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Introduction

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This book is concerned with the role and contribution of the permanent regional judicial mechanisms – in Europe, Africa and the Americas – to improving human rights compliance in societies emerging from conflict or authoritarian rule. Many studies have contrasted the approaches of constitutional courts in such settings,[1] or the ad hoc and sometimes quasi-judicial mechanisms instituted to navigate transitional obstacles.[2] With few exceptions, however, there has so far been little recognition that the jurisprudence of these regional institutions is profoundly shaping and enriching the law of transitional justice.[3] As critical sites of transitional normativity, the case law of the regional commissions and courts – particularly the European Court of Human Rights – deserves close attention.

The very emergence of the European system was intimately bound up with transition from abusive pasts. As Fionnuala Ní Aoláin suggests in

[1] See R. Teitel, 'Post-Communist Constitutionalism: A Transitional Perspective', *Colum. Hum. Rts. L. Rev.* 26 (1994–1995) 167 at 186, cf. W. Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories', in A. Czarnota, M. Krygier and W. Sadurski (eds.) *Rethinking the Rule of Law after Communism* (Budapest: CEU Press, 2005) 9–24 at 18–19. See also R. Uitz, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication* (Budapest and New York: CEU Press, 2005) at 204–224; A. Czarnota, 'Lustration, Decommunisation and the Rule of Law', *Hague Journal on the Rule of Law* 1 (2009) 307–336; and H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, 2000) at 102. Also, A. Sajó, 'Militant Democracy and Transition Towards Democracy', in A. Sajó (ed.) *Militant Democracy* (Utrecht: Eleven International Publishing, 2004) 209 at 218–220 and 223–230; and S. Issacharoff, 'Constitutionalizing Democracy in Fractured Societies', *Tex. L. Rev.* 82 (2003–2004) 1861–1893.

[2] See, for example, P. Haynor, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd edn (New York and London: Routledge, 2010).

[3] Exceptions include L. Viaene and E. Brems, 'Transitional Justice and Cultural Contexts: Learning from the Universality Debate', *Netherlands Quarterly of Human Rights* 28(2) (2010) 199, 200–201; and P. Engstrom and A. Hurrell, 'Why the Human Rights Regime in the Americas Matters', in M. Serrano and V. Popovski, *Human Rights Regimes in the Americas* (Tokyo, New York and Paris: United Nations University Press, 2010) at 29–55.

Chapter 2 – examining the overlap between situations of transition and emergency – 'transition can be viewed as a motif for the early history of the Convention' which itself 'can be understood as a transitional legal instrument'. Similarly, Tony Allen and Benedict Douglas (in Chapter 9) note that 'the majority of members ratified the Convention after emerging from a period of military conflict or authoritarian government or both' and that 'the Convention itself was seen as a restoration of the legal traditions of the member states'.

With contributors from various disciplinary backgrounds, the book examines the ways in which law, leveraged from this external vantage-point, brings (or, in some cases, fails to bring) human rights norms to bear on situations where national legal institutions have either been complicit in, or powerless to halt, violations of core rights. The overarching question is whether such external human rights scrutiny can assist in refounding domestic rule of law commitments. Within this project, however, are three further subsidiary themes which we set out briefly in this introductory chapter.

First, there is a need to widen the scope of 'transitional justice' analysis beyond the dialectic of 'peace versus justice'. Transitional justice entails a much more expansive legal frame demanding analysis of human rights interpretation both within and between transitional and non-transitional settings, and across multiple rights issues. This, however, is not to promote only a 'thin' or 'legalistic' conception of transitional justice.[4] The narratives of individual applicants that come to the fore in these chapters provide a much fuller picture of the myriad challenges that confront transitional policy-makers. More fundamentally, these narratives pointedly illustrate the equivocal and contingent nature of the concepts of harm, responsibility, victimhood and justice during periods of transition.

