on follow-up initiatives, both by government and broader civil society groups. The mechanism would likewise include spaces for broad stakeholder participation, ensuring that multiple spaces of leverage and information collection are available to local actors involved in implementation and follow-up work. It might also include the function of expressly coordinating follow-up activities, publicizing best practices, linking local groups with others working on similar issues or strategies, and more generally orchestrating the partnerships and initiatives being pursued by a great variety of social stakeholders. It can thereby serve both as a check on fluctuations in political will to implement needed reforms and as a resource for civil society advocates in their own implementation efforts. The permanent research foundation contemplated in the TRCK's Framework Act could very profitably play this important orchestration role.

C. *Truth as an Ongoing Project*

A third lesson arising from the contributions relates to the importance of pursuing truth as an ongoing project—one that can speak to multiple constituencies and unfold dialogically over time. Indeed, a major criticism of the TRCK, and truth commissions more generally, is that a highly limited version of the truth may be produced that serves some larger macro-political end, rather than the needs of victims and society at large in understanding the ideological or structural basis of violence. In the Korean context, this has manifested in the TRCK's preference for forensically investigating and verifying "micro-truths," rather than situating those events within a broader narrative that could help the nation understand the ideological and structural causes of past violence, including the complex ways they continue to manifest in the present. Such linkages are essential if policy connections are in fact going to be made between truth commission findings on the past and recommendations for present action. The mobilization of public action, too, depends in large measure on the clarity of these linkages, a fact Hun Joon Kim underscores in highlighting the higher rate of public awareness and superior implementation record produced in response to the truth-telling work of the Jeju Commission, as compared to the TRCK.

While some prominent experts thus stress the importance of finality in truth commission life-spans,²³⁶ the reality, complexities, and limitations of truth in South Korea, and many other contexts, suggest that the truth-telling exercise should be extended on a more permanent basis.²³⁷ Jeon Seung-Hee,

236. HAYNER, *supra* note 6, at 215-16 (suggesting that truth commissions should ideally have a maximum life-span of two to three years).

237. The two positions may not be inconsistent, provided the short- and long-term bodies are institutionally distinct.

for example, has argued that the mission of a truth commission can be achieved *only* when it exists as a permanent institution. Such an institution, she stresses, must be one in which “individuals and social groups and entities are provided with an appropriate level of authority and resources and can then creatively collaborate with each other.”²³⁸ Jeon stresses in this regard the importance of pursuing truth as part of an ongoing process that is both dynamic and dialogic. This is particularly important in the Korean context, she posits, given how selectively truth has been remembered. She thus issues a plea to engage in creative and critical dialogues with various discourses of the Korean War, which, she suggests, can only be done by creating “space for endless dialogues,” particularly through multimedia and interactive structures.²³⁹

She uses the example of the multimedia project “Still Present Pasts” as a key example of how a continuous truth seeking process may be pursued in Korea. Although focused on Korean-American memories of the War, that project offers an important example of how memories can be kept alive through interactive narrative displays, and how younger generations can come to understand the painful memories and long-silenced experiences that their elders lived through. These understandings are critical for ensuring that clear inter-generational connections are made between the findings and conclusions of truth-telling initiatives and the adequacy of present reform measures taken (or not) in response. Such understandings are likewise essential if the long-desired goal of Korean reunification is ever to be achieved. Similar sorts of projects are being pursued in the form of community museums and “houses of memory” in Guatemala²⁴⁰ and sites of conscience in other places of transition.²⁴¹ If appropriately resourced and staffed, the permanent research institute contemplated by the Framework Act can additionally serve to house or promote localized initiatives directed toward these ends.

D. *Data Accessibility and Independence*

Fourth, for society to act, it must know; it must have access to information. As virtually all contributors to this Special Issue have observed, the

238. Jeon, *supra* note 40, at 623.

239. *Id.*

240. See Arriaza & Roht-Arriaza, *supra* note 105, at 158-59.

241. Sites of conscience refer to “public memorials that make a specific commitment to democratic engagement through programs that stimulate dialogue on pressing social issues today and that provide opportunities for public involvement in those issues.” SEBASTIAN BRETT ET AL., MEMORIALIZATION AND DEMOCRACY: STATE POLICY AND CIVIC ACTION 1 (2008).

availability and accessibility of data regarding the past, and of access to government policies looking to the future, is of critical importance to the transitional justice project in South Korea. This is true to ensure both broad social awareness of the TRCK and the past it investigated, and that the project of investigation and analysis can continue well into the future. It is essential, therefore, that priority attention be given to implementing the TRCK's interim recommendation regarding the creation of a permanent data archive. The establishment of such data archives and the legislation of general freedom of information laws have indeed been recognized as a critical component for implementing the right to truth for victims of human rights violations.²⁴²

Kim Dong-Choon stresses in particular the imperative in the Korean context of guaranteeing the accessibility, safety, and independence of such an archive. He correspondingly urges its creation in an institution *independent* of the National Archives of South Korea, a recommendation that no doubt results from his difficult experience in seeking documents related to abuses of the past from the Korean National Police and Ministry of Defense.²⁴³ Such a suggestion deserves careful attention. Indeed, other societies have sought similar nongovernmental or otherwise independent homes for physical and online data archives to ensure their permanent accessibility to the public, and to facilitate scholarly and legal research into historical documentation of past abuses. They have done so either in the absence of government interest in maintaining public data archives or in coordination with government authorities, often as a safeguard against future censorship or destruction of data sources that implicate distinct national authorities.

In Cambodia, for example, the Documentation Center of Cambodia, an independent non-governmental research institute, partnered with the national government to establish an extensive archive of data on Khmer Rouge history available to researchers.²⁴⁴ The archive now maintains the world's most extensive data on Khmer Rouge history and has become a primary source for continuing investigations into the past, both for ordinary Cambodians and national and international researchers.