Second, the book overviews the parameters and internal coherence of this regional 'transitional jurisprudence'.[5] The key question here is whether (and if so, how) the 'evolutive jurisprudence'[6] of regional mechanisms

[4] K. McEvoy, 'Letting Go of Legalism: Developing a "Thicker" Version of Transitional Justice', in K. McEvoy and L. McGregor (eds.) *Transitional Justice From Below* (Oxford and Portland, Oregon: Hart Publishing, 2008).

[5] R. Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation', *Yale L. J.* 106 (1997) 2009.

[6] The President of the European Court of Human Rights, for example, has argued that 'the leitmotiv of the Court's case law has been continuity in the framework of an evolutive jurisprudence'. Speech by Mr Luzius Wildhaber, President of the European Court of Human Rights, on the Occasion of the Opening of the Judicial Year, 20 January 2006, in *European Court of Human Rights, Annual Report 2005*, at 20.

can remain true to the rule of law whilst also meaningfully recognising the acute social, economic and political exigencies which characterise periods of transition (for example, when successor governments are held accountable for the abuses of previous regimes).[7] With regard to the latter, we attempt to distil what the concept of 'transition' itself means for the regional courts. How does 'transition' differ, or intersect with, declared states of emergency, situations of armed conflict, or other extant threats to 'effective political democracies'? Given that transitional settings are often characterised by systemic and structural deficiencies, do the regional courts have capacity to provide normative guidance across political, economic and legal spheres? Moreover, in assessing the legitimacy and/or necessity of measures tailored to manage the fallout of transition, how does the case law acknowledge the significance of passing time, or delimit transition start and endpoints? Central to this jurisprudential analysis is the degree of deference afforded to national authorities. Indeed, the deference question opens a number of further lines of inquiry – how precisely are arguments from transition used to determine the appropriate degree of deference afforded? And at what point in judicial reasoning does such deference have bite? In one way or another, all the chapters assess whether the regional mechanisms succeed in mediating between maximal and minimal poles of norm compliance, and ultimately, whether this results in a *sui generis* transitional jurisprudence.

Third, the book addresses the role and wider impact of regional judicial mechanisms. By contrasting the three regional systems – paying particular attention in this regard to the book's two comparator chapters on the Inter-American (Chapter 10) and African (Chapter 11) systems by Diego Rodríguez-Pinzón and Gina Bekker respectively – we seek to highlight the alternative ways in which regional mechanisms can meet transitional challenges. The remoteness of these regional courts from the situations under review gives rise to two specific challenges – evidential fact-finding and reliance upon recognised expertise, and the delivery of judgments when the issues at stake are time-sensitive. These issues also link to the nature of the relationship between the regional and national courts. Specifically, they raise the question of whether the regional mechanisms

[7] See, for example, ECtHR, *Kononov* v. *Latvia* [GC], 17 May 2010 (Appl. no. 36376/04) para. 241. Similarly, Gina Bekker in Chapter 11 of this volume welcomes the African Commission's approach in situations where regime change has occurred and the Commission – expressly drawing upon international law – has 'strictly adhered to the principle of the continuity of the state'.

exist as a fourth-instance court or de facto court of appeal (or indeed, as some have suggested, a regional constitutional court).

These three sub-themes – narratives of transition, the contours and coherence of transitional jurisprudence and the roles of regional review – provide the structure for this brief introduction. We aim here simply to precis the key arguments that resurface in the chapters that follow.

Narratives of transition

Perhaps most clearly, this book illustrates the ways in which narratives of transition are refracted and constructed through individual human rights complaints. The cases involve individuals from widely different backgrounds with the uniting factor being that enjoyment of their rights has been diminished in the course of, or more pertinently, because of, the transition process. The cases evince the human dimension at the heart of every transitional claim – individual quests for justice, exoneration, amnesty, truth, inclusion, equality, representation, protection, restitution or compensation. These claims underscore the breadth of remedial measures necessary to fully consolidate transitional gains. They also illustrate how regional courts are frequently confronted with the nuances of identity politics. The chapters by James Sweeney (Chapter 5) and by Anne Smith and Rory O'Connell (Chapter 8), for example, recount stories of those whose traditional influence has been affected by transition (such as established churches) and those who have been structurally excluded from public life (including the Roma and LGBT communities, and minority religious groups).

Far from being epiphenomenal in the reconstructive process, the constitutive role of law is clearly demonstrated in Kris Brown's examination (in Chapter 3) of how Strasbourg judgments are integrated into the narratives of non-state combatants in Northern Ireland. Brown's analysis provides powerful empirical evidence of the role of transitional jurisprudence in legitimating particular understandings of the past (and of struggle and victimhood) and thereby also shaping the conflict resolution agenda. Several key Strasbourg judgments (regarding the state's failure to meet its positive obligations when using lethal force to counter attacks by Republican paramilitaries in Northern Ireland) not only vindicated campaigns for justice by victims' relatives, but helped authenticate the Irish Republican account of the causes of the conflict – among them, the 'mis-rule of British law' – and served to instigate reforms by the British

government.[8] The transitional case law can thus posit normative referents for movements seeking to mobilise support in their struggle for recognition. In the same way that legal developments in other jurisdictions can provide human rights advocates with greater leverage when addressing domestic justice deficits,[9] the judgments of regional courts can create 'structural openings' that influence the strategies employed by different actors in the context of transition.[10] As Paul Schiff Berman has argued, 'the very existence of multiple systems can at times create openings for contestation, resistance and creative adaptation'.[11]

The precariousness of history, and the possibility of judicial revisionism, is also well illustrated by the case of *Kononov* v. *Latvia* (2010).[12] As described in Chapter 6 by Antoine Buyse, this case concerned the prosecution of Vasiliy Kononov for his role during the Second World War in the 1944 killing of inhabitants of a village who were alleged to have collaborated with the Nazis. The period in question recalls the 'dual occupation' of Latvia (first, in 1940 by the USSR, then in 1941 by Nazi Germany). Kononov, a Latvian, was called up to the Soviet army in 1942 and soon became the leader of a commando unit. In his trial, his defence was that the attack was one of liberation in the face of German aggression (which had earlier forced the retreat of Soviet forces from the Baltic states).

The alternative view though, and that ultimately given credence by the Grand Chamber's ruling, was that he had committed war crimes

[8] See, for example, the Council of Europe, Committee of Ministers, Interim Resolution, CM/ResDH(2009)44, 'Action of the Security Forces in Northern Ireland' (Case of *McKerr* against the United Kingdom and five similar cases): Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights: Adopted on 19 March 2009 at the 1051st Meeting of the Ministers' Deputies. For analysis of the 'package of measures' introduced by the British government, see, P. Lundy, 'Commissioning the Past in Northern Ireland', *Review of International Affairs* LX, 1138–1139 (2010) 101–133.

[9] See, for example, E. Lutz and K. Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', *Chi. J. Int'l. L.* 2 (2001) 1.

[10] See further C. Hilson, 'New Social Movements: The Role of Legal Opportunity', *Journal of European Public Policy* 9(2) (April 2002) 238; B. M. Wilson and J. C. Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics', *Comparative Political Studies* 39(3) (April 2006) 325; and E. Anderson, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press, 2006).

[11] P. S. Berman, 'Global Legal Pluralism', *S. Cal. L. Rev.* 80 (2006–2007) 1158 at 1159.

[12] The vulnerability of historical record is particularly striking given that in some of the most significant transitional rulings of the European Court, the Grand Chamber has overturned the previous ruling of the Chamber (see, for example, the cases of ECtHR, *Ždanoka* v. *Latvia*, 16 March 2006 (Appl. no. 58278/00), and ECtHR, *Kononov* v. *Latvia*, 17 May 2010 (Appl. no. 36376/04)).