In Burma, by contrast, human rights organizations worked independently of government to create a publicly accessible data archive. Formed

242. See, e.g., Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Commission for Human Rights, UN Doc. E/CN.4/2005/102/ADD.1, Feb. 8, 2005; Right to the Truth, Human Rights Council Resolution 9/11, UN Doc. A/HRC/Res/9/11 (2008).

243. See Kim Dong-Choon, *supra* note 65, at 107-08 (describing difficulties).

244. See Ciorciari & Ramji-Nogales, *supra* note 101, at 213-14. The archive originated in the Cambodian Genocide Project at Yale University.

in 2004, the Network for Human Rights Documentation (ND-Burma), a coalition of twelve member organizations trained in human rights documentation, assembled a common open-source database of over 3,000 records of human rights violations. By doing so, coalition members “seek to collectively use the truth of what communities in Burma have endured to challenge the regime’s power through present-day advocacy as well as prepare for justice and accountability measures in a potential transition.”²⁴⁵

An innovative third approach has been pursued in Guatemala. When millions of administrative police documents dating from 1882 to 1996 were discovered in Guatemala City in 2005, a creative partnership was formed between the Historical Archive of the National Police of Guatemala and a private U.S. university to produce an online digital archive of the documents, thereby ensuring their safe preservation and long-term accessibility to researchers.²⁴⁶ Although the physical archive remains preserved in Guatemala as an important historical patrimony of the Guatemalan people,²⁴⁷ the housing of the online data archive (which mirrors and extends it) in an independent body outside of Guatemala was seen as necessary given continuing issues of state-sponsored impunity and cover-up for the massive state abuses during the country’s nearly four decades of armed civil conflict. Indeed, the Guatemalan government and police had long denied the existence of the documents, including when such records were requested by the state-authorized U.N. Commission for Historical Clarification and a second truth commissions sponsored by the Catholic Church in the 1990s.²⁴⁸ The archive has since become a focal point for a renewed debate about Guatemala’s recent past, serving as a valuable resource for human rights activists, victims, historians, and other researchers.²⁴⁹

245. ND-Burma, *About Us*, available at <<http://www.nd-burma.org/>> (formed in 2004 to provide a way for Burma human rights organizations to collaborate on the human rights documentation process, “ND-Burma conducts fieldwork trainings; coordinates members’ input into a common database using Martus, an open-source software developed by Benetech; and engages in joint-advocacy campaigns.”).

246. The Archive is currently comprised of approximately 80 million documents. As of early 2012, about 12 million of the documents had been digitized, with 10 million already uploaded to the online data archive housed at the University of Texas at Austin. More documents are being digitized every year and added to the digital collection. See University of Texas at Austin, *Politics of Memory: Guatemala’s National Police Archive*, <<http://www.utexas.edu/law/conferences/guatemala/>>.

247. AHPN, Digital Archive of the Guatemalan National Police Historical Archive, Home, <<https://ahpn.lib.utexas.edu/>>.

248. *Politics of Memory*, *supra* note 246.

249. *Id.*

South Korean stakeholders should look closely at these various models and experiences, determining what kinds of arrangements would work most effectively and securely in their own domestic context to ensure the long-term safety, accessibility, and independence of its historical human rights archives. Such accessibility is indispensable for making sure the lessons and linkages of the past are always available for understanding and engaging with the present. As noted, the experience of the Jeju Commission in South Korea bears this out, both in terms of longer-term scholarly and citizen interest and actual implementation of the truth commission's policy recommendations.

E. *Measurable Indicators*

Finally, although not raised expressly by any of the contributors, a strong case can be made for the importance of creating measurable indicators, both quantitative and qualitative, to assess the degree of implementation of truth commission recommendations. Such indicators can serve a variety of purposes. Perhaps most importantly, they can be used as a tool by a range of civil society actors for holding distinct stakeholders to account for taking meaningful actions with respect to discrete recommendations. They can thereby help to ensure that truth commission follow-up work remains prominent on the national political agenda at a truth commission's expiry. The use and active monitoring of indicators may also serve to facilitate key learning processes related to implementation, illuminating not only acts of footdragging and backtracking by distinct constituencies, but also best practices that might be replicated or adapted by new communities.

Implementation-related indicators might also be used by international actors to leverage and further incentivize progress; for example, by linking international aid or other diplomatic benefits to indicator-related benchmarks. Truth commission observers have indeed long noted the utility of tying commission recommendations to international aid.²⁵⁰ Examples where this has occurred nonetheless suggest that dangers arise where local actors do not have independent ownership of truth commission outputs and international pressure is correspondingly interpreted as foreign meddling.²⁵¹ The case of El Salvador is particularly instructive in this regard.²⁵² The creation of appropriate indicators and benchmarks by national civil society itself may help to avoid these perils by ensuring that international

250. *See supra* note 226.

251. *See* ERIC WIEBELHAUS-BRAHM, TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY 151-52 (2010).

252. *Id.*

conditionality is focused on areas of local priority, and that it in fact accentuates democratic ownership of institutional transformation.

* * *

The process of ensuring effective implementation of the TRCK's recommendations and related reforms in South Korea will be a long and difficult one. If it is to be successful, and if it is to result in deep preventative reform throughout society, the active participation of all social stakeholders will be necessary. We hope this Special Issue can serve to promote more rigorous debate and strategic action on the TRCK's recommendations, including, in particular, their creative use as a springboard for initiating far deeper and richer processes of truth-telling, social repair, community-building, memorialization, human rights education, social reconstruction, and institutional reform.