which had been sufficiently foreseeable as such in 1944. Overruling the Chamber judgment (which found that his prosecution violated Article 7 – the ECHR's prohibition on retrospective sanctions),[13] the majority of the Grand Chamber concluded that there was no violation of Article 7 ECHR.[14] The successful prosecution of the applicant arguably cast the Soviet occupation itself as unlawful (thus comporting with Latvia's post-independence narrative).[15] Aside from demonstrating the complex prosecutorial issues that arise when injustice is facilitated by unjust law, *Kononov* illustrates how law can inscribe the actions of individuals and groups during momentous events with either valour or treachery.[16] In this sense, the jurisprudence serves a fixative role – the finality of legal judgment helping to settle contested histories. As Buyse observes in Chapter 6, the judgments produce 'different narratives of the oppressor and oppressed, about the significance of key events and persons, and more broadly, about right and wrong'. Indeed, in addition to their contribution to the historical record, these alternative accounts are not without consequence. As Károly Bárd noted prior to the Grand Chamber judgment in *Kononov*:

> [A] decision of no-violation by Latvia could result in branding the USSR as an occupying power which, in turn, could justify Latvia's claim for compensation … [and] induce descendents of Jews murdered by Latvian subunits during World War II to make claims for compensation … [A] finding that Kononov's conviction … was in line with the ECHR could

[13] Article 7(1) provides that 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'.

[14] The three dissenting judges included the Court's President.

[15] See the 1996 'Declaration on the Occupation of Latvia' which referred to the annexation of Latvian territory by the USSR in 1940 as a 'military occupation' and an 'illegal incorporation', and its repossession after the Second World War as the 're-establishment of an occupying regime'. See ECtHR, *Kononov* v. *Latvia*, 17 May 2010 (Appl. no. 36376/04) para. 29.

[16] See also ECtHR, *Streletz, Kessler and Krenz* v. *Germany*, 22 March 2001 (Appl. nos. 34044/96, 35532/97 and 44801/98) – the East German Border Guards case – and ECtHR, *Korbely* v. *Hungary*, 19 September 2008 (Appl. no. 9174/02) – in which the applicant was prosecuted for his part in putting down the anti-communist uprising in Budapest in 1956. Both cases concern the actions of individuals decorated as heroes by regimes that were themselves subsequently discredited (respectively, the German Democratic Republic, and Hungary under Soviet rule). See also, Teitel, 'Transitional Jurisprudence', 2022–2026; P. Quint, 'Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command', *The Review of Politics* 61(2) (1999) 303 at 327. See also the Hart-Fuller-Radbruch debate as discussed in Chapter 9, this volume.

result in repercussions for the Russian minority of Latvia and could provide support for the argument that the role the Soviet Union had played in World War II should be revisited.[17]

In the words of Rodríguez-Pinzón (Chapter 10), the regional jurisprudence speaks of 'civil society's continuous struggle to achieve justice'. Inevitably though, it captures only partial narratives. Christopher Lamont, in Chapter 4, points out that since Croatia only became subject to the ECHR's contentious jurisdiction in 1997, all judgments delivered by the ECtHR occurred after the collapse of the Tudjman regime. As he notes, this blindspot is all the more striking in relation to Serbia given the relatively small number of cases heard since Serbia belatedly ratified the Convention in 2003. The resulting jurisprudential gap is also noted by Allen and Douglas (Chapter 9) – the denial of temporal jurisdiction by Strasbourg has precluded the admission of complaints regarding property that was lawfully confiscated before Article 1 of Protocol 1 came into force.[18] Such temporal markers help us begin to understand the manner in which 'transition' itself is conceptualised by regional courts.

Transitional jurisprudence: contours, endpoints and coherence

Initially, this project sought to identify whether a *sui generis* transitional jurisprudence existed – a task eliciting Eric Posner and Adrian Vermeule's contention that 'legal and political transitions lie on a continuum, of which regime transitions are merely the endpoint'.[19] Posner and Vermeule doubt that transition is really 'a distinctive topic presenting a distinctive set of moral and jurisprudential dilemmas',[20] suggesting instead that 'the problems are at most overblown versions of ordinary legal problems'.[21]

[17] K. Bárd, 'The Difficulties of Writing the Past Through Law – Historical Trials Revisited at the European Court of Human Rights', *International Review of Penal Law* 81 (2010) 27 at 28, citing 'Ex-Soviet partisan Vasily Kononov fights his last battle'.

[18] Whereas prior *unlawful* deprivation of property is sometimes regarded by the Court as a continuing act which it has been willing to scrutinise.

[19] E. Posner and A. Vermeule, 'Transitional Justice as Ordinary Justice', *Harv. L. Rev.* 117 (2004) 761, 763.

[20] *Ibid*., at 764. [21] *Ibid*., at 765.

The contours of 'transitional jurisprudence'

We fully accept that the line between transitional and non-transitional settings is evanescent. The challenge of ensuring free and fair elections, for example, is common to all democracies (more or less difficult according to any number of institutional and demographic variables). Moreover, 'transitional jurisprudence' encompasses both human rights violations directly connected to (occurring because of) transition and those which simply coincide with (occurring in the course of) transition. The difficulty in distinguishing between these categories, given both indirect causes and cumulative harms, is further heightened because of transitional posturing by individual applicants[22] and (more frequently) respondent states.[23] Both have sought to capitalise on the rhetorical capital of 'transition'. Indeed, the invocation of arguments from transition may even serve courts well by providing a 'constitutive fiction' which enables seeming fidelity to rule of law ideals whilst deferring to transitional pressures.[24]

In light of the narratives of transition outlined above, we favour the view that the 'abusive paradigms' implicated in transition do actually pose distinct dilemmas and are not merely extreme cases of ordinary problems.[25] Nonetheless, we also believe that the question of whether transition gives rise to an entirely unique problem set (and thus a *sui generis* jurisprudence) is something of a distraction. There are clear synergies and divergences between transitional and non-transitional cases, but little is achieved by honing in on the question of whether a particular application is, or is not, truly 'a transition case'. Often, transition is recognised by the Court as a valid consideration in determining the proportionality of a particular restriction or the scope of the margin of appreciation, but it may not be the only or decisive factor. In some cases, as Marton Varju has

[22] For example, Tatjana Ždanoka's (unsuccessful) argument that a constitutional diarchy existed in which diverging opinions regarding Latvia's future (specifically those favouring a return to Soviet rule) should have been protected. ECtHR, *Ždanoka* v. *Latvia* [GC], 16 March 2006 (Appl. no. 58278/00). See further Chapter 7 in this volume.

[23] For example, in seeking to expand its margin of appreciation, the Bulgarian government (unsuccessfully) sought to capitalise on the existence of communal tensions in order to restrict the commemorative activities of the United Macedonian Organisation, ILINDEN. See ECtHR, *Stankov and the United Macedonian Organisation Ilinden* v. *Bulgaria*, 2 October 2001 (Appl. nos. 29221/95 and 29225/95) para. 73.

[24] J. Přibáň, *Dissidents of Law: On the 1989 Velvet Revolutions, Legitimations, Fictions of Legality and Contemporary Version of the Social Contract* (Aldershot: Ashgate, 2002) 4–5.

[25] For further discussion of 'abusive paradigms', see D. C. Gray, 'Extraordinary Justice', *Ala. L. Rev.* 62 (2010).

highlighted elsewhere, 'the inappropriateness of the impugned measure' is simply 'more relevant than the uniqueness of the transition'.[26] Indeed, even judgments which place heavy emphasis on arguments from transition can often be read as employing straightforward consequentialist reasoning given the contextual risk of political regression.[27]

Furthermore, to classify as 'transitional jurisprudence' only those cases that develop a uniquely transitional conception of justice would itself be problematic. James Sweeney (in Chapter 5) helpfully points to the distinction in the Strasbourg jurisprudence between what the Court deems *legitimate* and what is *proportionate*. He argues that the former, since it embodies the Court's conception of justice, should not be varied or diluted by the application of the margin of appreciation since this would undermine both the vanguard role of the Court and its claim to universality. Sweeney's observation that there is 'a notable absence of consistency in the stage at which the transitional context … is considered', makes it all the more important to analyse *how* transition arguments influence the regional mechanisms, and the coherence of these arguments. In this regard, it is undoubtedly the case that the proportionality of restrictions is often assessed differently in transition cases. By way of illustration, in one notable case relating to post-transition property restitution, the Court expressly ruled that:

> In complex cases as the present one, which involve difficult questions in the conditions of transition from a totalitarian regime to democracy and rule of law, a certain 'threshold of hardship' must have been crossed for the Court to find a breach of the applicants' Article 1 Protocol No. 1 rights.[28]

On occasion, the regional jurisprudence thus deals directly with the traditional concerns and modalities of transitional justice. This is most evident in the non-European chapters. Bekker (in Chapter 11), for example, recalls a Sudanese case where the African Commission recommended the

[26] M. Varju, 'Transition as a Concept of European Human Rights Law', *European Human Rights Law Review* 2 (2009) 170–189, 183.

[27] See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) at 125.

[28] ECtHR, *Velikovi and Others* v. *Bulgaria*, 15 March 2007 (Appl. nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01 and 194/02) paras. 192 and 235, finding no violation of Article 1 of Protocol 1 on this basis. The applications in both *Padalevičius* v. *Lithuania*, 7 July 2009 (Appl. no. 12278/03) and *Pavlinović and Tonić* v. *Croatia*, 3 September 2009 (Appl. nos. 17124/05 and 17126/05) were declared inadmissible since this threshold of hardship had not been reached.

establishment of a National Reconciliation Forum and that the government refrain from adopting amnesty laws. In addition, the first case heard by the new African Court on Human and Peoples' Rights raised issues of the relationship between criminal proceedings and truth commissions, although the Court ultimately held that it lacked jurisdiction in the case. Diego Rodríguez-Pinzón's chapter examining the Inter-American system similarly demonstrates how this 'hemispheric laboratory' has been traditionally associated with the fight against impunity (Chapter 10).[29]

Paradigmatic transitional concerns have also arisen in the European system. Even though 'the ECHR is not a system or a jurisprudence … noted for confronting situations of gross and systematic violations of rights'[30] and the ECHR does not deal explicitly with prosecution or amnesty, it does 'prohibit the underlying violations, and provide a right to a remedy (in general terms), and to a hearing before a competent tribunal for violations of rights'.[31] Moreover, as James Sweeney's chapter highlights, the Council of Europe has dealt directly with transitional preoccupations in its Resolution 1096 (1996) on 'Measures to dismantle the heritage of former communist totalitarian systems'.[32] Buyse's discussion of the case of *Kenedi* v. *Hungary* (2009) also shows how the search for historical truths is increasingly underpinned by legal norms which derive from the right to freedom of expression and its corollary, the right to receive information.[33] Finally, and also relating to the attenuated Hungarian transition, Ní Aoláin notes that the 2008 *Korbely* case 'raises

[29] In reviewing situations such as the dictatorships in the southern cone, the civil wars in Central America, the 'democratic' dictatorship of the Fujimori regime, and the protracted war still affecting Colombia.

[30] See F. Ní Aoláin, 'The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis', *Mich. J. Int'l L.* 19 (1998) 957 at 977–978.

[31] C. Bell, 'The New Law of Transitional Justice', in K. Ambos, J. Large and M. Wierda (eds.) *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Berlin and Heidelberg: Springer-Verlag, 2009) 105, 108. See also, EComHR, *Asociación de Aviadores de la Republica* v. *Spain*, 11 March 1985 (Appl. no. 10733/84) in which the applicants argued that amnesty provisions enacted in the post-Franco period were, *inter alia*, discriminatory because they did not apply similarly to members of the Republican armed forces and to civilian public servants. The Commission found the complaint to be inadmissible on several grounds (both *ratione materiae* and *ratione temporis*), including that 'where the person concerned has already been convicted, any dispute concerning the existence or extent of an amnesty falls outside the scope of Article 6 of the Convention since the dispute has ceased to involve a criminal charge against the applicant within the meaning of Article 6.'

[32] Reiterated a decade later in Resolution 1481 (2006) on the 'Need for international condemnation of crimes of totalitarian communist regimes'.

[33] Similarly, see ECtHR, *Chauvy and Others* v. *France*, 29 June 2004 (Appl. no. 64915/01).